*2010 Ill. App. LEXIS 624, **

COPPERWELD TUBING PRODUCTS, CO., Appellant, v. ILLINOIS **WORKERS' COMPENSATION** COMMISSION, et al., (JOSE SANTOYO, Appellee).

No. 1-09-1422WC

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

2010 Ill. App. LEXIS 624

June 22, 2010, Filed

SUBSEQUENT HISTORY: Released for Publication August 11, 2010.

PRIOR HISTORY: [*1]
APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 08 L 50632. HONORABLE SANJAY T. TAILOR, JUDGE PRESIDING.

DISPOSITION: Circuit court affirmed in part and reversed in part; Commission's decision vacated in part; and cause remanded to the Commission with directions.

CASE SUMMARY

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) entered a judgment that confirmed a decision of the state **workers' compensation** commission that awarded appellee employee wage differential benefits pursuant to 820 ILCS 305/**8(d)(1)** (2000) of the **Workers' Compensation** Act after he filed a claim for **workers' compensation** benefits. Appellant employer appealed.

OVERVIEW: The employee worked for the employer as a mill operator. A piece of equipment struck his body. He immediately felt pain in his left elbow. Eventually, the employee underwent surgeries to relieve the pain. He then obtained within his physical limitations as a security guard. He later left that job when his wife found a better job. He applied for wage differential benefits pursuant to 820 ILCS 305/**8(d)(1)** (2000). The Commission adopted a finding by an arbitrator that the employee was entitled to wage differential benefits and that the difference should be the amount he earned as a security guard over the amount that a coworker, who worked the same hours as the employee, testified that the coworker made, including voluntary and mandatory overtime. The trial court confirmed the Commission's decision. The appellate court found that the employee was entitled to a wage differential award. However, it also found that in calculating the differential amount pursuant to 820 ILCS 305/10 (2000), the Commission should not have permitted the employee to include the coworker's voluntary overtime, as 820 ILCS 305/10 (2000) only included those hours during each week that were consistently worked.

OUTCOME: The appellate court reversed that part of the trial court's judgment which confirmed the Commission's calculation of the wage differential to which the employee was entitled, vacated that part of the Commission's decision, otherwise affirmed the trial court's judgment, and remanded the matter to the Commission for a recalculation of the employee's wage differential benefits.

CORE TERMS: claimant, wage differential, overtime, earn, calculation, arbitrator, manifest, per hour, earning capacity, earning, nerve, arbitration hearing, security guard, ulnar, average weekly wage, full performance, confirmed, vocational rehabilitation, work-related, impairment, per week, occupational, calculated, counselor, therapy, hourly, elbow, pain, arm, question of fact

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Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN1 To qualify for a wage differential award, a claimant must prove: (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305/**8(d)(1)** (West 2000). Whether a claimant has satisfied each element is a question of fact to be resolved by the Commission, whose determination in that regard will not be disturbed on appeal unless it is against the manifest weight of the evidence. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. More Like This Headnote

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN2 In determining whether a reduction in earning capacity has occurred, 820 ILCS 305/**8(d)(1)** (2000) of the **Workers'**

Compensation Act instructs the Commission to look to the amount a claimant is earning or is able to earn in some suitable employment or business after an accident. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN3 An employee who, as a result of an accidental injury, becomes partially incapacitated and cannot pursue his "usual and customary line of employment" is entitled to receive a wage differential award equal to 66 and 2/3 percent of the difference between the average amount which he would be able to earn in the **full performance** of his duties in the occupation in which he was engaged at the time of an accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. 820 ILCS 305/**8(d)(1)** (2000). The Commission's calculation of an employee's wage differential award is a factual finding, which will not be set aside on review unless it is contrary to the manifest weight of the evidence. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN4 The express language of 820 ILCS 305/10 (2000) states that the definition of average weekly wage contained therein shall form the "basis for computing the compensation provided for in Section 7 and 8 of the Act." As a wage differential award is provided for under 820 ILCS 305/**8(d)(1)** (2000), 820 ILCS 305/10 (2000)'s definition of average weekly wage clearly applies to the computation of a wage differential award. More Like This Headnote

Workers' Compensation & SSDI > Benefit Determinations > Earning Capacity

HN5 Overtime is explicitly excluded from the calculation of an employee's average weekly wage. 820 ILCS 305/10 (2000). The **Workers' Compensation** Act, however, does not define "overtime." Nevertheless, reviewing courts have consistently interpreted the overtime exclusion to include those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week. More Like This Headnote

COUNSEL: For Appellant: Stephen M. McClary, of counsel, Inman & Fitzgibbons, Ltd., of Chicago, Chicago, IL.

For Appellee: Peter C. Bobber, of counsel, Lewis, Davidson & Hetherington, Ltd., of Chicago, Chicago, IL.

JUDGES: Honorable Thomas E. Hoffman, J., with Honorable John T. McCullough, P.J., Honorable Donald C. Hudson, J., Honorable William E. Holdridge, J., and Honorable James K. Donovan, J., concur. JUSTICE HOFFMAN delivered the opinion of the court.

OPINION BY: Thomas E. Hoffman

OPINION

JUSTICE HOFFMAN delivered the opinion of the court:

Copperweld Tubing Products Company (Copperweld) appeals for an order of the circuit court which confirmed a decision of the Illinois **Workers' Compensation** Commission (Commission) that awarded the claimant, Jose Santoyo, wage differential benefits pursuant to section **8(d)(1)** of the **Workers' Compensation** Act (Act) (820 ILCS 305/**8(d)(1)** (West 2000)). For the reasons which follow, we reverse that portion of the circuit court's judgment which **[*2]** confirmed the Commission's calculation of the wage differential to which the claimant is entitled and remand this matter to the Commission for a recalculation of the claimant's wage differential benefits.

The following factual recitation is taken from the evidence presented at the arbitration hearing held on July 19, 2006, and November 9, 2006.

The claimant was employed by Copperweld as a mill operator. His duties included setting up the machinery for production and required the use of a sledge hammer, crowbar, air tools, and wrenches.

The claimant testified that, on November 28, 2001, he was pulling a 35-to-50-pound spacer out of a shaft, when the spacer struck his body and dropped to the floor. According to the claimant, he immediately felt pain in his left elbow.

The following day, Copperweld sent the claimant to the Ingalls Occupational Health Clinic. He was diagnosed with a left elbow strain and was instructed to return to work with the restrictions of only occasional lifting or carrying more than 30 pounds and no repetitive use of his left arm.

The claimant returned to work, but noticed an increase in the pain in his left side following the accident. The claimant eventually came **[*3]** under the care of Dr. Henry Fuentes, an orthopedic surgeon who had previously treated him for an injury to his right elbow. When Dr. Fuentes examined the claimant on January 2, 2002, he diagnosed the claimant with left lateral epicondylitis. Dr. Fuentes removed the claimant from work and ordered occupational therapy.

After the therapy failed to relieve the claimant's symptoms, Dr. Fuentes recommended surgery. On September 20, 2002, the claimant underwent an anterior submuscular transposition of his left ulnar nerve.

Following the surgery, the claimant continued to complain of pain and weakness in his left arm and hand. On December 11, 2002, another surgeon, Dr. Daniel Mass, performed a second submuscular transposition of the left ulnar nerve, as well as a lysis of the ulnar nerve and a nerve graft.

At the request of Copperweld's insurance carrier, the claimant was examined by Dr. Brian Cole on August 4, 2003, and March 1, 2004. As of the second examination, Dr. Cole concluded that further surgical intervention of the claimant's left ulnar nerve would be required.

On March 5, 2004, Dr. Mass performed a left ulnar nerve neurolysis with vein-wrapping. Dr. Mass released the claimant from his **[*4]** care on August 2, 2004, with the work restrictions of no lifting greater than 30 pounds with his left arm.

The claimant returned to Dr. Cole for a third time on November 30, 2004. On that occasion, Dr. Cole recommended that the claimant undergo a functional capacity evaluation (FCE). The FCE was performed on January 13, 2005, at the Occupational and Hand Therapy, Ltd. The results of the FCE revealed that the claimant possessed the ability to work at the light- to medium-physical demand level; whereas, his job as a mill operator required a heavy-physical demand level.

At the request of his attorney, the claimant met with Edward Steffan, a vocational rehabilitation counselor, on October 25, 2004. Steffan issued a written report, noting that, without professional assistance, the claimant would likely be able to obtain a position paying between $ 8 and $ 12 per hour.

On August 17, 2005, the claimant met with Martin Power, a vocational rehabilitation counselor employed by Copperweld's insurance carrier. Power concluded that the claimant could not return to work at Copperweld. Power also believed that the claimant could still obtain a job as a light- to medium-level production worker, such **[*5]** as an office cleaner or security guard.

In 2005, the claimant commenced a self-directed job search. On his own initiative, the claimant enrolled in a security guard training course in February of 2006. Following the completion of this course, the claimant was able to obtain employment as a security guard with Securatex, Ltd. (Securatex). The claimant testified that he was paid $ 8 per hour and worked 40 hours a week. He also stated that the job was within his physical restrictions.

The claimant worked at Securatex for two-and-a-half months. At the arbitration hearing, the claimant testified that he quit when his wife found a "better job," stating that "[i]t was better for our family for me to stay home and she go to work." The claimant admitted that he had not searched for another job since leaving Securatex and had been receiving social security-disability benefits since 2004.

The claimant presented the testimony of Duane Lee, a former co-worker at Copperweld. Lee testified that he and the claimant were both mill operators at Copperweld, they both worked similar hours, they both worked the same shift, and they both were paid the same hourly rate. Lee estimated that he earned approximately **[*6]** $ 78,000 in 2005. He stated that he has worked and continues to work overtime. Lee admitted that, while a portion of the overtime he worked was mandatory, he worked some of the overtime on a voluntary basis.

A copy of the applicable collective bargaining agreement was admitted into evidence. The agreement contained a wage schedule for numerous employees, including mill operators.

At the conclusion of the hearing, the arbitrator found that the claimant sustained injuries on November 28, 2001, arising out of and in the course of his employment with Copperweld. The arbitrator awarded the claimant temporary total disability (TTD) benefits for 219 1/7 weeks. The arbitrator also ordered Copperweld to pay: (1) $ 1,952.39 for necessary medical expenses; (2) $ 43.74 for travel expenses; and (3) $ 169 for reasonable vocational rehabilitation expenses. Finally, the arbitrator entered a wage differential award of $ 534.16 per week, commencing on March 17, 2006, and continuing for the duration of the claimant's disability. The wage differential award was calculated based upon the difference between the claimant's wages of $ 8 per hour, or $ 320 per week, as a security guard at Securatex and the $ **[*7]** 78,000 Lee testified he earned as a mill operator in 2005.

Copperweld filed a petition for review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission affirmed and adopted the decision of the arbitrator.

Copperweld then sought judicial review of the Commission's decision in the Circuit Court of Cook County. The circuit court confirmed the decision of the Commission, and this appeal followed.

Initially, Copperweld contends that the Commission's decision to award the claimant a wage differential award is against the manifest weight of the evidence. We disagree.

HN1 To qualify for a wage differential award, a claimant must prove: (1) a partial incapacity that prevents him from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305/**8(d)(1)** (West 2000); *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 494, 867 N.E.2d 1063, 311 Ill. Dec. 77 (2007). Whether a claimant has satisfied each element is a question of fact to be resolved by the Commission, whose determination in this regard will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1061, 853 N.E.2d 40, 304 Ill. Dec. 508 (2006). **[*8]** For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 308 Ill. Dec. 715 (2006).

In its briefs before this court, Copperweld does not contest that the injuries the claimant incurred on November 28, 2001, prevent him from returning to his former occupation as a mill operator. Rather, its claim of error is addressed solely to the question of whether the claimant sustained his burden of proving an impairment of earnings. Specifically, Copperweld argues that, as of the date of the arbitration hearing, the claimant had voluntarily removed himself from the labor market and, thus, was no longer suffering from a loss in earning capacity. In support of this proposition, Copperweld cites to *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886, 553 N.E.2d 8, 142 Ill. Dec. 658 (1990).

In *Durfee*, the claimant left his job as a repairman following a work-related injury. The claimant's treating physician placed no physical restrictions on him and suggested that he attempt to perform his former job on a trial basis. Instead, the claimant accepted a lower-paying position with a school church; a job that coincided **[*9]** with his clerical interests. Although the claimant testified that this was the best position he could find, this court noted that there was no evidence that the claimant attempted to obtain any other form of employment. *Durfee*, 195 Ill. App. 3d at 890. Based on these facts, we concluded that the Commission could have reasonably determined that the claimant had not shown a loss of earning capacity. *Durfee*, 195 Ill. App. 3d at 890.

Contrary to Copperweld's contention, we do not believe that *Durfee* stands for the proposition that the claimant's voluntary decision to remove himself from the labor market precludes a wage differential award. Rather, our holding in *Durfee* was based, in part, on the

fact that the claimant in that case made a personal choice to accept a lower-paying job and failed to prove that he could not obtain a better-paying position.

HN2 In determining whether a reduction in earning capacity has occurred, section **8(d)(1)** of the Act instructs the Commission to look to the amount the claimant "is earning *or is able to earn* in some suitable employment or business after the accident." (Emphasis added.) 820 ILCS 305/**8(d)(1)**. (West 2000). Consequently, even though the claimant in **[*10]** this case was not presently employed, he was entitled to a wage differential award, so long as he established his current earning capacity. See *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 532, 76 N.E.2d 457 (1948) ("The test is the capacity to earn, not necessarily the amount earned"). Based on our review of the record, we conclude that he sustained his burden in this regard.

At the arbitration hearing, the claimant testified that he conducted a self-directed job search and obtained a position within his physical capabilities, a job as a security guard at Securatex. The claimant stated that he was paid $ 8 per hour and worked 40 hours each week. Although Copperweld asserts that it was speculative for the Commission to rely on the claimant's employment at Securatex as he had not worked there for six months prior to the arbitration hearing, we do not believe that the claimant's employment at Securatex was too far removed to be considered speculative. Furthermore, the rate of pay for the security guard position at Securatex fell within the $ 8 to $ 12 range the claimant's vocational rehabilitation counselor, Edward Steffan, believed he could obtain without professional **[*11]** assistance.

Under the facts of this case, the Commission could reasonably rely on the claimant's job at Securatex in determining that he had proven that his earnings were impaired. We, therefore, conclude that the Commission's finding that the claimant was entitled to a wage differential award is not against the manifest weight of the evidence.

Alternatively, Copperweld takes issue with the Commission's computation of the claimant's wage differential award. Copperweld contends that the Commission erred in calculating the claimant's average weekly wage both before and after his accident.

HN3 An employee who, as a result of an accidental injury, becomes partially incapacitated and cannot pursue his "usual and customary line of employment" is entitled to receive a wage differential award "equal to 66-2/3% of the difference between the average amount which he would be able to earn in the **full performance** of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/**8(d)(1)** (West 2000). The Commission's calculation of an employee's wage differential **[*12]** award is a factual finding, which will not be set aside on review unless it is contrary to the manifest weight of the evidence. See *United Airlines, Inc. v. **Workers' Compensation** Comm'n*, 382 Ill. App. 3d 437, 440-42, 887 N.E.2d 888, 320 Ill. Dec. 744 (2008); *First Assist, Inc.*, 371 Ill. App. 3d at 495-97.

With regard to Copperweld's contention that the Commission erroneously calculated the amount the claimant could earn after his work-related accident, it asserts that the claimant's own vocational expert, Steffan, opined that the claimant could earn up to $ 12 per hour. Copperweld requests that the matter be remanded to the Commission with instructions to recalculate the claimant's wage differential award using the $ 12 hourly wage as the basis of the claimant's current earning capacity, not the $ 8 per hour relied upon by the Commission.

As previously discussed, it was reasonable for the Commission to rely on the claimant's employment at Securatex in determining his impairment of earnings. Based on the claimant's wages and the number of hours he worked while employed at Securatex, the Commission could reasonably conclude that the claimant's present earning capacity was $ 8 per hour or $ 320 per week. **[*13]** We, therefore, reject Copperweld's argument that the Commission's decision in this regard is against the manifest weight of the evidence.

Copperweld also contends that the Commission erroneously-relied upon the testimony of Duane Lee in calculating the amount the claimant would have been able to earn as a mill operator had he not suffered a work-related injury. Copperweld maintains that, in direct contradiction to the language of section 10 of the Act, Lee's testimony that he earned $ 78,000 in 2005 improperly included wages for overtime worked on a voluntary basis.

Although the claimant asserts that section 10 of the Act does not apply to a wage differential award, HN4 the express language of this section states that the definition of average weekly wage contained therein shall form the "basis for computing the compensation provided for in Section 7 and 8 of the Act." 820 ILCS 305/10 (West 2000). As a wage differential award is provided for under section **8(d)(1)** of the Act (820 ILCS 305/**8(d)(1)** (West 2000)), section 10's definition of average weekly wage clearly applies to this issue. See *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 555-56, 813 N.E.2d 119, 286 Ill. Dec. 62 (2004) (applying section 10 to **[*14]** the computation of a wage differential award).

HN5 Section 10 of the Act explicitly states that overtime is excluded from the calculation of an employee's average weekly-wage. 820 ILCS 305/10 (West 2000). The Act, however, does not define "overtime." Nevertheless, this court has consistently interpreted the overtime exclusion to include those hours "in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc. v. **Workers' Compensation** Comm'n*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979, 310 Ill. Dec. 259 (2007).

In this case, Lee testified that he and the claimant were both mill operators at Copperweld, they both worked similar hours, they both worked the same shift, and they were both paid the same hourly rate. Lee further testified that in 2005 he earned around $ 78,000 as a mill operator. Lee, however, stated that he has worked and continues to work overtime. While Lee testified that a portion of the overtime he worked was mandatory, he also admitted that some of the overtime he worked was voluntary.

In adopting the decision of **[*15]** the arbitrator, the Commission found the testimony of Lee to be credible and utilized the $ 78,000 Lee earned in 2005 as the basis for the amount the claimant would have earned if he was still employed as a mill operator. Based on Lee's testimony, however, it is apparent that at least a portion of the $ 78,000 he earned in 2005 included wages for voluntary overtime and, thus, should not have been included in the Commission's calculation of the claimant's wage differential benefits. See *Airborne Express, Inc.*, 372 Ill. App. 3d at 555. For this reason, we conclude the Commission's calculation of the amount which the claimant would be able to earn in the **full performance** of his duties as a mill operator is against the manifest weight of the evidence.

Notwithstanding this conclusion, we note that the record reflects that additional evidence was presented from which the claimant's

average weekly wage as a mill operator might be calculated; namely, the wage schedule contained in the collective bargaining agreement. Despite Copperweld's assertions to the contrary, we believe that questions of fact still remain and, therefore, decline its invitation for us to decide this issue on appeal. Accordingly, **[*16]** this cause must be remanded to the Commission for a recalculation of the wage differential benefits to which the claimant is entitled.

Based upon the foregoing analysis, we reverse that portion of the circuit court's order which confirmed the Commission's calculation of the wage differential benefits to which the claimant is entitled; affirm the circuit court's order in all other respects; vacate the Commission's calculation of the amount that the claimant would have been able to earn in the **full performance** of his duties as a mill operator and its dependent calculation of wage differential payments to which the claimant is entitled; and remand this cause to the Commission with instructions to calculate the amount that the claimant would have been able to earn in the **full performance** of his duties as a mill operator, omitting therefrom evidence properly excluded by section 10 of the Act, and, based thereon, recalculate the wage differential payments to which the claimant is entitled.

Circuit court affirmed in part and reversed in part; Commission's decision vacated in part; and cause remanded to the Commission with directions.

McCULLOUGH, P.J., and HUDSON, HOLDRIDGE, and DONOVAN, JJ., **[*17]** concur.

ORDER

CCG N002-300M-2/28/05(43480

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COPPERWELD TUBING PRODUCTS CO., et al.

v.

JOSE SANTOYO and ILLINOIS WORKERS' COMPENSATION COMMISSION

No. 2008 L 50632

ORDER

This cause coming on to be heard for argument on Plaintiff's appeal of the Commission's decision in case number 08 IWCC 576, the parties having appeared through respective counsel, the court having reviewed the parties briefs and considered their arguments; now, therefore:

It is ordered the the decision of the Illinois Workers Compensation Commission in case No. 08 IWCC 576 is confirmed in its entirety.

Atty. No.: 12700
Name: Karpel
Atty. for: Defendant Santoyo
Address: 1N Franklin, 1850
City/State/Zip: Chgo IL 60606
Telephone: 312/726-3054

ENTERED:

Dated:

ENTERED
JUDGE SANJAY TAILOR-1870
APR 30 2009
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge

Judge's No.

DOROTHY BROWN, CLERK

*8 IWCC 576; 2008 Ill. Wrk. Comp. LEXIS 554, **

JOSE SANTOYO, PETITIONER, v. **COPPERWELD TUBING** PRODUCTS CO. AND WELDED TUBE CO. OF AMERICA, D/B/A LTV COPPERWELD U.S. STRUCTURAL GROUP, RESPONDENT.

NO. 02WC 4276

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

8 IWCC 576; 2008 Ill. Wrk. Comp. LEXIS 554

May 19, 2008

CORE TERMS: ulnar, elbow, nerve, arbitrator, pain, pound, numbness, neuropathy, arm, vocational rehabilitation, left hand, finger, security guard, underwent, wrist, bilateral, ring, counselor, hardening, tingling, workers' compensation, diagnosed, wrench, spacer, digits, tube, causal connection, upper extremity, transposition, functional

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2006 is hereby affirmed and adopted.

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

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

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

ATTACHMENT

ILLINOIS [*2] WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

2 of 4 claims

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley,** arbitrator of the Commission, in the city of **Chicago,** on **July 19, 2006 & November 9, 2006.** After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues noted below, and attaches those findings to this document.

DISPUTED ISSUES

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

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

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

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

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

F. Is the respondent liable for petitioner's travel expenses incurred to attend respondent's §12 examinations?

G. Is the respondent liable for petitioner's vocational rehabilitation expenses?

AGREED FINDINGS

. On **November [*3] 28, 2001,** the respondent, **Copperweld Tubing Products Co., et al, *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.

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

. In the year preceding the injury, the petitioner earned **$ 50,801.25;** the average weekly wage was **$ 923.70.**

. At the time of injury, the petitioner was **34** years of age, ***married*** with **3** children under 18.

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

. To date, **$ 84,094.01** has been paid by the respondent for TTD and/or maintenance benefits. The parties noted that this was the amount paid for all pending and consolidated claims. (Arb.Ex. # 2).

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of **$ 615.80** per week for **219-1/7** weeks, from **January 2, 2002** through **March 16, 2006,** which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of **$ 534.16 [*4]** per week commencing **March 17, 2006** and extending for the duration of the disability, as provided in Section **8(d)1** of the Act, because the injuries sustained resulted in **petitioner's incapacity to engage in his usual and customary occupation.**

. The respondent shall pay the petitioner compensation that has accrued from **November 28, 2001** through **November 9, 2006,** and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of **$ 1,952.39** for necessary medical services, as provided in Section 8(a) of the Act. The Arbitrator also awards travel expenses in the amount of **$ 43.74** relating to petitioner's attendance at the one §12 examination that respondent failed to provide travel expenses. The Arbitrator further orders respondent to pay petitioner **$ 169.00** for reasonable vocational rehabilitation expenses pursuant to §8(a) 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 **[*5]** Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 4.88% shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

12/22/06

Date

STATEMENT OF FACTS:

Petitioner is 39 years old and lives with his wife and three daughters. He obtained his GED approximately 10 years ago and has no further education. His prior job history includes that of a farm worker, manufacturing and industrial painting.

Prior to November 28, 2001, petitioner never suffered any injury to or required any medical treatment for any condition of ill being involving his left upper extremity.

In June, 1997, petitioner commenced employment with respondent. Respondent manufactures structural tubing and piping. The tubes range from 20 to 65 feet long and have a diameter of 4 to 16 inches square. Petitioner's job title was mill operator. This job required him to change over the machinery for production of different tube sizes. Petitioner testified that there was at least one changeover per shift.

Physically, **[*6]** a changeover involved petitioner utilizing sledge hammers, wrenches, an air wrench, a crowbar, and a 2" by 4." First, petitioner utilized sledge hammers weighing 20 to 26 pounds to adjust the diameter of the machine. He would strike the sledge hammer against a wrench, which weighed 20 to 25 pounds, to loosen the nuts. Each nut weighed 10 to 15 pounds and was 6 to 8 inches in diameter. Petitioner testified unrebutted that during the course of a shift he would swing the sledge hammer 50 to 100 times and he would have to loosen and tighten a hundred nuts per changeover.

Petitioner also utilized an air wrench weighing more than 35 pounds. Petitioner noted that the socket alone for the air wrench weighs 15 pounds. He used the air wrench to tighten bolts in tight places on the machine. He used the air wrench to tighten 10 to 15 nuts per shift. The tightening of each bolt required him to hold the air wrench for 2 to 5 minutes.

Petitioner also pushed and pulled a 4 or 5 foot-long crowbar weighing 20 to 25 pounds a couple times per shift to assist the tubes in and out of the machine following a changeover.

Lastly, after the tubes were completed, petitioner would utilize a 2" by 4" as a **[*7]** lever to rotate the tubes in order to inspect each side of the tube by pushing the 2" by 4" with both hands from his chest away from his body.

The facts regarding the accident and related medical care pertaining to petitioner's February 2, 2001 work accident are addressed in

the Arbitrator's Decision in 01 WC 24754.

On November 28, 2001, petitioner was working on a change over when he was pulling a spacer, which is a round piece of metal weighing 35 to 50 pounds from overhead to the floor when he felt pain in his left elbow. The day after this occurrence, respondent sent petitioner to its clinic, Ingalls Occupational Health Network. There, petitioner was diagnosed with a left elbow strain and was instructed to return to light duty work, no greater than 30 pounds and no repetitive use of the left arm. (PX3). Petitioner returned to work, but because the pain persisted over the several weeks following his accident, petitioner was referred from the Ingalls Occupational Health Network to orthopedic surgeon Dr. Henry Fuentes.

Dr. Fuentes first examined petitioner's left arm on January 2, 2002. In addition to complaining of left elbow pain, petitioner also complained of pain in the right **[*8]** arm and shoulder. (PX4). Dr. Fuentes took petitioner off work, diagnosed left lateral epicondylitis, and ordered physical therapy along with medication.

The following day, January 3, 2002, respondent's workers' compensation insurance carrier had petitioner examined by J.S. Player, M.D. Dr. Player noted that petitioner's chief complaints at the time of his examination were right elbow pain, right shoulder pain, left elbow pain, and both hands, numbness and tingling. (PX9). More specifically, Dr. Player noted the numbness was located in the third, fourth and fifth digits of the left hand and the right hand. Dr. Player denied causal connection between petitioner's work injuries and his current complaints.

Based on Dr. Player's report, respondent denied authorization for any further treatment. (PX30).

Dr. Bauer of Physicians Plus ordered a cervical MRI which took place on January 10, 2002 and revealed small central bulging at C5-C6 and C4-C5. (PX4). Petitioner then followed up with orthopedic surgeon Dr. Fuentes on February 1, 2002. Dr. Fuentes noted complaints of numbness and tingling of the ulnar three digits on the left. (PX4).

Next, petitioner underwent an EMG/NCV on February **[*9]** 2, 2002. That electrodiagnostic study revealed bilateral ulnar neuropathy due to entrapment at the level of the elbow. (PX4).

Despite an injection and therapy, petitioner's complaints of pain persisted over the ulnar cubital tunnel bilaterally radiating into the ulnar two digits associated with numbness and tingling. Dr. Fuentes then referred petitioner to Neurology Associates for further consultation. (PX4).

Petitioner was then examined by Dr. Tonya Fuller at Neurology Associates on April 12, 2002. Her neurological examination revealed bilateral ulnar neuropathy. (PX12). Based on the limited relief with conservative modalities, Dr. Fuentes performed an anterior submuscular transposition of the right ulnar nerve on April 30, 2002. (PX4). Post-operatively, petitioner complained of numbness in the right little fingers, which subsided as time and post-operative physical therapy progressed. (PX4, PX6).

On August 20, 2002, Dr. Fuentes performed an anterior transposition of petitioner's left ulnar nerve. (PX4). Two days following this surgery, petitioner presented to the emergency room at Ingalls Memorial Hospital complaining of inability to sleep, sweating and fever and intense pain **[*10]** to the left arm and elbow. (PX5).

Additionally, on September 27, 2002, Dr. Fuentes noted petitioner was having shooting pain in his left arm and he could not straighten the fingers of his left hand. (PX4). Further, the pain was getting worse and his left hand was still numb. Dr. Fuentes noted on examination slight clawing of the ring and little fingers of the left hand.

Dr. Fuentes referred petitioner for neurological evaluation with Dr. Fuller. Dr. Fuller performed an EMG of the left arm on October 8, 2002 which revealed severe left ulnar neuropathy with associated active denervation. (PX12). Dr. Fuller then referred petitioner for a left elbow MRI. That MRI took place on October 15, 2002 and revealed high signals surrounding the expected location of the ulnar mass although the ulnar nerve itself was very difficult to demonstrate. (PX12).

Thereafter, petitioner was evaluated by his family physicians at Cavero Medical Group on October 18, 2002 and October 25, 2002. (PX10). From there, he was referred for further neurologic evaluation by Dr. Rioja at Neurologic Care Associates. Dr. Rioja examined petitioner on October 29, 2002 and noted that petitioner's left hand had a "claw hand" **[*11]** type of appearance which was consistent with weakness of the ulnar innervated muscles of the hand. (PX13). She recommended surgical exploration of the left elbow and a repeat MRI for better visualization of the ulnar nerve. She referred petitioner to Dr. Daniel Mass for further orthopedic evaluation.

Concurrently, Dr. Fuentes referred petitioner for a second opinion with Dr. Mark Gonzalez at University of Illinois Hospital. Following that examination on November 15, 2002, Dr. Gonzalez concluded that petitioner suffered from compression of the left ulnar nerve probably because of bleeding and scarring. (PX4). He indicated that a re-operation was necessary in order to free up the nerve. He suspected that the ulnar nerve was tethered somewhere underneath the submuscular course following the first left ulnar nerve transposition.

Dr. Daniel Mass of the University of Chicago first examined petitioner on November 26, 2002. (PX14). On December 11, 2002, Dr. Mass performed an exploration of the ulnar nerve; lysis of the left ulnar nerve; and ulnar nerve submuscular transposition; and a nerve graft with PGA tube of the accessory branch of the ulnar nerve. (PX14).

Post-operatively, petitioner **[*12]** underwent physical therapy at Occupation and Hand Therapy, Ltd. (PX11). Although he was progressing as expected, pain in the left elbow persisted as well as clawing of the ring and small finger of the left hand.

Respondent's workers' compensation insurance carrier had petitioner evaluated by Dr. Brian Cole on August 4, 2003. Dr. Cole concluded that injuries to both upper extremities were causally connected to petitioner's employment with respondent. (PX15).

Dr. Cole performed a second evaluation on March 1, 2004. (PX15). Dr. Cole concluded that further surgical intervention of the left ulnar nerve would be required. Dr. Mass then performed a left ulnar nerve neurolysis with vein-wrapping from the greater saphenous vein of the right leg on March 5, 2004. (PX14). Following that surgical procedure and post-surgical rehabilitation, Dr. Mass released petitioner from his care on August 2, 2004 with work restrictions of no lifting with the left arm greater than 30 pounds. (PX14).

On September 11, 2004, petitioner was deemed unable to perform any gainful employment by the Social Security Administration

since December 28, 2001. (PX21).

Dr. Cole examined petitioner for a third time on November **[*13]** 30, 2004. (PX15). On that occasion, he recommended another EMG/NCV as well as a functional capacity evaluation. Dr. McGonagle of Neurologic Care Associates performed this examination on January 4, 2005. His findings included severe ulnar neuropathy at the left elbow, however compared to the June 18, 2003 evaluation, there had been significant improvement in the ulnar nerve distribution with evidence of definite prominent reinervation of the ulnar nerve. (PX13). His examination was also suggestive of mild ulnar neuropathy at the left wrist.

Per Dr. Cole's order, the functional capacity evaluation was performed on January 13, 2005 at Occupational Hand and Therapy, Ltd.. (PX11). That evaluation revealed that petitioner could perform at a light/medium level of physical demand and that his job as a mill operator required a heavy physical demand level. (PX11). As a result of that evaluation, Dr. Cole ordered a course of work hardening which petitioner underwent at Occupational and Hand Therapy, Ltd. (PX11).

Lastly, on April 7, 2005, Dr. Cole reviewed the discharge summary from the work hardening and confirmed that petitioner remained at the "light/medium" level of physical capability. **[*14]** (PX15). Dr. Cole placed petitioner at maximum medical improvement on that date. Dr. Cole also noted that petitioner complained of pain in the left wrist which he indicated would require further evaluation by a hand/wrist specialist.

At the request of his family physician, petitioner underwent one final EMG/NCV performed by Dr. Rioja of Neurologic Care Associates on December 30, 2005. (PX13). Dr. Rioja concluded that there was more pronounced evidence of axonal injury, ulnar neuropathy, at the left wrist, but with regard to the ulnar neuropathy at the elbow, the study was relatively unchanged from the previous study. (PX13).

Vocational rehabilitation counselor Edward P. Steffan performed an initial vocational evaluation and assessment on November 10, 2004. (PX17). Mr. Steffan concluded that, with a self-directed job search and no professional assistance, petitioner could expect to locate alternative employment paying between $ 8.00 and $ 12.00 per hour.

Petitioner commenced a self-directed job search in 2005. He documented job contacts that he made. (PX19). At the request of respondent's workers' compensation insurance carrier, petitioner underwent a vocational assessment by its **[*15]** own vocational rehabilitation counselor, Martin Power, on August 22, 2005. (PX16). Mr. Power concluded that petitioner could not return to work for respondent given his physical restrictions at a light/medium level. He further assessed that petitioner could, who he classified as a motivated individual, could perform work as an office cleaner or security guard.

Next, Mr. Power developed a vocational plan for petitioner on December 27, 2005. (PX16). Mr. Power routinely noted that petitioner was motivated and cooperative in job search efforts for returning to work.

On his own initiative, petitioner enrolled in a security guard training course in February, 2006. Following completion of that course, he became a certified security guard and located alternative employment at Securatex, Ltd. Petitioner informed Mr. Power of the security guard training and the job with Securatex and Mr. Power assented to petitioner proceeding with same.

Petitioner commenced employment with Securatex on March 17, 2006. That job required him to sit in a pick-up truck and monitor a factory during the night. That job paid petitioner $ 8.00 an hour for a 40 hour work week. On April 11, 2006, Martin Power closed **[*16]** his vocational rehabilitation file regarding petitioner as petitioner had returned to work. (PX16).

After working at Securatex for two and a half months, petitioner noted that, although he could physically perform the job, his wife had obtained a better job and thus he and his wife decided to have petitioner stay home to assist in the parenting of his three children. Petitioner has not worked anywhere or obtained any other job offers other than the job with Securatex.

Presently, petitioner is relatively unsymptomatic in his right upper extremity however his left elbow, wrist and hand remain symptomatic. Petitioner testified at arbitration that he does anticipate further need for treatment as to his left arm because his symptoms have not abated as he had hoped.

Duane Lee, petitioner's former co-worker, also testified at arbitration. He, like petitioner, was a mill operator for respondent. Mr. Lee maintains that position through today. In 2001 petitioner and Mr. Lee worked the same shift and similar hours. Mr. Lee testified that in 2005, the last full calendar year for which he had reported earnings, his gross earnings totaled approximately $ 78,000.00, and he anticipated that had **[*17]** petitioner still been working for respondent, that petitioner's present earnings would likely have been even higher.

WITH RESPECT TO ISSUE (A), 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:

On November 28, 2001, petitioner was at work pulling a metal spacer, weighing 35-50 pounds from overhead to the floor when he noticed the sudden onset of pain in his left elbow.

The following day, November 29, 2001, petitioner was sent by his employer to its clinic, Ingalls Occupational Health Network. There, petitioner offered a consistent history of injury. (PX3). Similarly, every subsequent medical provider noted a similar, consistent history of injury.

The Arbitrator notes the record is void of any evidence contradicting petitioner's claimed left elbow injury. Based on the above, the Arbitrator finds that on November 28, 2001, an accident occurred while petitioner attempted to pull a spacer at work causing injury to his left elbow.

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

Prior **[*18]** to November 28, 2001, petitioner never suffered any condition of ill-being involving, or required any medical treatment to, his left arm.

Following his November 28, 2001 work accident, respondent sent petitioner to Ingalls Occupational Health Network for treatment on

November 29, 2001. There, petitioner complained of pain about the left elbow. (PX3). Petitioner clearly associated the onset of said pain with the pulling of the spacer incident at work the previous day. The examining doctor noted tenderness about the left later epicondyle; diagnosed left lateral epicondylitis; imposed work restrictions; and prescribed ice, a wrist splint, an elbow wrap and physical therapy. (PX3).

Concurrently, petitioner was receiving treatment at Physicians Plus for his right arm and neck, which commenced in October, 2001. In those records, in addition to complaining about his right arm and neck, petitioner also complained about his left arm following the November 28, 2001 accident. Specifically, on the 12/3/2001 office visit, petitioner complained of numbness in the left arm down to the hand. (PX7).

Similarly, on December 10, 2001, when Dr. Goldberg examined petitioner, with regard to the left **[*19]** arm, Dr. Goldberg suspected that petitioner may be suffering from pain resulting from neuropathic entrapment, possibly the left radial nerve. (PX8).

The Ingalls Hospital occupational therapy note from December 12, 2001 indicates that petitioner's left elbow was swollen and he complained of tingling/numbness in the fingers of the left hand and a cold sensation in the volar forearm. (PX5).

Next, when petitioner was examined again at the Ingalls company clinic in 12/17/2001, he complained of sharp pain, numbness and tingling in the left hand, and increasing pain with movement. (PX3). The clinic doctor still diagnosed left lateral epicondylitis. Thereafter, on 12/24/2001, due to persistent symptoms bilaterally, the clinic doctor referred petitioner to Dr. Fuentes, an orthopaedic surgeon.

Dr. Fuentes first examined petitioner's left elbow on 1/02/2002. (PX4). At that time, Dr. Fuentes noted a consistent history of "pulling an overhead spacer at work," and noted tenderness about the left lateral epicondyle. He took petitioner off work, prescribed therapy and medication and initially diagnosed lateral epicondylitis. During the following visit, which took place on 2/1/2002, Dr. Fuentes **[*20]** noted that petitioner complained of numbness and tingling of the ulnar three digits. Then, Dr. Fuentes diagnosed "lateral epicondylitis rule out ulnar neuropathy."

On January 3, 2002, one day after seeing Dr. Fuentes, Dr. Player performed a §12 examination. Although Dr. Player was primarily examining petitioner in connection with the injury to his right arm and neck, he did note that petitioner complained of numbness in the third, fourth and fifth digits bilaterally. (PX9). He also noted pain in both elbow and hands which he notices mostly at night when he goes to sleep. In his report, Dr. Player admits that "[n]o records prior to 02/21/01 or subsequent to 06/05/01 were available for review."

The January 10, 2002 occupational therapy progress note to Dr. Fuentes indicates that petitioner was complaining of pain in the left elbow and numbness and tingling in the fourth and fifth digits in the left hand. (PX4, PX5).

Petitioner underwent an EMG/NCV on February 2, 2002. That test revealed bilateral ulnar nerve neuropathy due to entrapment at the level of the elbow. (PX4).

Next, Dr. Fuentes, while maintaining petitioner's off work status, referred petitioner for a neurological consult **[*21]** at Neurology Associates. Dr. Fuller of Neurology Associates examined petitioner on April 12, 2002; noted the history of petitioner's February 2, 2001(01 WC 24754) and November 28, 2001 work accidents; and concluded petitioner should undergo surgical intervention to address the bilateral ulnar neuropathy. (PX4).

On April 18, 2002, Dr. Fuentes filled out and signed an "Attending Physician's Statement" in which he stated that petitioner was continuously disabled from work since January 2, 2002 and that the injury arose out of the employment when petitioner was "[p]ulling a spacer that was slightly higher than his head." (PX4).

In his April 25, 2002 narrative report, Dr. Fuentes opined that petitioner's ulnar cubital tunnel syndrome is causally related to his work duties, probably aggravated by his work injury. (P. Ex. 4). Thereafter, on 4/30/2002, Dr. Fuentes performed an anterior submuscular transposition of the right ulnar nerve, after which petitioner underwent an uneventful post-operative course of treatment. (PX4, PX6, PX11).

Dr. Fuentes performed an anterior submuscular transposition of the left ulnar nerve on August 20, 2002. (PX4). Following this surgery, petitioner noted **[*22]** intense pain and burning in his left elbow and hand. He went to the emergency room at Ingalls Memorial Hospital on August 22, 2002. There, he complained that he was unable to sleep since the surgery; medicine was not relieving the pain; he has been sweating for two days and had a fever the previous day; and that his left elbow felt very warm at the surgical site. (PX5). Petitioner was treated with pain medications and an injection.

Postoperatively, petitioner continued to complain about shooting pain in the left arm, a burning pain along the ulnar border of the left palm, ring and small fingers, and numbness in the ulnar forearm and hand. (PX11). In the September 26, 2002 occupational therapy report addressed to Dr. Fuentes, the therapist noted that during the three weeks of treatment, edema increased throughout the left hand; clawing of the ring and small finger was noted; only trace abduction and adduction was noted in all digits; and redness, burning and slight elevation in temperature was noted in the small and ring fingers. (PX11).

On referral from Dr. Fuentes, petitioner was examined by neurologist, Dr. Tonya Fuller on October 9, 2002. Dr. Fuller performed an EMG which showed **[*23]** severe left ulnar neuropathy with associated active denervation localized at or just above the elbow. (PX12). Dr. Fuller ordered a MRI of the left elbow which revealed that the ulnar nerve was "not well seen" and some high signal surrounding the suspected location of an ulnar mass. (PX12).

Dr. Fuentes then referred petitioner for another orthopaedic consultation with Dr. Mark Gonzalez of the University of Illinois Hospital. (PX4). Dr. Gonzales saw petitioner on November 15, 2002. (PX4). He surmised that petitioner left ulnar nerve was still compressed at the elbow likely because of bleeding and scarring. He recommended surgical intervention to free the nerve.

Concurrently, petitioner sought treatment from Dr. Guzman at Cavero Medical Group, his family doctor, who referred petitioner for a neurological consult. (PX10). On October 29, 2002, Dr. Rioja of the Neurologic Care Associates examined petitioner and noted a "claw hand" type of appearance which is consistent with weakness of the ulnar innervated muscles. (PX13). Dr. Rioja ordered another MRI to hopefully better visualize the ulnar nerve at the elbow and she referred petitioner to Dr. Daniel Mass at the University of Chicago **[*24]** Hospitals for possible surgical intervention.

Petitioner first saw Dr. Mass on November 26, 2002. Dr. Mass' exam revealed almost no adduction or abduction of the fingers on the left hand and very weak left thumb pinch. (PX14). Dr. Mass diagnosed complete ulnar nerve palsy on the left. His interpretation of the second MRI was that the ulnar nerve is not visualized right around the medial condyle or something that is bulbous is present. In his office note, Dr. Mass stated, "This is a very complex problem and I have talked to Mr. Santoya (sic) about how we don't know exactly what we will find (upon surgical exploration) and we don't know his long-term results are even if we repair the nerve back." (PX14).

On December 11, 2002, Dr. Mass performed surgical exploration of the left ulnar nerve, including lysis of the ulnar nerve; ulnar nerve transposition, submuscular; and a nerve graft with PGA tube of the accessory branch of the ulnar nerve. (PX14). Postoperatively, petitioner underwent extensive therapy, (PX11), and during the February 4, 2003 office visit, Dr. Mass indicated, "I think it is just going to take time for this nerve to wake up after having multiple traumatic events including **[*25]** the surgeries." (PX14).

Dr. Mass examined petitioner again on June 3, 2003. At that time, he noted that petitioner was complaining of increased pain and hypersensitivity with a positive Tinel's sign that all the way up and down the arm. (PX14). He also noted that the ulnar nerve seemed to be regenerating somewhat because the hand was no longer completely clawing, petitioner had some adduction-abduction strength and he now had some sweat on the ring finger, but the little finger was still dry.

Petitioner's family doctor, Dr. Guzman of Cavero Medical Group, ordered an EMG. Dr. McGonagle of Neurological Care Associated performed the EMG on June 18, 2003. (PX13). That test revealed bilateral ulnar neuropathy at the elbow, with some possible reinnervation of the left ulnar nerve in the forearm and hand.

Respondent then requested a second Section 12 examination, this time utilizing Dr. Brian Cole. Dr. Cole first examined petitioner on August 4, 2003. Dr. Cole, after noting a consistent history of petitioner's February 2, 2001 (01 WC 24754) and November 28, 2001 traumatic work accidents, opined that the prognosis for the left elbow was guarded. (PX15).

Next, Dr. Mass noted on December **[*26]** 16, 2003, that petitioner's condition was regressing. Specifically, he noted that the first interosseous was disappearing; the ulnar nerve distribution was insensate with no sweat in the fingers; and the Tinel's sign was very positive around the proximal scar, causing tingling in the posterior aspect of the elbow which was explained by formation of a new neuroma. (PX14). Because of petitioner's condition, Dr. Mass prescribed further surgery.

Dr. Cole examined petitioner a second time on March 1, 2004. Following his exam, he concurred with Dr. Mass' recommendation for surgery. (PX15). On March 5, 2004, Dr. Mass performed a left ulnar nerve neurolysis with vein-wrapping from the great saphenous vein of the right leg. (PX14).

Postoperatively, Dr. Mass prescribed Vicodin and Neurontin as well as physical therapy. (PX14). Petitioner attended therapy regularly, but he continued to complain of pain, numbness and a burning sensation in his left elbow down into his small and ring fingers. (PX11). During the August 2, 2004 exam, Dr. Mass noted that petitioner still had numbness and no sweat in the ring and little fingers. (PX14). He went on to note that workers' compensation cut petitioner **[*27]** off and they refused vocational rehabilitation so Dr. Mass released petitioner from his care and released him to return to work with no lifting over 30 pounds with the left arm.

Respondent then had petitioner examined a third time by Dr. Cole. At his November 30, 2004 examination, Dr. Cole noted that petitioner complained of numbness and pain of the ulnar aspect of the left elbow and forearm as well as pain over the posterior/olecranon region. (PX15). He also noted pain and numbness at the ulnar aspect of the left wrist, into the ulnar two digits. Dr. Cole ordered an EMG of the left arm as well as a functional capacity evaluation.

Dr. McGonagle performed the EMG on January 4, 2005. That test revealed moderately severe ulnar neuropathy at the left elbow; reinnervation of the ulnar nerve; and ulnar neuropathy at the left wrist. (PX13). Dr. McGonagle went on to note that the neuropathy at the wrist might represent a soft tissue mass, but because of the injury and a "double crush" phenomenon, the distal ulnar nerve fibers are at risk of significant deterioration.

Petitioner then underwent a functional capacity evaluation on January 13, 2005. That evaluation revealed that although petitioner **[*28]** gave maximum voluntary effort, he was only able to function at the "light-medium" level of physical demand and his prior job as an operator requires a "heavy" demand level. (PX11).

Dr. Cole examined petitioner for a fourth time on February 3, 2005. At that time, he concurred with the FCE and indicated petitioner could return to work with the following restrictions: bilateral lifting from the floor at less than 40 pounds; bilateral carrying of 47 pounds or less; right hand carrying of less than 25 pounds on an occasional basis; left hand carrying of less than 25 pounds on an occasional basis; and pushing/ pulling maximum of 65 pounds on the right, 50 pounds on the left. (PX15).

Dr. Cole went on to recommend work hardening or light duty accommodating work. He also noted in his 2/3/2005 quick report that petitioner's painful left wrist might warrant future evaluation by a hand/wrist specialist. (PX15).

Petitioner then underwent four weeks of work hardening with excellent attendance. (PX11). Following the work hardening, the therapist noted that petitioner's capabilities remained unchanged from the FCE results.

On April 7, 2005, Dr. Cole concurred with the therapist's conclusions **[*29]** indicating that petitioner remained at a "light/medium" level of physical capability. (PX15). Dr. Cole indicated the restrictions, which as stated above, were permanent.

Most recently, on December 30, 2005, petitioner was referred again by his family doctors at Cavero Medical Group for an EMG. Dr. Rioja, who is Dr. McGonagle's associate, performed the testing which revealed slightly more pronounced evidence of ulnar neuropathy at the left wrist and the ulnar neuropathy at the left elbow was unchanged from the 1/4/2005 study. (PX13).

The Arbitrator notes the record evidences that petitioner underwent extensive medical treatment for his left arm since his November 28, 2001 work accident. All medical treatment records are consistent as to the history of the injury. There is no evidence that petitioner suffered any condition of ill-being involving his left arm prior to November 28, 2001, and petitioner was sent to the company clinic the day after the accident and has consistently noted symptoms in his left arm and hand ever since. Further, the Arbitrator notes there is no evidence of any intervening trauma. Based on these unrebutted facts alone, the Arbitrator could find causal connection.

[*30] Notwithstanding the above, inspection of the medical opinions as to causation further supports a causal connection finding. Specifically, Dr. Fuentes, the initial treating surgeon, opined at his deposition that petitioner's left ulnar cubital tunnel syndrome was causally related to the mechanism of pulling a spacer overhead at work. (PX25, p. 20).

Similarly, in his initial report, Dr. Cole opined that petitioner's left ulnar neuropathy was causally connected to his November 28, 2001 work accident. (PX15). Specifically, Dr. Cole stated: "While there are clearly physiologic underpinnings of ulnar neuropathy, based on the nature of the mechanism , he describes, these are ones which might or could aggravate a preexisting ulnar neuropathy or a neurologic demise." (PX15).

At his evidence deposition, Dr. Cole first offered a causation opinion similar to the above. (PX29, p. 11). Then he modified his causation opinion stating that the November 28, 2001 traumatic work accident was not likely the cause of petitioner's left ulnar neuritis because his first complaint of numbness in the left hand was not until April 5, 2002. (PX29, pp. 25-27). Rather, petitioner's work could be a competent cause **[*31]** of the ulnar neuritis as petitioner is 36, otherwise healthy and he does not possess any of the other risk factors, including smoking, arthritis, or being diabetic. (PX29, pp. 39-40). Specifically, Dr. Cole opined that "... in a labor environment, in a 36 year old with no other competent causes, I would - I would look at the work environment as a potential contributing factor to causing compression at the elbow in all fairness to this patient." (PX29, p.44).

The Arbitrator notes that although Dr. Cole altered the basis for causally connecting petitioner's left arm injury to his work, if the Arbitrator adopted Dr. Cole's repetitive trauma theory, causal connection would still hold as petitioner's symptoms about the left elbow were first manifest on November 28, 2001 and therefore, that would be a reasonable date of manifestation of the condition.

In addition, the Arbitrator finds Dr. Cole's repetitive trauma theory unpersuasive as said theory was premised on the fact that petitioner failed to complain of numbness in the left hand for a significant time following the occurrence. As noted above, it appears Dr. Cole was operating under the assumption that the first such complaints were **[*32]** in Dr. Fuentes' April 5, 2002 note.

The evidence in the record supports that petitioner had multiple complaints of numbness in his left hand shortly after the November 28, 2001 accident. Specifically, complaints of numbness in the left hand appear in the following records: Physicians Plus Ltd, December 3, 2001 (PX7); Dr. Goldberg, December 10, 2001 (PX8); Ingalls Memorial Hospital Occupational Therapy, December 12, 2001 (PX5); Ingalls Occupational Health Clinic, December 17, 2001 (P. Ex. 3); Dr. Player, January 3, 2002 (PX9); Ingalls Memorial Hospital Occupational Therapy, January 10, 2002 (PX5); and Dr. Fuentes, February 1, 2002 (PX4).

The Arbitrator finds that the record is replete with multiple complaints of numbness in petitioner's left hand in the medical treatment records immediately following the November 28, 2001 work accident. Because said complaints are regular and consistent following petitioner's trauma with the 35-50 pound spacer on November 28, 2001, the Arbitrator is not persuaded by Dr. Cole's repetitive trauma theory.

The only medical opinion arguably denying causal connection is Dr. Player's §12 exam. Dr. Player, who was examining petitioner's right upper extremity **[*33]** in connection with petitioner's February 2, 2001 work accident, offered the opinion that "there is no causal relationship between the examinee's current bilateral elbow and shoulder complaints and the 02/02/01 work injury or the 11/29/01 alleged work injury." (PX9). The Arbitrator is not persuaded by Dr. Player's opinion in that Dr. Player admits that he reviewed no records subsequent to 06/05/01. Further, it is noteworthy that Dr. Player concluded that petitioner had nothing wrong with him, but shortly after said exam, petitioner was objectively diagnosed with bilateral ulnar neuropathy and bulging cervical discs with a radicular component. (PX4, PX7). Therefore, the Arbitrator is not persuaded by any of Dr. Player's opinions.
Given the above and the absence of any persuasive evidence to the contrary, the Arbitrator is persuaded by Dr. Fuentes' opinion as to causal connection. As such, the Arbitrator finds that petitioner's condition of ill-being involving his left upper extremity is causally related to his November 28, 2001 work accident.

WITH RESPECT TO ISSUE (C), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR FINDS AS FOLLOWS: [*34]

At arbitration, petitioner identified Petitioner's Exhibit 27 (PX27) as all outstanding bills for treatment rendered in connection with his work-related injuries. The Arbitrator notes that the Physician Plus, Ltd. bill in the amount of $ 6,826.32 was awarded in connection with companion case 01 WC 24754. The Arbitrator notes the remaining charges in PX27 all relate to care which took place following petitioner's November 28, 2001 work injury.

Given the respondent only objected to liability for said charges and given the Arbitrator's findings as to accident and causal connection, the Arbitrator orders respondent to pay petitioner $ 1,952.39 for necessary medical services, as provided in §8(a) of the Act.

WITH RESPECT TO ISSUE (D), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Dr. Fuentes took petitioner off work on January 2, 2002. (PX4). Thereafter, Dr. Fuentes maintained petitioner's off work status throughout the course of his treatment which concluded May 2, 2003. (PX4, PX25, pgs. 21). Similarly, Dr. Mass kept petitioner off work through August 2, 2004. (PX14). At that time, Dr. Mass indicated petitioner could **[*35]** return to work with the restriction of no lifting with his left arm greater than 30 pounds. Petitioner testified unrebutted that respondent never offered him any light-duty work from 2002 on.

Following the light-duty release by Dr. Mass, petitioner was examined by Dr. Cole on November 30, 2004. (PX15). At that time, Dr. Cole ordered a repeat EMG and a functional capacity evaluation. Thereafter, Dr. Cole saw petitioner again on February 3, 2005. At that time, he recommended further work hardening, which petitioner underwent.

Ultimately, on April 7, 2005, Dr. Cole determined Mr. Santoyo to be at MMI and placed him at the "light/medium" level of physical capability. (PX15).

Following the release by Dr. Cole, petitioner then commenced a self-directed job search, which ultimately involved the involvement of respondent's workers' compensation insurance carrier's vocational rehabilitation counselor, Martin Power. (PX16). After an extensive job search and ultimate retraining as a security guard, petitioner procured alternative employment, which commenced on March 17, 2006.

Given the above, the Arbitrator finds that, as a result of his February 2, 2002 work accident, petitioner was temporarily **[*36]** totally disabled from February 3, 2002 through April 7, 2005, the date Dr. Cole deemed petitioner at MMI, and was entitled to maintenance from April 8, 2005 through March 16, 2006. Therefore, the Arbitrator finds respondent is liable for temporary total disability compensation from February 3, 2002 through March 16, 2006, totaling 214 5/7 weeks.

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

Petitioner testified that presently his left arm is painful when he does anything physical. He also continues to suffer numbness and tingling in the little and ring fingers of his left hand. Petitioner described the pain going from the left elbow into the little and ring fingers. Specifically, he said tasks, such as raking leaves, end up "killing" him at night because of the pain, numbness, and burning sensation in his left upper extremity.

Occupationally, respondent's examining doctor, Dr. Cole, indicated prior job as a mill operator required him to perform at the "heavy physical demand level, but as a result of his injury to his left upper extremity, he could only operate at the light/medium" level of his capacity. (PX15). **[*37]** Specifically, Dr. Cole indicated petitioner could only perform work with bilateral lifting from floor to 89 inches of eight to 40 pounds or less; bilateral carrying of 47 pounds on the left on an occasional basis; right hand carrying of 25 pounds on an occasional basis; left hand carrying of 25 pounds on an occasional basis; and pushing/pulling of less than or equal to 65 pounds on the right and 50 pounds on the left.

Dr. Cole arrived at these restrictions based upon the functional capacity evaluation and work hardening, which were performed at his direction at Occupational and Hand Therapy, Ltd. (See PX11). In said functional capacity evaluation, petitioner was noted to have given maximum voluntary effort, and in the work hardening discharge report, the evaluator noted that, although petitioner attended work hardening four times a week for the past four weeks with excellent attendance, his ability to return to work is limited because the left elbow medial pain increases after physical activity, as does the numbness in the ulnar nerve distribution, which radiates into his ring and small fingers. (PX11).

The Arbitrator finds petitioner credible as to his complaints and disabilities **[*38]** as to his left upper extremity. Based upon petitioner's testimony and the corroborative medical evidence from Dr. Cole and Occupational and Hand Therapy, Ltd., the Arbitrator finds that, as a result of petitioner's November 28, 2001 work injury, he is precluded from returning to his former occupation as a mill operator.

Petitioner testified that after being taken off work January 2, 2002, respondent never offered him any light-duty work. In fact, respondent terminated petitioner in 2004. Respondent's vocational rehabilitation counselor, Martin Power, confirmed that respondent did not have light-duty work available for petitioner. (PX16).

Following the release from medical care and the MMI determination by Dr. Cole on April 7, 2005 (PX15), petitioner commenced a self-directed job search without assistance from respondent or his workers' compensation carrier. Petitioner read the newspaper and contacted friends to locate alternative employment. He also began logging his employment contacts. (PX19). Petitioner met with vocational rehabilitation counselor, Edward Stefan, on November 10, 2004. Mr. Stefan concluded that without vocational rehabilitation assistance petitioner could potentially **[*39]** locate alternative employment earning between $ 8.00 an hour and $ 12.00 an hour. (PX17).

At respondent's request, petitioner also met with respondent's workers' compensation insurance carrier's in-house vocational rehabilitation counselor, Martin Power. (PX16). After his initial assessment on August 22, 2005, Mr. Power concluded that petitioner could obtain alternative employment in light to medium production work, office cleaning, or as a security guard. Mr. Power noted petitioner to be a motivated individual. (PX16). Several months later, on December 27, 2005, Mr. Power developed a vocational plan in order to assist petitioner to procure alternative employment. Petitioner then filled out and forwarded to Mr. Power job search logs, as Mr. Power requested. (PX19).

Petitioner then enrolled in a security guard training course with the consent of Mr. Power. Petitioner paid for and completed the course and became licensed as an unarmed security guard. After obtaining his license, he obtained a job offer from Securatex to work as a security guard. Petitioner testified without rebuttal that Mr. Power assented to him accepting the job with Securatex. Mr. Power's April 11, 2006 closing **[*40]** report indicates, "As a result of job placement services and Mr. Santoyo's compliance, he returned to work for Securitas Security (SIC) as a security guard at $ 8.00 an hour on 3/17/06." (PX16).

Petitioner commenced his alternative employment with Securatex on March 17, 2006. His job required him to sit in a pick-up truck to observe a factory during the night. Petitioner testified that said alternative employment was within his physical restrictions and he was physically able to perform the job. Petitioner testified that he was paid $ 8.00 an hour and worked 40 hours a week at Securatex. Petitioner's representative pay stubs from Securatex confirm that hourly rate and number of hours worked. (PX20).

Other than the Securatex job, petitioner has not been offered no other alternative employment.

Based on petitioner's credible testimony and the opinions of vocational rehabilitation counselors Stefan and Power, the Arbitrator finds that petitioner performed a reasonable job search and that his alternative employment with Securatex, Ltd., earning $ 320.00 per week, constitutes suitable alternative employment.

At arbitration, Dwayne Lee, an employee of respondent, testified. Mr. Lee **[*41]** indicated that he still works for respondent as a mill operator. He and petitioner held the same job title, worked same shifts, earned the same hourly compensation, and worked similar hours prior to petitioner's work accidents. Mr. Lee also testified that the rate of his pay, hours worked, shift premiums, and overtime requirements were all covered by his union's collective bargaining agreement. (See PX26). This witness went on to testify that in 2005, the most recent full year for which he had reportable earnings, he earned approximately $ 78,000.00 working for respondent. Mr. Lee testified unrebutted that, if petitioner had still been working as a mill operator, that petitioner would be presently earning the same or more than he. The Arbitrator finds Mr. Lee credible and notes there is no evidence contradicting his testimony. Therefore, the Arbitrator finds that if petitioner was presently working in the full performance of his occupation as a mill operator for respondent, his weekly earnings would average at least $ 1,500.00 ($ 78,000.00 / 52).

Based on the above, the Arbitrator finds that petitioner has met his burden in proving that his November 28, 2001 work injury has

partially **[*42]** incapacitated him from his usual and customary employment as a mill operator, and said incapacitation has resulted in a reduction of his earning capacity. Pursuant to §8(d)(1), petitioner is entitled to receive 66-2/3% of the difference between the average amount he would be able to earn in the full performance of his duties as a mill operator ($ 1,500.00) and the average amount he is able to earn in suitable alternative employment ($ 320.00), which amounts to $ 786.67 ($ 1,500.00 - $ 320.00 = $ 1,180.00 x 66-2/3% = $ 786.67). The Arbitrator notes that the maximum wage differential benefit applicable to petitioner's accident date is $ 534.16, and, thus, that rate would apply. Therefore, the Arbitrator orders respondent to pay petitioner $ 534.16 per week from March 17, 2006, the date petitioner commenced alternative employment, through November 9, 2006, the date proofs were closed, and ongoing for the duration of petitioner's disability.

WITH RESPECT TO ISSUE (F), WHETHER THE RESPONDENT LIABLE FOR PETITIONER'S TRAVEL EXPENSES INCURRED TO ATTEND RESPONDENT'S §12 EXAMINATIONS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner was seen by Dr. Cole at respondent's request on four **[*43]** occasions. (PX15). Petitioner testified he was never reimbursed for his travel expenses by respondent for the last three of those examinations. The Arbitrator notes distance between petitioner's home and Dr. Cole's office is approximately 18 miles. Three round trips total approximately 108 miles. The Arbitrator orders respondent to reimburse petitioner at the official State of Illinois mileage allowance rate, effective July 1, 2005, of $ .405 per mile, or a total of $ 43.74, for the three examinations.

WITH RESPECT TO ISSUE (G), WHETHER THE RESPONDENT IS LIABLE FOR PETITIONER'S VOCATIONAL REHABILITATION EXPENSES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he incurred $ 169.00 in expenses relative to his security guard training course and obtaining his security guard license. Those expenses were itemized in PX18. Petitioner testified unrebutted that respondent's vocational rehabilitation counselor, Martin Power, informed him that the workers' compensation insurance carrier would reimburse petitioner for those expenses. To date, respondent's carrier has not done so. Given that petitioner ultimately procured alternative employment from said vocational rehabilitation **[*44]** efforts and given that respondent's own vocational rehabilitation counselor signed off on said alternative job, the Arbitrator orders respondent to pay petitioner $ 169.00 for reasonable vocational rehabilitation expenses pursuant to §8(a).

Legal Topics:

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

Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > Rehabilitation
Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview