*2010 Ill. Wrk. Comp. LEXIS 557, **

NICOLE KELLY, PETITIONER, v. ILLINOIS DEPARTMENT OF CORRECTIONS, RESPONDENT.

No. 04WC 030928

10IWCC 600

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF WILL

2010 Ill. Wrk. Comp. LEXIS 557

June 21, 2010

CORE TERMS: arbitrator, knee, security guard, pain, vocational rehabilitation, left knee, earning, wage differential, stair, temporary total disability, permanent, training, surgery, correctional officer, filing clerk, patellofemoral, recommended, earn, stub, temporary, concurrent, squatting, counselor, climbing, walking, lateral, armed, average amount, exacerbation, unrebutted

JUDGES: Nancy Lindsay; David Gore; 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 benefit rates, medical expenses and temporary total disability benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings as more specifically set forth herein pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Wage Differential Award

After considering the entire record, the Commission vacates the wage differential award due to a lack of evidence concerning Petitioner's average earnings in her new job. On review, Respondent contends the Arbitrator miscalculated Petitioner's wage differential award by failing to properly evaluate the full extent of Petitioner's current earning capacity for her new employer, Securitas. Respondent contends the evidence **[*2]** shows Petitioner makes an average of $ 15.00 per hour while the Arbitrator determined the evidence shows an average earning of $ 12.00 per hour. The Commission finds that neither party is correct. The Arbitrator's award of wage differential benefits based upon an average earning of $ 12.00 per hour must be vacated, and the matter must be remanded to the Arbitrator for a hearing on Petitioner's earning capacity at Securitas.

Petitioner testified that she accepted full-time work as a security guard for Securitas on January 15, 2008. Petitioner testified that she earns $ 12.00 per hour as a security guard and submitted PX 14, her first pay stub from Securitas, in support of her testimony. That pay stub shows that Petitioner also worked 8.5 hours at $ 24.00 per hour. Petitioner testified that she has continued working for Securitas through the date of arbitration

When calculating a wage differential award, § **8(d)1** mandates that a claimant receive a sum equal to 66 2/3% of the difference between the average amount would be able to earn in the **full performance** of his/her occupational duties at the time of the accident, and the average amount which the claimant is earning or is able to earn **[*3]** through some suitable employment or business after the accident. The Arbitrator based his wage differential award on the one pay stub from January of 2008. The Commission finds it significant that Petitioner testified she had been working full-time for Securitas for approximately four months at the time of arbitration and, yet, submitted minimal evidence of her wages in support of her wage differential claim. The Commission further notes it is apparent from PX 14 that Petitioner earns more than just $ 12.00 per hour. In light of the foregoing, the Commission finds there is insufficient evidence in the record to determine Petitioner's average earnings at Securitas and, therefore, vacates the Arbitrator's calculation of the wage differential award and remands this matter to the Arbitrator for a hearing solely on the issue of Petitioner's average amount of earnings at Securitas so that Petitioner's wage differential award may be recalculated pursuant to § **8(d)1** of the Act.

Respondent's Credit for Temporary Total Disability

The Commission further modifies the Arbitrator's Decision to reflect the parties' stipulation that Respondent is entitled to a credit for temporary total disability **[*4]** benefits previously paid in the amount of $ 48,772.12. This sum includes a credit for $ 33,069.00 asserted in a companion case (05 WC 32297) which was tried in conjunction with this case. In case number 05 WC 32297, the Arbitrator found that an accident occurring on May 9, 2005 was a temporary exacerbation of Petitioner's left knee injury sustained in this case and awarded no temporary total disability benefits therein. In so crediting Respondent in this case, the parties acknowledge and understand that Respondent is being granted one credit for both cases and a double recovery is prohibited.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 7, 2008 is modified as stated

herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the wage differential award pursuant to § **8(d)1** is vacated and this matter is remanded for further calculation and determination of the wage differential award as more specifically set forth herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of $ 631.05/week for 167-6/7 weeks from June 7, 2004 through February 16, 2005, **[*5]** from March 14, 2005 through April 14, 2005, and from May 10, 2005 through October 17, 2007, those being the periods of temporary total incapacity for work under § 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from June 4, 2006 through April 21, 2008, and shall pay the remainder of the award, if any, in weekly payments.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $ 8,267.68 for medical expenses under § 8(a) of the Act pursuant to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits of $ 631.05/week for 11-1/7 weeks, from October 29, 2007 through January 15, 2008, as provided in § 8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, including $ 48,772.12, to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further **[*6]** 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.

DATED: JUN 21 2010

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Joliet, Illinois**, on **April 21, 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.

DISPUTE ISSUES
G. What were the petitioner's earnings?
J. Were the medical services that were provided to petitioner reasonable and necessary?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On **June 6, 2004**, the respondent **Illinois Department [*7] of Corrections *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 $ **49,222.16**; the average weekly wage was $ **946.58**.

. At the time of injury, the petitioner was **24** years of age, ***married*** with **1** children under 18.

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

. To date, $ **15,703.12** has been paid by the respondent for TTD and/or maintenance benefits,

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **631.05**/week for **167-6/7** weeks, from **June 7, 2004** through **February 16, 2005 and from March 14, 2005 through April 14, 2005; May 10, 2005 October 17, 2007**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **494.92**/week **[*8]** for a further period of **commencing January 16, 2008 and ongoing for the duration of Petitioner's disability** weeks, as provided in Section **8(d)(1)** of the Act, because the injuries sustained caused **Petitioner to be partially incapacitated from pursuing her usual cand customary line of employment**.

. The respondent shall pay the petitioner compensation that has accrued from **June 4, 2006** through **April 21, 2008**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **8,267.68** for necessary medical services, as provided in Section 8(a) of the Act The

Arbitrator notes that medical bills incurred after February 1, 2006 are to be paid pursuant to the medical fee schedule contained in the recent amendment to the Illinois Workers Compensation Act. This may cause the total amount awarded to decrease to comply with the provisions of said schedule.

Respondent shall further pay the petitioner maintenance benefits of $ **631.05**/week for **11-1/7** weeks, from **October 29, 2007** through **January 15, 2008**, as provided in Section 8(a) of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition* **[*9]** *for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 1.92% 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

8/7/08

Date

AUG 07 2008

FINDINGS OF FACT:

On June 6, 2004, Petitioner, who worked as a correctional officer for the Illinois Department of Corrections, was walking down the stairs at the prison when she slipped on a wet patch on the stairs. Petitioner reported twisting her ankle as she fell down the stairs.

On June 6, 2004, Petitioner went to Saint Joseph Medical Center. Petitioner reported pain in her left ankle and mild left knee discomfort. Petitioner was given crutches and advised she had a knee and ankle sprain. Petitioner participated in physical therapy to rehabilitate her ankle and knee, but continued to have left knee pain and was diagnosed in August of 2004 with internal derangement **[*10]** of the left knee. On September 9, 2004, Petitioner had surgery on her left knee which consisted of an arthroscopy and debridement to repair chondromalacia in her left knee. Petitioner was returned to work full duty on February 17, 2005 after completing work hardening and physical therapy. (Pet. Ex # 1 and # 3)

After returning to work, Petitioner noted increased pain and swelling about the left knee after any extended standing, walking or stair climbing. On March 4, 2005 she presented to the South Shore Hospital emergency room. (Pet. Ex. # 4). There, she was instructed to follow up with her doctor. Petitioner then followed up with her new family doctor, Dr. Gee on March 7, 2005. (Pet. Ex. # 5). Dr. Gee examined Petitioner, ordered a second MRI and took her off work. The MRI when performed on March 17, 2005 revealed lateral subluxation of the patella. (Pet. Ex. # 5)..Dr. Gee then referred Petitioner for orthopaedic consultation with Dr. Mark Hutchinson.

Dr. Hill re-examined Petitioner on March 30, 2005. (Pet. Ex. # 3). He diagnosed left patellofemoral syndrome and recommended Petitioner obtain a second opinion, noting that a repeat arthroscopy and potential lateral release might be **[*11]** required for the chondromalacia of the left patella, as well as the patellar malalignment. He also determined that the chondromalacia was related to her work accident. (Pet. Ex. # 3).

On April 25, 2005, Petitioner presented to Dr. Mark Hutchinson. The doctor noted lateral riding of the patella and significant tenderness to palpation over the medial and lateral retinacula. He also noted moderate patellar grinding and a positive patellar apprehension test. He recommended physical therapy with McConnell taping and hamstring stretching. Dr. Hutchinson also indicated surgical intervention to tighten the medial tissues surrounding the kneecap may be necessary. (Pet Ex. # 6).

Petitioner returned to work on April 15, 2005. Petitioner continued to experience symptoms in her. left knee. She returned to Dr. Gee who referred Petitioner to Dr. Ibrahim. Petitioner was first examined on May 5, 2005. The doctor rendered a diagnosis of left patellar maltracking/ subluxation. (Pet. Ex. # 7). The doctor also indicated Petitioner could work provided she did not perform any stair climbing, no walking for time periods greater than 15 minutes, and no standing for greater than 15 minutes at a time. Lastly, **[*12]** Dr. Ibrahim recommended further surgery including a Fulkerson tibial tubercle transfer or a medial application and lateral release.

On May 9, 2005, Petitioner along with other correctional officers were escorting an inmate when the inmate attempted to assault one of the other officers. Petitioner assisted the other officers in restraining the inmate, but twisted her left knee during the altercation. Following the incident, Petitioner presented to South Shore Hospital, at which time she was taken off work and referred to her family physician, Dr. Gee. (Pet. Ex. # 4). Dr. Gee then referred Petitioner back to Dr. Ibrahim who because of office relocation referred her to Dr. Durudogan. (Pet. Ex. # 7). Dr. Durudogan first examined Petitioner on June 14, 2005.

On June 29, 2005, Petitioner bad surgery which was performed by Dr. Durudogan. The surgery consisted of a left knee arthroscopy with debridement and lysis of adhesions and excision of medial patellofemoral plica and open lateral release with tibial tubercle osteotomy. On January 11, 2006, Dr. Durudogan performed another surgery to Petitioner's left knee which consisted of manipulation of the left knee arthroscopic lysis of adhesions, **[*13]** removal of loose body, debridement, and removal of hardware from previous surgery on knee. On July 27, 2006, Dr. Durudogan placed permanent restrictions upon Petitioner of no climbing of stairs greater than one flight at a time and no squatting or kneeling: (Pet Ex. # 7)

On October 24, 2005, Petitioner saw Dr. Troy Karlsson for an independent medical evaluation which was requested by Respondent, Dr. Karlsson diagnosed patellofemoral pain syndrome. He indicated that Petitioner's present problems pre-date her May 9, 2005 work accident and that same represented an exacerbation of her pre-existing patellofemoral pain. Dr. Karlson also indicated Petitioner had reached maximum medical improvement and that the permanent restriction of no repeated walking up stairs was a valid restriction, but that the work accident on May 9, 2005 did not lead to the restriction. (Resp. Ex # 1)

On August 29, 2006, Petitioner received a letter from the warden at the Illinois Department of Corrections at Stateville indicating that Petitioner's restriction of no repetitive stair climbing could not be accommodated. (Pet Ex # 13)

Petitioner continued occasional follow-up treatment with Dr. Durudogan. On August **[*14]** 17, 2007, Dr. Durudogan administered an

injection to the knee. (Pet. Ex. # 7).

Petitioner testified that through the State of Illinois Alternative Work Program, she was ultimately placed in a job as a filing clerk with the Department of Human Services on October 18, 2007. Petitioner indicated the filing clerk job exceeded her restrictions in that she was required to repetitively bend and stoop to perform various filing activities. She was also required to lift files weighing up to 25 pounds.

On October 26, 2007, Petitioner presented to Dr. Durudogan with complaints of increased left knee pain. The doctor noted Petitioner commenced a new job which required a lot of walking, squatting, bending, and standing. Dr. Durudogan performed another injection and prescribed Vicodin. (Pet. Ex. # 7). Lastly, he recommended that Petitioner no longer perform that work and reiterated permanent physical limitations to include no kneeling, no squatting, and no standing for greater than six hours. Petitioner was unable to continue her job with the Department of Human Services. Petitioner indicated she then again contacted the Alternative. Work Program and requested another job placement. Linda McDermott, **[*15]** the Alternative Work Program representative, informed Petitioner that she would contact Petitioner if any other job opportunities became available. Petitioner indicated that subsequent thereto she attempted to make several more contacts with the Alternative Work Program, but never received any response, any further job leads or offers of employment.

Certified vocational rehabilitation consultant David A. Patsavas, performed an initial vocational assessment of Petitioner on November 20, 2007. He concluded Petitioner was a candidate for vocational rehabilitation services and indicated two areas of potential employment for her, given her transferrable skills and physical restrictions, would include work as a hotel desk clerk or night auditor, working as a security guard at an assignment or observing monitors. (Pet. Ex. # 9). Mr. Patsavas then assisted Petitioner in enrolling in a security officer training program and facilitated her obtaining her State of Illinois PERC card, which was a prerequisite to working as a security guard.

On January 15, 2008, Petitioner accepted full-time work as a security guard for Securitas. Petitioner testified that this was the only job offer she obtained **[*16]** since the failed attempt to work as a filing clerk. Petitioner's job with Securitas involves working at various locations, including the Boeing headquarters building in Chicago. She stated that the job is within her restrictions as she is only required to sit at a reception desk area, checking visitors in and out of the building, and observing video screens. Petitioner works full time, 40 hours per week, and earns $ 12.00 an hour. She identified Petitioner's Exhibit 14 as her first pay stub from Securitas, confirming her hourly rate at $ 12.00 an hour. The paycheck stub from Securitas, from 1-11-08 till 1-24-08, shows Petitioner worked 27 hours with 18.5 of the hours at a pay rate of $ 12.00 per hour and 8.5 hours at 24.00 per hour. (Pet. Ex # 15) Petitioner continued performing work with Securitas through the date of arbitration. Mr. Patsavas concluded Petitioner's work with Securitas represented suitable alternative employment. (Pet. Ex. # 9)

Petitioner identified Petitioner's Exhibit 11 as copies of Mr. Patsavas' bills for his services, which included his paying her expenses for her security training, obtaining her PERC license with the State of Illinois, and obtaining a uniform **[*17]** for her job Mr. Patsavas vocational rehabilitation expenses total $ 3,460.30.

Additionally, Petitioner identified Petitioner's Exhibit 15 as the outstanding medical bill from Dr. Durudogan's office/Southwest Orthopaedics, totaling $ 1,499.38. Petitioner also identified Petitioner's Exhibit 17 as the bill from Electronic Wave Form Lab, Inc./Medac in the amount of $ 3,308.00. Petitioner testified that both of these bills remain outstanding.

Petitioner testified at the hearing that while working for the Illinois Department of Corrections she had a second job at IFPC Worldwide as a security officer where she made $ 15.00 per hour. She also testified that Respondent knew of her second job, which she found through the advice of her supervisor. After completing the secondary employment form that Respondent required, Petitioner commenced work with IFPC as an armed security guard at Foot Locker stores. Petitioner testified that as a prerequisite for the job, she had to agree to work at least 20 hours per week, and she was paid $ 15.00 an hour. Petitioner's W2 records from 2004 show that she made $ 847.50 for the entire year working for IFPC. (Pet. Ex # 18) In 2005, Petitioner made $ 60.00 **[*18]** working for IFPC. (Pet. Ex. # 18) The parties stipulated that if Petitioner were currently working for Respondent she would be earning $ 92238 per week according to the Union agreement. (Pet. Ex # 12)

In support of the Arbitrator's decision relating to (G) WHAT WERE THE PETITIONER'S EARNINGS, the Arbitrator finds the following:

The parties stipulated that Petitioner's average weekly earnings for her work with Respondent are $ 646.58. The only issue as to average weekly wage pertains to Petitioner's concurrent wages.

Petitioner testified unrebutted that her supervisor, a lieutenant at Stateville, advised her of the concurrent employment opportunity with IFPC working as an armed security officer. The physical requirements of the job would include standing, walking, and apprehending shoplifters. In order to accept his employment, Respondent required Petitioner to complete a secondary employment form, which she did. Respondent offered no evidence to refute, Petitioner's testimony.

Petitioner's work with IFPC commenced in mid May of 2004. She was paid $ 15.00 an hour and had to commit to working at least 20 hours per week. Petitioner identified Petitioner's Exhibit 18 as her first **[*19]** pay stub she received from IFPC, which supports Petitioner's testimony that she was paid at a rate of $ 15.00 per hour and worked at least 20 hours during this initial two-week period.

The Arbitrator notes there is no evidence rebutting Petitioner's testimony that Respondent was aware of the concurrent employment and that Petitioner earned $ 15.00 an hour and the regular work week was at least 20 hours. Therefore, the Arbitrator finds that the average wages from Petitioner's concurrent employment are $ 300.00 ($ 15.00 per hour x 20 hours per week).

Based on the above, Petitioner's average weekly wage is $ 946.58, representing $ 646.58 weekly from her employment with respondent, as was stipulated by the parties, and $ 300.00 from her concurrent employment with IFPC.

In support of the Arbitrator's decision relating to (J) WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, the Arbitrator finds the following:

Respondent does not question the reasonableness or necessity of the medical charges in question. Rather, its dispute is only as to liability for said bills. (Arb. Ex. 1). Petitioner testified unrebutted that Petitioner's Exhibits 15 and **[*20]** 17 are outstanding related

bills. These bills total $ 4,807.38.

Regarding the bills in question, the Arbitrator notes that Petitioner's Exhibit 15 is a bill from Southwest Orthopaedics.. Petitioner obtained related medical treatment, including two surgeries to her knee that were performed by Dr. Durudogan, at Southwest Orthopaedics. Therefore, these bills are clearly related to Petitioner's work injuries. Similarly, Dr. Durudogan ordered the H-Wave therapeutic machine for Petitioner to use at home. The resulting bill, which is been marked as Petitioner's Exhibit 17; similarly is clearly related to the same course of treatment.

Given the above, the Arbitrator finds that Respondent shall pay Petitioner $ 4,807.38 for related reasonable and necessity medical services.

Petitioner testified unrebutted that Petitioner's Exhibit 11 were the unpaid invoices from vocational rehabilitation counselor, David Patsavas. Respondent did not challenge the reasonableness or necessity of said charges. (Arb. Ex. 1). Rather, Respondent only questions its liability for same.

Petitioner testified that Mr. Patsavas not only recommended that she undergo the necessary training to become a licensed unarmed security **[*21]** guard, but also he helped facilitate said training and licensure by fronting the cost of the training, the cost of the license, and the cost of Petitioner's security guard uniforms.

The Arbitrator notes that the vocational rehabilitation counselor was successful in assisting Petitioner to obtain necessary license and training to find alternative work. Further, the Arbitrator notes that the vocational rehabilitation counselor was successful in placing Petitioner in alternative work which is within Petitioner's physical limitations and which she has been able to perform for several months.

Given the above, the Arbitrator orders respondent to pay Petitioner $ 3,460.30 for reasonable and necessary vocational rehabilitation services pursuant to Section 8(a) of the Act.

In support of the Arbitrator's decision relating to (K) WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, the Arbitrator finds the following:

Petitioner alleges that she was temporarily totally disabled as a result of her June 6, 2004 work injury from 6/7/2004 through 2/16/2005; 3/14/2005 through 4/14/2005; 5/10/2005 through 10/17/2007; and 10/29/2007 through 1/15/2008, representing 180-3/7ths weeks. **[*22]** (Arb. Ex. 1). Respondent agreed to the above TTD periods, but denied liability for the period from 10/29/2007 through 1/15/2008.

On May 9, 2005, Petitioner sustained an accident which arose out of and in the course of her employment with Respondent. The Arbitrator found that the May 9, 2005 accident was a temporary exacerbation of Petitioner's left knee injury related to her June 6, 2004 accident in that it no way altered the course of treatment for said underlying injury or the temporary or permanent disability relating to same. As such, the Arbitrator awarded no benefits in connection with that claim (05 WC 32297).

Following Petitioner's failed attempt to work as a filing clerk, on October 26, 2007, Dr. Durudogan issued revised permanent restrictions. Subsequent thereto Petitioner contacted the Alternative Work Program on several occasions and she also began vocational rehabilitation with certified vocational rehabilitation counselor, David Patsavas, on November 20, 2007. Following Mr. Patsavas' recommendation, Petitioner underwent training to become a licensed, unarmed security guard. Ultimately, Petitioner located alternative employment in that field on January 15, 2008.

Given **[*23]** the above and the absence of evidence to the contrary, the Arbitrator finds that Petitioner was temporarily totally disabled for the periods stipulated by the parties, from 6/7/2004 through 2/16/2005; 3/14/2005 through 4/14/2005; 5/10/2005 through 10/17/2007, and the Arbitrator finds that Petitioner is entitled to maintenance pursuant to Section 8(a) from 10/29/2007 through 1/15/2008 because she was actively engaged in vocational rehabilitation and attempting to procure alternative employment.

In support of the Arbitrator's decision relating to (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

Petitioner commenced employment as a correctional officer for the State of Illinois at the Stateville Correctional Center in November of 2003 after undergoing a pre-employment physical. Thereafter, she underwent training, which included physical training, to become a licensed correctional officer.

Petitioner worked as a correctional officer without incident until June 6, 2004 when she hurt her left knee and ankle at work. Since then, although there were brief periods of attempted return to regular work, Petitioner has undergone three surgical procedures, **[*24]** multiple injections, and extensive conservative therapies, medications, and home exercise to treat her significant left knee injury.

Petitioner had a second work injury on May 9, 2005 which is the subject of the companion claim 05 WC 32297, but her diagnosis, disability and course of treatment were in no way altered or changed as a result of that accident. First, Dr. Ibrahim, who examined Petitioner on May 5, 2005, four days prior to the May 9th accident, was already prescribing the surgery that Dr. Durudogan ultimately performed on June 29, 2005. Similarly, Drs. Hill and Hutchinson were discussing additional surgery on March 30, 2005 and April 24, 2005, respectively. Lastly, Dr. Karlsson opined that the May 9, 2005 accident was merely a temporary exacerbation of Petitioner's underlying patellofemoral pain. Given the above, the Arbitrator finds that the May 9, 2005 work accident was merely a temporary exacerbation of Petitioner's underlying left knee condition. As such, the Arbitrator awards no permanency or other benefits in connection with that claim (05 WC 32297), but rather awards such benefits in connection with Petitioner's June 6, 2004 work accident (04 WC 30928),

Dr. Karlsson, **[*25]** Respondent's examining physician, diagnosed Petitioner with left patellofemoral pain syndrome. Similarly, Dr. Durudogan, Petitioner's treating physician, diagnosed her with patellofemoral dysfunction for which three surgical interventions were required, including performing a tibial tubercle osteotomy and subsequent removal of hardware, as well as removal of other loose bodies, debridement and manipulation of the left knee under anesthesia.

On August 10, 2006, Dr. Durudogan issued permanent restrictions, including no climbing of stairs greater than a flight at a time and

no squatting or kneeling. It is undisputed that Respondent was unable to accommodate the restrictions. Respondent indicated as much to Petitioner in its August 29, 2006 correspondence, in which it also recommended that Petitioner participate in the Alternative Work Program for State of Illinois employees.

Petitioner worked with the State of Illinois' Alternative Work Program until October 16, 2007, when she was placed in a job as a filing clerk with the Department of Human Services. The physical requirements of that job included filing, bending, stooping, climbing, squatting, and lifting files weighing up to 25 pounds. **[*26]** As she performed the work, she noted increasing pain and swelling in her left knee. During the October 26, 2007 office visit with Dr. Durudogan, he indicated performing the filing work had become increasingly difficult for Petitioner, but she could perform only desk work with no lifting greater than 20 pounds, no squatting, bending, pushing, pulling, kneeling, and no extended standing.

Petitioner testified that presently she has pain and difficulty with her left knee with weather changes or when she attempts to do any significant standing or walking, including when shopping. Furthermore, Petitioner testifies that attempting to climb stairs, stoop, or bend increases her pain and swelling about the left knee. Lastly, she noted that her left knee will lock up approximately three to four times per week.

Petitioner also testified that since her June 6, 2004 work injury, she attempted to return to work at her concurrent job with IFPC on one occasion in May of 2005. During that four-hour shift, she noticed increased pain and swelling in her left knee, as she was required to stand the entire shift. Petitioner testified unrebutted that the physical requirements of her work as an armed security **[*27]** officer with IFPC exceed her physical capabilities and the permanent restrictions issued by Dr. Durudogan as she is required to stand and walk the entire shift and she is required to physically apprehend shoplifters.

Given Petitioner's testimony, coupled with the consistent medical evidence and the absence of evidence to the contrary, the Arbitrator concludes that as a result of Petitioner's June 6, 2004 work injury, she is precluded from returning to her former occupations as a correctional officer and armed security guard.

REASONABLENESS OF JOB SEARCH/SUITABILITY OF ALTERNATIVE EMPLOYMENT

Following Dr. Durudogan's imposition of permanent work restrictions on August 10, 2006, Respondent indicated in correspondence that it could not accommodate Petitioner's restrictions. Further, Respondent referred Petitioner to the Alternative Work Program for State of Illinois employees. Petitioner participated in said program and was ultimately place in an alternative job as a filing clerk with the Department of Human Services on October 16, 2007.

As indicated above, the requirements of the filing clerk job exceeded Petitioner's permanent work restrictions. Nonetheless, Petitioner attempted **[*28]** to work for approxi mately two weeks until the pain and swelling in her left knee became too severe. Petitioner sought and received further medical attention from Dr. Durudogan, including an injection into her left knee, and he restated her permanent physical restrictions.

Petitioner then contacted the Alternative Work Program, at which time Linda McDermott indicated she would keep Petitioner in mind for any other appropriate job that might become available. Thereafter, Petitioner called the Alternative Work Program on several occasions trying to locate accommodating alternative work, but no further employment opportunities were offered.

Petitioner underwent an initial vocational assessment performed by a certified vocational rehabilitation counselor, David Patsavas, on November 19, 2007. Mr. Patsavas concluded that, given Petitioner's transferable skills and physical limitations, the best vocational fit would be for her to seek employment as a hotel-motel desk clerk/night auditor or an unarmed sedentary security guard. Petitioner worked with Mr. Patsavas to obtain the necessary training and license to become an unarmed security guard. She underwent a security training program, as **[*29]** well as applied to obtain her PERC card from the State of Illinois.

Upon completion of the training program, she commenced a job search and was successful in obtaining a job offer with Securitas, a security company. Petitioner was hired by Securitas on January 15, 2008 to work as a sedentary security guard, sitting at the reception desk of a building checking visitors in and out of the building, and observing video screens. Petitioner is paid $ 12.00 per hour, and her regular work week is 40 hours. Petitioner's pay stub supports her allegation of her hourly rate. Petitioner testified unrebutted that since commencing employment on or about January 15, 2008 with Securitas, she has continually worked for that company through the date of arbitration. Further, Petitioner testified that she has obtained no other job offers.

The Arbitrator notes that David Patsavas, a certified rehabilitation counselor recommended that Petitioner accept the job with Securitas and indicated that this alternative employment constitutes a viable and stable alternative employment.

Based on Petitioner's credible testimony, Mr. Patsavas' credible opinions, and the absence of evidence to the contrary, the Arbitrator **[*30]** finds that Petitioner performed a reasonable job search in participating in the State of Illinois' Alternative Work Program, as well as working with Mr. Patsavas, and her alternative employment with Securitas earning $ 480.00 per week ($ 12.00 per hour x 40 hours per week), constitutes suitable alternative employment.

*SECTION **8(d)1** CALCULATION*

Given the above, the Arbitrator finds that Petitioner has met her burden in proving that her June 6, 2004 work injury has partially incapacitated her from performing her usual and customary employment as a correctional officer and an armed security guard and said incapacitation has resulted in a reduction of her earning capacity. Pursuant to Section **8(d)1,** Petitioner is entitled to receive 66-2/3% of the difference between the average amount she would presently be able to earn in the **full performance** of her prior occupations as a correctional officer (the parties stipulated that Petitioner would presently be earning $ 922.38 per week if she was still working as a correctional officer for Respondent) and armed security guard ($ 300.00) and the average amount she is able to earn in suitable alternative employment ($ 480.00), which amounts **[*31]** to $ 494.92 ($ 922.38 + $ 300.00 = $ 1,222.38 - $ 480.00 = $ 742.38 x 2/3 = $ 494.92) weekly from January 15, 2008, the date she commenced alternative employment, through April 21, 2008, the date proofs were closed, and continuing weekly payments of $ 494.92 the duration of her disability.

Legal Topics:

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

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
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*2009 Ill. Wrk. Comp. LEXIS 1364, **

RONALD MUNOZ, PETITIONER, v. EXCEL WATERPROOFING, RESPONDENT.

NO: 04WC 03291

09 IWCC 1341

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 1364

December 14, 2009

CORE TERMS: arbitrator, waterproofer, lbs, overtime, pain, temporary total disability, causal connection, estimator, residential, permanent, regular, wage differential, prescription, accommodate, underwent, earning, notice, occupation, earn, disputed issues, disability, prescribed, ill-being, weighing, duration, salary, ladder, doctor, lift, goes

JUDGES: Barbara A. Sherman; Paul W. Rink; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice having been given to all parties, the Commission, after having considered the issues of causal connection, medical expenses, and nature and extent, and having been advised of the facts and law, hereby affirms and adopts the Arbitrator's decision, which is attached hereto and made a part hereof.

The Commission declines to consider Petitioner's Petition for Penalties, which was attached to Petitioner's response to Respondent's Statement of Exceptions and Supporting Brief, and characterized as Petitioner's Statement of Exceptions. Because of the manner in which Petitioner presented the petition, the Commission is concerned that Respondent did not have adequate notice of such petition and an opportunity to respond. Should Petitioner wish to pursue the petition, Petitioner must provide Respondent with notice of the time and date he will present his petition and supporting evidence, and Respondent will be entitled to file a response and present evidence to show the reasonableness of its conduct in this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's **[*2]** decision, filed on November 25, 2008, 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 $ 1,900.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: DEC 14 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 **Joseph Prieto**, arbitrator of the Commission, in the city of **Chicago**, on **10/8/2008**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues **[*3]** 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?
L. What is the nature and extent of the injury?

FINDINGS

. On **7/23/2003**, the respondent **Excel Waterproofing *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 $ **79,330.40**; the average weekly wage was $ **1,525.88**

. At the time of injury, the petitioner was **24** years of age, ***single*** with **1** children under 18.

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

. To date, $ **3,758.61** has been paid by the respondent for TTD and/or maintenance **[*4]** benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **1,017.25**/week for **4 3/7** weeks, from **10/1/2004** through **10/3/2004 and 5/12/2008 thru 6/812008**, which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **450.97**/week for a further period of **the duration of Petitioner's disability** weeks, as provided in Section **8(d)(1)** of the Act, because the injuries sustained caused **Petitioner's diminution of earnings**.

. The respondent shall pay the petitioner compensation that has accrued from **9/22/2008** through **10/8/2008**, and shall pay the remainder of the award, if any, in weekly payments.

. The respondent shall pay the further sum of $ **191.29** for necessary medical services, as provided in Section 8(a) of the Act.

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

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

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

RULES REGARDING APPEALS Unless **[*5]** 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

11-25-08

Date

RIDER TO THE ARBITRATION DECISION

INTRODUCTION

Evidence in the above captioned matter was presented to Arbitrator Prieto on October 8, 2008. On that date, the Arbitrator heard the testimony of Ronald Munoz (Petitioner) and Patrick Black, owner and President of Excel Waterproofing (Respondent), and received into evidence numerous exhibits including medical records, letters from the employer, IME reports from Dr. Levin, and other documentation. The Arbitrator is considering the following disputed issues in connection with this case:

1) Causal Connection;
2) Medical;
3) Amount of **[*6]** TTD due to Petitioner;
4) Nature and Extent-8(d)(l) Wage Differential.

Before making conclusions of law in connection with this case, the Arbitrator makes the following findings of fact:

FINDINGS OF FACT

This case was previously tried under Sections 19(b) and 8(a) of the Workers' Compensation Act before Arbitrator Andros on September 30, 2004 (Pet Ex 1). As part of the decision, Arbitrator Andros ordered that Respondent shall provide written authorization to the Petitioner and Rehabilitation Institute of Chicago (RIC) for the RIC program as prescribed by Drs. Mochizuki and Tata and further ordered Respondent to. initiate vocational rehabilitation on behalf of Petitioner (Pet Ex 1). Arbitrator Andros' 19(b) and 8(a) decision was affirmed by the Commission on August 28, 2006 (Pet Ex 1). Petitioner testified on October 8, 2008. The Arbitrator finds that Petitioner's testimony was credible and was consistent with the medical records that were offered into evidence at the time of hearing. Subsequent to Petitioner's testimony at the September 30, 2004 19(b) hearing, Respondent began to accommodate his restrictions on or about October 4, 2004. Petitioner began to work as a dispatcher **[*7]** in the office; his job duties consisted of answering calls, filling out work orders, dispatching workers to job sites, and involved office work with no physical labor. In June 2006, Respondent offered Petitioner the job of an estimator; this job consists of office work, reading blue prints, pricing jobs, and is a

sedentary employment position. Respondent continued to pay Petitioner union scale as he worked these light duty positions up until September 2008.

Petitioner followed up with Dr. Mochizuki on October 26, 2004, January 18, 2005, and August 26, 2005 (Pet Ex 2). Dr. Mochizuki re-evaluated Petitioner, refilled his prescriptions, and continued to prescribe the RIC program. Eventually, Petitioner underwent an initial evaluation at RIC in January 2007, but he did not receive authorization to being the program until May 12, 2008. Petitioner underwent the RIC program from May 12, 2008 through June 6, 2008 (Pet Ex 8). Petitioner testified that this was a five day per week, eight hour per day program, consisting of physical therapy, occupational therapy, regular visits with the doctor, meetings with a psychologist, cardio and water aerobics, and pain management (Pet Ex 7). Petitioner **[*8]** further testified that the techniques he learned in RIC did not decrease his pain but helps him to deal with and manage the pain.

As part of the RIC program, Petitioner underwent a Functional Capacity Evaluation in June 2008. Pursuant to the FCE, Petitioner tested at the Medium strength level and was prescribed permanent restrictions of: lifting 50 lbs maximum; frequent lift/ carry of 25 lbs and 10 lbs constantly; lift from floor to waist 40 lbs occasionally and 20 lbs regularly; from his waist to his overhead 30 lbs occasionally and 20 lbs regularly, he can carry 20 lbs for 50 feet; he can push/pull a wheeled cart weighing up to 125 lbs for 200 feet on a flat surface; ladder climbing on a rare basis; stair climbing, bending, squatting, kneeling, and reaching overhead on an occasional basis (Pet Ex 7). Petitioner brought these restrictions into Patrick Black, the President and owner of Excel Waterproofing on June 9, 2008. Petitioner again met with Patrick Black on September 22, 2008 and received correspondence from him indicating:

> Please be advised that per our discussions and meeting regarding your employment status at Excel Waterproofing, Inc. upon completion of your medical **[*9]** treatment with the RIC it has been determined that your restrictions are permanent. Excel Waterproofing, Inc. has attempted to accommodate your limitations in the past, but due to the fact that the restrictions are permanent we will no longer be able to accommodate your position as a union employee and your pay of $ 36.40 per hour. We are offering you a salary of $ 50,000.00 per year to become an estimator and this will go into effect immediately... (Pet Ex 4).

Petitioner testified regarding his prior job duties as a waterproofer and explained that a waterproofer works in basement foundations and holes as soon as the concrete is poured. As a waterproofer, he used to carry rolled sheet goods weighing 80-125 lbs and buckets of mastic or tar weighing 50 lbs. He used to load 55 gallon drums into the trailer by manually breaking them over and rolling them. He used to pull spray hoses and spray guns that were full of waterproofing material that could weigh 125-150 lbs (See also Pet Ex 1).

Petitioner testified that he continues to work as an estimator at Excel Waterproofing, but based on his permanent restrictions, his rate of pay was reduced to $ 50,000 per year, or a weekly gross salary **[*10]** of $ 961.54, starting on September 22, 2008 (Pet Ex 5). Petitioner testified that the current union rate for a waterproofer is currently $ 36.40 per hour. The prior 19(b) award and stipulation sheet for this hearing indicated that in the year preceding the injury, the Petitioner earned $ 79,330.40; the average weekly wage was $ 1,525.88 (Pet Ex 1) and Petitioner testified that a waterproofer's earnings would be greater since that time. Petitioner testified that waterproofers work overtime on a regular and mandatory basis and overtime could be five hours per week.

Petitioner testified that since he last testified on September 30, 2004, he suffered no injuries to any part of his body since that date. When asked what Petitioner notices about himself as he sits in the courtroom today, Petitioner testified that he has physical limitations. He has a sharp pain in his low back that migrates into his legs. This pain goes from his low back through his hips and down both legs; the pain goes down his right leg into his thigh, and goes down his left leg into his calf. Driving aggravates his back pain and he has pain into his legs. He has trouble sleeping and takes a sleep aid. Petitioner further **[*11]** testified that he finds some household chores difficult including mopping because of the twisting, and washing windows. He no longer performs the landscaping and snow removal duties around the house. Petitioner testified that he has two children, a two year old and a six year old. He stated that sometimes his two year old gets fussy and wants to be held; she weighs approximately 27 lbs and when he attempts to lift her, he feels pain in his lower back. He also states that standing in a bent over position while changing her diapers also hurts his back.

Patrick Black, the President and owner of Excel Waterproofing also testified on October 8, 2008. The Arbitrator finds that his testimony was credible and was consistent with the documentation (Pet Ex 3 &4) that was offered into evidence. He testified regarding the overtime work hours of his waterproofers; he stated that the residential waterproofers could work 8 hours of overtime per week and although the goal of the commercial waterproofers is to have zero hours of overtime per week, he would have to defer and would have to look up their regular overtime hours. He explained that Petitioner worked for Excel Waterproofing as a residential **[*12]** waterproofer and sometimes as a commercial waterproofer. He testified that ladder work is involved in both residential and commercial work. He also testified that he referred Petitioner to his doctor for treatment. When asked about whether the Petitioner was a good and loyal employee, Patrick Black responded, "None better." He testified that he continued to pay Petitioner as a union waterproofer until September 22, 2008. He testified that based on Petitioner's permanent restrictions, he offered Petitioner a job as an estimator, with a reduced rate of pay of $ 50,000 per year.

CONCLUSIONS

In support of the Arbitrator's decision relating to "F," Is the Petitioner's present condition of ill-being causally related to the injury, the Arbitrator makes the following conclusion:

The Arbitrator confirms that a causal connection exists between the Petitioner's low back injury and his accident of July 23, 2003. The Arbitrator notes that the issue of causal connection was decided in the 19(b) decision rendered by Arbitrator Andros on December 10, 2004 and affirmed by the Commission in case number 06 IWCC 0724 on August 28, 2006 (Pet Ex 1). Therefore, based **[*13]** on the principle of res judicata, the issue has already been litigated and has become a final decision. Furthermore, the Petitioner testified that he has not suffered any subsequent injuries since he testified on September 30, 2004 and this testimony is unrebutted. The February 1, 2007 medical records from RIC further support this already determined causal connection in stating, "Mr. Munoz is a 28-year-old ... who fell off a ladder on July 23, 2003 and since that time has been dealing with chronic low back pain" (Pet Ex 7). Therefore, the evidence demonstrates that Petitioner did not suffer any new injuries and has a continuation of symptoms from his July 23, 2003 injury. The Arbitrator relies on the previous 19(b) decision and finds a continued causal connection opinion between Petitioner's work injury and his current condition of ill-being to his low back.

In support of the Arbitrator's decision relating to "J," Were the medical services that were provided to Petitioner

reasonable and necessary, the Arbitrator makes the following conclusion:

The Arbitrator concludes that the medical treatment that Petitioner received constitutes reasonable and necessary care. The prescription **[*14]** medications were prescribed by Dr. Mochizuki and Dr. Stanos to treat Petitioner's condition of ill being from the July 23, 2003 injury. Respondent is responsible for and shall pay to the Petitioner the sum of $ 191.29 to reimburse the Petitioner for out of pocket expenses of his prescription medication (Pet Ex 6). Petitioner testified and the exhibit demonstrates that the majority of the prescriptions were paid through Petitioner's union insurance and not through the workers' compensation carrier. Therefore, Respondent is ordered to hold Petitioner harmless in the event that the Union Health Insurance carrier seeks reimbursement for those expenses.

In support of the Arbitrator's decision relating to "K," What amount of compensation is due for Temporary Total Disability, the Arbitrator makes the following conclusion:

The Arbitrator finds that Petitioner is entitled to 4 3/7 weeks of Temporary Total Disability. Temporary total disability has been defined as that condition which exists from the time an injury incapacitates an employee for work until such time as he is as far recovered or restored as the character of the injury will permit. Brinkmann v. Industrial Commission, 82 Ill. 2d 462, 467, 413 N.E. 2d 390, 392, 45 Ill. Dec. 912 (1980). **[*15]** To prove a temporary total disability claim, the employee must show not only that he did not work but that he also was unable to work. Schmidgall v. Industrial Commission, 268 Ill. App. 3d 845, 848, 644 N.E. 2d 1206, 206 Ill. Dec. 153 (4th Dist. 1994).

Subsequent to the September 30, 2004 trial and prior to the Respondent accommodating Petitioner's restrictions on October 4, 2004, Petitioner had work restrictions that the employer was not willing to accommodate. Petitioner is entitled to TTD for October 1-3, 2004. In addition, Petitioner underwent the court ordered RIC program from May 12, 2008 through June 6, 2008 for a five-day per week, eight hour per day program. The note from Dr. Stanos indicates that Petitioner was in the full time day program and was to miss work during this period of time, to return to work on Monday, June 9, 2008 (Pet Ex 8). Therefore, Petitioner is entitled to Temporary Total Disability for that period in which his doctors determined that he was taken off work and undergoing the RIC program. The Arbitrator concludes that the Petitioner is entitled to TTD benefits for October 1-3, 2004 and from **[*16]** May 12, 2008 through June 8, 2008.

In support of the Arbitrator's decision relating to "L," What is the nature and extent of the injury/ whether Petitioner is entitled to an 8(d)(1) wage differential award, the Arbitrator makes the following conclusion:

The Arbitrator finds that pursuant to all of the evidence, Petitioner is entitled to an **8(d)(1)** wage differential award. Pursuant to Section **8(d)(1)** of the Act:

> If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, ... receive compensation for the duration of his disability ... 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 2008).

Based on Petitioner's restrictions as detailed in the FCE results (Pet Ex 7) Petitioner is unable to return to his usual and customary **[*17]** occupation as a waterproofer and is relegated to a lower paying job of an estimator. Therefore, Petitioner is entitled to 66-2/3% of the difference between what his old job as a waterproofer currently pays and what his new salary is as an estimator. Patrick Black testified Petitioner had worked as a residential and commercial waterproofer. He testified that the residential waterproofers could work 8 hours of overtime per week and although the goal of the commercial waterproofers is to have zero hours of overtime per week, he would have to defer and would have to look up their regular overtime hours. Petitioner testified that waterproofers work overtime on a regular and mandatory basis and overtime could be five hours per week. Therefore, the Arbitrator bases the calculation, on the lesser of the two figures, at five hours of overtime per week. Petitioner testified that the current pay rate for a union waterproofer is $ 36.40 per hour. Based on the calculations, ($ 36.40 per hour x 45 hours per week = $ 1638.00 per week), Petitioner would be able to earn $ 1,638.00 per week in the **full performance** of his duties in the occupation in which he was engaged at the time of the accident. **[*18]** Petitioner is now earning $ 961.54 per week (Pet Ex 5). Two-thirds of the difference between what his old job currently pays and what his new job pays equals $ 450.97 (2/3 x $ 676.46 = $ 450.97). Therefore, the Arbitrator awards Petitioner a wage differential award to receive $ 450.97 subsequent to September 22, 2008 as a weekly benefit for the duration of his disability.

Legal Topics:

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

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview
Labor & Employment Law > Equal Pay > General Overview
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Enforcement > Notice to Employers

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*2009 Ill. Wrk. Comp. LEXIS 1310, **

ELIZABETH DONNELLAN, PETITIONER, v. UNITED AIRLINES, RESPONDENT.

NO: 05WC 15420; 09 IWC C 1181

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 1310

November 9, 2009

CORE TERMS: arbitrator, average weekly wage, flight, temporary total disability, attendant, seniority, year preceding, pharmacy, routes, claimant, wage differential, flight attendant, evidence offered, confirmed, maximum, earning, occupation, suitable, treating physician, cross examination, physical therapy, way of knowing, right arm, part time, disability, functional, permanent, unrefuted, duration, perdiem

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

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 issues of temporary total disability, causal connection, permanent partial disability, medical expenses, wage differential, 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 March 17, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 10,000.00. 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 **[*2]** Office of the Secretary of the Commission.

ATTACHMENT

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

Arbitrator DeVriendt

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 **Charles DeVriendt,** arbitrator of the Commission, in the city of **Chicago,** on **1/28/2009.** 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

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?

O. Other **8(d)1**

FINDINGS

. On **5/14/2003,** the respondent **United Airlines *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 **[*3]** 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 $ **49,747.20;** the average weekly wage was $ **956.68.**

. At the time of injury, the petitioner was **39** years of age, ***single*** with **0** children under 18.

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

. To date, $ **156,652.95** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **637.78**/week for **254 5/7** weeks, from **5/15/2003** through **3/31/2008** which is the period of temporary total disability. for which compensation is payable.

. The respondent shall pay the petitioner the sum of **538.29**/week for further period from **4/1/2008** through **duration of disability,** pursuant to **Section 8(d)1,** because of the injuries sustained caused a loss in earnings as further discussed in the Order and Decision.

. The respondent shall pay the further sum of **$ 3,600.00** for necessary medical **[*4]** services, as provided in Section 8(a) of the Act. Payment shall be made subject to the limitations set forth in the Medical Fee Schedule pursuant to Section 8.2 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(1) of the Act.

. The respondent shall pay $ **0** 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 in this award, interest shall not accrue.

Signature of arbitrator

3-17-09

Date

Arbitrator Charles DeVriendt

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT:

The **[*5]** Petitioner testified she worked as a flight attendant for United Airlines for twenty three years. She started working on a reserve basis where she would be on call to do short routes domestically. She initially was making approximately $ 18,000.00 per year. She eventually worked her way up to where the year preceding her injury she made $ 60,000.00.

Petitioner described labor intensive duties of pushing and dragging a beverage cart weighing approximately 300 pounds, moving luggage, carrying trays of food and assisting passengers.

She testified that because she had a great deal of seniority, she could bid on popular lines or plane routes. Typically she would try to work international lines which were the most popular as they were most financially rewarding. She "held" a line for Chicago to London due to her seniority. She was often able to transfer up into Asian routes which she preferred because she spoke Japa nese and it allowed her to build a greater number of flight hours. The Petitioner also explained that often similarly situated flight attendants preferred shorter domestic routes due to family considerations. This was later confirmed by Respondent's witness Jerry Gee, a United **[*6]** Airlines payroll employee who was called to testify by the Respondent.

On May 14, 2003 the Petitioner was moving a beverage cart during a flight when she experienced turbulence. She was thrown against the wall and struck her right elbow. It is stipulated she suffered a work related injury within the meaning of the Workers' Compensation Act.

The Petitioner came under the care of Dr. Bruce Goldberg and ultimately underwent surgery on July 14, 2004. Dr. Goldberg diagnosed her with recurrent and recalcitrant right lateral epicondylitis. PX 1, pg. 76-77. Dr. Goldberg performed a resection and repair, right lateral epicondylitis, partial ostectomy and peripheral nerve block for postoperative pain control. Id. She was put on permanent restrictions by Dr. Goldberg following a functional capacity evaluation. PX 2, pg. 1 & 2. The functional capacity evaluation said the Petitioner could work at sedentary - light level which falls below job requirements. PX 4, pg. 1.

The Petitioner introduced a note from Lynn Kivett of United Airlines which authorized and approved her to work on a part time basis while receiving temporary total disability benefits. PX 4, pg. 10. There was no evidence offered **[*7]** to the contrary. She was able to turn this job into a full time position with Osco Drugs as a pharmacy tech making $ 11.55 per hour.

The Petitioner saw Dr. Scott Sagerman twice at the request of the Respondent. Dr. Scott Sagerman issued two Section 12 reports for which he provided causation to the work related injury. Dr. Sagerman agreed that the Petitioner had work restrictions which may prevent her from returning to prior work. PX 3, pgs. 1-7.

Petitioner testified, as did Mark Farnsworth who is the Chairperson and Coordinator for United Airlines flight attendants, regarding Petitioner's regular work schedule. Mark Farnsworth testified that part of his job entails reviewing and coordinating the flight attendants. Mark Farnsworth testified that the maximum amount of hours a flight attendant could work for the year of Petitioner's injury was 255 a quarter or 1020 per year.

Petitioner's Exhibit # 11, pgs. 10-26 showed the Petitioner regularly worked 80 hours or excess in each month which would put her at the maximum number of hours. In the twelve months of the year preceding the accident, seven of the months exceeded 80 hours. The average for the year was 80.43 hours for a total of 965.13 **[*8]** for the year. This represents 95% of the maximum number of hours available for the year which was 1,020.

Mr. Farnsworth testified that United Airlines flight attendants are currently allowed to work three hundred hours a quarter for a total of 1200 hours a year to make up for wage reduction due to United Airline Bankruptcy issues. Based on the Petitioners prior work history and seniority Mr. Farnsworth estimated the Petitioner would currently have an average weekly wage of $ 1,087.00 per week based on that and perdiem.

The United Airline Collective Bargaining agreement shows that the senior level of United Airlines flight attendants is after the fourteenth year. PX 8, pg. 4) It shows the current hourly rate at $ 43.15. Mark Farnsworth and Jerry Gee for the Respondent confirmed the current hourly rate. Mr. Farnsworth testimony was essentially unrefuted.

Petitioner testified that while she received somewhere in the neighborhood of $ 200 to $ 300 perdiem on an Asian trip she would rarely spend more than $ 20.00 as she would just go to the grocery store and keep the food in her room. She considered the balance as income. There was no evidence to the contrary.

Respondent hired Corvel to **[*9]** perform vocational rehabilitation. PX 5, pg.1. The report from Corvel shows that they closed their file based on the Petitioner obtaining a job as a pharmacy tech. PX 5, pg. 1. The Petitioner testified that Respondent began to voluntarily pay her differential benefits as of April 1, 2008. There was no evidence offered by the Respondent disputing the suitability of the position that the Petitioner obtained. The Petitioner offered her Osco pay stubs as a demonstration of her current average weekly wage. PX 6.

The records also show that for the year preceding with Osco Drugs that she averaged 24.26 number of hours per week at a rate of $ 11.52 per hour which resulted in an average weekly wage of $ 279.56. PX 6.

Petitioner had a bill for $ 3,600.00 from Stratford Orthopaedics for physical therapy. She testified that physical therapy alleviated her conditions from time to time and put her in a stable situation which helped her go about her day to day duties. She states that she continues to have problems with her right arm. The restrictions on the functional capacity evaluation shows that she has a lifting restriction to 2.5 - 7.5 lbs. on the right arm. PX 4, pg.3. The records show that **[*10]** she is right arm dominant. The Respondent produced a utilization review from Dr. Alan Knopf. Dr. Knopf did not examine the Petitioner. Dr. Goldberg, her treating physician, prescribed the disputed physical therapy. Dr. Goldberg, her treating physician said the therapy controlled her symptoms. PX 2, pg. 1-2.

The Respondent offered two witnesses. The first witness they offered was Arthur Eubanks, an economist hired by the Respondent to testify for the Respondent. Mr. Eubanks attempted to estimate for the court what the Petitioner's work life expectancy would be based on statistical analysis. However, on cross examination, the economist admitted that based on the current economy, the nation was in a recession, possibly heading for a depression. He agreed that there was no way of knowing how long this would last or how this would ultimately affect the work force. There was no telling how long the Petitioner would actually work nor would that apply to anyone else. He also stated that he was unaware of the Petitioner's work or family history in terms of her health and how long she would actually work. He offered no opinion regarding the Petitioner's financial position.

Jerry Gee, an employee **[*11]** from the payroll department at United, testified on behalf of the Respondent. He basically confirmed much of the testimony of the Petitioner and her witness in that he said the Petitioner, based on her seniority is free to bid on her number of hours per quarter. He produced a spread sheet for two workers with similar seniority to the Petitioner and stated that this represented the number of hours the Petitioner could possibly work. He offered no opinion on what the Petitioner's current average weekly wage would be. He then admitted on cross examination that he had no way of knowing why these particular flight attendants took these particular amount of hours and that personal circumstances, etc. can dictate how many hours each flight attendant works. He agreed that the attendants are free to choose their number of hours and that it was completely speculative as to why the flight attendants, used in this example, took those hours. In addition, he was not asked on direct examination whether he would or could extrapolate these numbers to say what the Petitioner's average weekly wage would be had she been physically able to continue her prior employment.

CONCLUSIONS OF LAW:

[*12] Causation

Both Dr. Goldberg and Dr. Sagerman, the Respondent's Section 12 doctor confirmed the Petitioner suffered a work related injury within the meaning of the Act which put her at permanent restrictions. This medical evidence was unrefuted by the Respondent. The Arbitrator finds a causal connection between the Petitioner's current condition of ill being and work related injury of March 14, 2003.

Section 8(d)1

Section **8(d)1,** "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall *** receive compensation for the duration of his disability *** equal to 66-2/3 % of the difference between the average amount which he would be able to earn in **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 2002).*

The Petitioner demonstrated that she is restricted from working in her prior capacity. It is agreed by both **[*13]** Petitioner's treating physician Dr. Goldberg and Respondent's Section 12 examiner, Dr. Sagerman, that the Petitioner was restricted from returning to her prior work activity.

Petitioner also established the earnings in her former occupation. The Petitioner testified that she regularly took the maximum number of hours allocated to her as a flight attendant. Mark Farnsworth testified that United flight attendants are currently allowed to work three hundred hours a quarter to make up for wage reductions due to United bankruptcy issues. Mr. Farnsworth was a credible witness and his testimony was largely unchallenged nor refuted by the Respondent. The Appellate Court has considered what the average weekly wage a claimant would have made had that claimant not been injured. In *Taylor v. Industrial Commission,* the Appellate Court rejected a claimant's argument that he would have been at a higher rate because he did not have the "seniority" to bid on new lucrative routes. *Taylor v. IIC 372, Ill.App 3d 327, 867 NE2d 1147.* The testimony of all witnesses in this case clearly showed that the Petitioner has such seniority and had been exercising it in **[*14]** the year preceding her injury. There is no speculation involved. Mr. Farnsworth credibly demonstrated to the arbitrator that the Petitioner's earnings, based on hours available and perdiem would be $ 1,087.00 per week.

The Respondent called Jerry Gee presumably to refute this testimony. However, Mr. Gee simply produced documents of two United Airline flight attendants who had seniority slightly above the Petitioner and slightly below the Petitioner. Presumably this was to demonstrate what the Petitioner's hours would be. However, Mr. Gee never conclusively said the Petitioner's average weekly wage would be a certain number. In fact, Mr. Gee conceded on cross examination that he had know way of knowing why these particular individuals chose the hours they did and agreed that there could be a multitude of reasons why they would choose a lesser or greater amount of hours depending on their own personal situation. In fact, Mr. Gee admitted that he did not even know the individuals whose wage records he was offering up to contest the Petitioner's claim.

The Arbitrator was presented three witnesses to offer testimony regarding Petitioner's average weekly wage. The Petitioner and Mark Farnsworth **[*15]** testified on behalf of the Petitioner. Jerry Gee testified on behalf of the Respondent. The Arbitrator was also presented documentation regarding Petitioner's number of hours worked in the year preceding the injury. These documents show the Petitioner worked an average of 95% of the maximum hours available to her. Section 10 of the Act requires a calculation which most accurately represents the Petitioner's average weekly wage with the understanding that some jobs or professions can be challenging to calculate.

Looking at the totality of the evidence presented, the Arbitrator finds that the calculations of Mark Farnsworth, based in part on an extrapolations of the Petitioner's prior work history, most accurately reflect what the Petitioner's current average weekly wage would equal had she continued in her former occupation.

Based on the foregoing, the Arbitrator finds that the Petitioner has established that her average weekly wage had she continued in her prior employment would be $ 1,087.00. The Petitioner testified to receiving $ 200.00 to $ 300.00 per week in per diem but only using approximately $ 20.00 of it due to her experience in the Asian market. There was no evidence to **[*16]** the contrary. Per diem travel expenses should be included in a claimants average weekly wage where they constitute real economic gain, rather than reimbursement for actual expenses incurred. *United Airlines v. Illinois Workers' Compensation Commission, 382 Ill.App 3d 437, 887 N.E.2d 888 (1st Dist 2008).* The Petitioner received the per diem on an hourly basis.

The Petitioner testified that she was now working as a pharmacy tech at Osco. The Petitioner had an average weekly wage of $ 279.56 for weeks leading up to the time of testimony. The Petitioner also introduced a letter from Lynn Kivett of United Airlines stating that the Petitioner could accept this part time work while she was receiving temporary total disability benefits. Again this testimony and evidence was unrefuted by the Respondent.

The Petitioner obtained this position on her own. Corvel accepted this as a suitable position on behalf of the Respondent. Petitioner testified that she worked the hours available to her. No evidence was offered to the contrary.

It is undisputed that the Respondent authorized the Petitioner to work as a pharmacy tech while receiving temporary **[*17]** total disability benefits. Ultimately, this was to the benefit of the Respondent as the Petitioner developed it into her new employment. It is well settled that there are exceptions to the general rule that a Petitioner may not work while receiving temporary total disability benefits. *J.M. Jones Co. v. Industrial Commission, 71 Ill.2d 368, 375 N.E. 2d 1306 (1978). Firestone Tire & Rubber v. Industrial Commission, 76 Ill.2d 197, 390 N.E. 2d 907 (1979). Zenith v. Industrial Commission, 91 Ill.2d 278, 437 N.E. 2d 628 (1982).* The Arbitrator finds this to be within the exception based on the limited number of hours worked per week and the Respondents written approval.

Finally, the Petitioner also introduced a report from Corvel showing that they had closed the file based on the Petitioner receiving an appropriate position. The Petitioner testified and the Respondent did not dispute that the Respondent voluntarily began paying her wage differential benefits following her obtaining this job albeit at a rate lower than which the Petitioner claimed was **[*18]** necessary. The Arbitrator finds persuasive that the Petitioner obtained her own employment, that the vocational rehabilitation consultants Corvel closed their file based on Petitioner obtaining this position, and no further objection was raised by the Respondent to this position. Based on the only evidence offered on this issue, it appears the Petitioner obtained suitable employment.

A comparison of the wages between the Osco Drug employment and what the United Airlines position currently pays shows the Petitioner has a weekly wage differential of $ 538.29. The Petitioner's current average weekly wage at Osco Drug is $ 279.56. The wage for her former position at United Airlines is $ 1,057.00. Two thirds of the difference is $ 538.29.

The Arbitrator ascribes no relevance to the testimony of Arthur Eubanks. Mr. Eubanks testimony was based on statistical speculation and had no basis in actual fact as it pertained to this Petitioner. Therefore, the Arbitrator finds that the sum of $ 538.29 shall be paid in **8(d)1** wage differential benefits for the duration of the Petitioner's disability.

TTD Overpayment

The Petitioner has conclusively shown through PX 10, a letter from Lynn Kivetts **[*19]** of United Airlines, that she was authorized to work on a part time basis as a pharmacy tech by United Airlines. The Arbitrator finds no temporary total disability over payment. There was no evidence offered one way or the other regarding Petitioner's return to work following the date of injury. Based on the evidence, or lack thereof, in this regard, in conjunction with the medical evidence, the Arbitrator finds that the Petitioner has been off work since the date of injury through April 1, 2008 for a total of 254 5/7 weeks. In that regard, neither side shall receive credit for

under or over payment of temporary total disability payments.

Medical Bills

The Petitioner has a bill for $ 3,600.00 from Stratford Orthopaedic. Based on her testimony that the therapy contolled her symptoms, put her in a stable situation, helped her to go about her day activities of daily living including and doing her job at Osco Drugs which Respondent authorized, the Arbitrator finds that the Respondent should pay Stratford Orthopaedic directly the sum of $ 3,600.00. The Respondent shall receive credit for any amount previously paid.

*2009 Ill. Wrk. Comp. LEXIS 1179, **

JOHN BELL, PETITIONER, v. H B S EXCAVATING, RESPONDENT,

09 IWCC 1016

04WC 52178

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2009 Ill. Wrk. Comp. LEXIS 1179

October 7, 2009

CORE TERMS: arbitrator, functional, truck, pounds, underwent, driving, pain, truck driver, maximum, occasional, full performance, medium, fusion, temporary total disability, wage differential, recommended, lifting, lift, earn, failed to prove, light duty, laminectomy, capabilities, symptoms, hired, physical therapy, union member, followed-up, customary, injection

JUDGES: Paul W. Rink; Barbara A. Sherman; Kevin W. Lamborn

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission after considering the issues of temporary total disability benefits, wage differential and the nature and extent of the injury and being advised in the facts and the law, clarifies the decision of the Arbitrator as stated below and the Commission otherwise affirms and adopts the decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission wishes to clarify the basis for its denial of Petitioner's request for wage differential benefits pursuant to Section **8(d) 1** of the Act.

The Commission finds that Petitioner failed to prove that, because of his injury, he can no longer earn as much as he did previously. The Functional Capacity exam of February 22, 2007 found Petitioner generally capable of being a truck driver. Ms. Julie Bose, of MedVoc Rehabilitation Ltd., testified to the availability of truck driver jobs. Petitioner claims that if he was still working as a member of Teamsters Union 301, he would be making $ 27.20 per hour. Ms. Bose's testimony has established that this is within the range of available **[*2]** truck driving positions in the Chicago area. The Commission notes that Petitioner never sought to rejoin the Teamsters Union Local 301 and seek employment as a union truck driver in Illinois. Petitioner has failed to prove that he is unable to work as a truck driver as a result of the injury, or that he is unable to earn as much as he would in the **full performance** of the duties he had performed for Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision is clarified to state that the Petitioner is not entitled to a wage differential pursuant to Section **8(d)1** because he failed to prove that, because of his injury, he has incurred a loss of wages. The Commission otherwise affirms and adopts the decision of the Arbitrator.

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

OCT 7 2009

ATTACHMENT:

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

[*3] 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 **Maureen H. Pulia**, arbitrator of the Commission, in the city of **Chicago**, on **November 19. 2007 and December 17, 2007**. 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?
K. What amount of compensation is due for temporary total disability?
L. What is the nature and extent of the injury?

FINDINGS

. On **August 25, 2004**, the respondent **HBS Excavating *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 $ **6,171.44**; the average **[*4]** weekly wage was $ **771.43**.

. At the time of injury, the petitioner was **48** years of age, ***single*** with **no** children under 18.

. Necessary medical services will be provided directly to the provider by the respondent.

. To date, $ **67, 789.91** has been paid by the respondent for TTD, maintenance benefits and permanent partial disability advance. The amount paid by respondent as a permanent partial disability advance was $ **4,411.10**. The amount paid by respondent for TTD and/or maintenance was $ **63,378.81**

ORDER

. The respondent shall pay the petitioner temporary total disability benefits of $ **514.28**/week for **129-3/7** weeks, from **August 26, 2004** through **September 14, 2004**, and from **November 16, 2004** through **April 19, 2007** which is the period of temporary total disability for which compensation is payable.

. The respondent shall pay the petitioner the sum of $ **462.86**/week for a further period of **225** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **petitioner a 45% loss of use of his person as a whole**.

. By stipulation of the parties, the respondent shall pay the usual and customary **[*5]** charges of medical treatment necessary and reasonably required to relieve or cure the effects of the accident injury pursuant to Section 8(a) of the Act. As to treatment rendered on or after February 1, 2006, payment shall issue in accordance with Section 8.2 of the Act. Respondent shall reimburse petitioner for an out-of-pocket medical expense of $ 90.00.

. The respondent shall have credit for all amounts paid, if any, to or on behalf of petitioner on account of said accidental injury.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 3.27% 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

January 9, 2008

Date

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a CDL licensed truck driver was hired by respondent **[*6]** on July 5, 2004 as a truck driver. While working for respondent petitioner drove a low boy and a dump truck. When petitioner was hired by respondent he was not in the union and was paid $ 20.00 per hour. Approximately 4-6 weeks after being hired, petitioner became a member of the Teamsters Local 301 and was paid $ 26.15 per hour. Petitioner had a 30 day wait period before he became eligible for union benefits. Petitioner worked multiple job sites and made between 8-14 hauls a day. Petitioner has a valid Florida CDL that was initially issued in March of 2003 that was reissued in 2006.

Prior to being employed by respondent petitioner was a truck driver that hauled EZ golf carts primarily to Chicago. Petitioner also owned his own trucking business from 1977-1985. He had 2-3 different trucks and employed 3-4 different drivers during that period. Petitioner testified that when he owned his own trucking business he did some hauling himself. He also stated that he performed all administrative duties associated with the business. From 1985-1998, petitioner performed some part-time hauling and owned apple orchards in Florida. One was 8 acres and one was 45 acres. From 1998-2004, petitioner **[*7]** worked as a truck operator for other trucking companies.

Petitioner sustained a prior injury to his low back in 2000. Petitioner lost some time from work, but returned to full duty work Without restrictions.

Petitioner a 48 year old truck driver sustained an accidental injury that arose out of and in the course of his employment by respondent on August 25, 2004. On that day, while operating a truck and trailer to pick up a "combo hoe" he blocked the wheels of the truck with two-by-fours and drove the combo onto the trailer. While driving the combo hoe onto the trailer the truck jumped the two-by-fours. Petitioner jumped out of the combo hoe to stop the truck. He experienced immediate pain in his low back. Petitioner was taken via ambulance to Our Lady of Resurrection Hospital.

On August 27, 2004, petitioner underwent an L3-L4 hemilaminectomy and discectomy at L3-L4 and L4-L5 performed by Dr. Yapor. Petitioner's post-operative treatment included physical therapy at Good Shepherd from 10/19/04 through 11/18/04. Petitioner worked restricted duty for respondent from September 15, 2004 through November 15, 2004. Petitioner testified that during this time he still had pain in his left leg **[*8]** when working the clutch. As of November 15, 2004, petitioner had gotten one truck stuck in the mud and managed to rip the transmission out of another. Based on these occurrences, petitioner was told by his boss that they could no longer accommodate his restrictions. Petitioner ceased being a union member in December of 2004, and moved to Florida. Petitioner stated that he moved to Florida and in with his mother because he had no income coming in Respondent did not pay petitioner's back

TTD benefits until August of 2005.

After returning to Florida petitioner continued pool therapy on his own and worked out in a public gym. On January 7, 2005, Dr. Yapor was of the opinion petitioner had done fairly well, but that his recovery had been somewhat delayed because of depression, which may be secondary to his post-operative condition, as well as the possibility of seasonal depression being a factor. Dr. Yapor opined that petitioner's current condition of ill-being is causally related to his accident on August 25, 2004. On April 29, 2005, petitioner followed-up with Dr. Yapor. He reported increased discomfort. Dr. Yapor ordered a follow-up MRI of the lumbar spine. These results revealed findings **[*9]** suggestive of post-surgical changes at L3-L4 and L4-L5 with associated enhancement and minimal interval worsening in the appearance of the central disc osteophyte complex at L5-S1.

On June 14, 2005, Dr. Gunnar Andersson performed a Section 12 examination. He recommended petitioner undergo a new MRI with contrast to determine if there were some residual. After reviewing the results of the MRI he recommended epidural steroid injections.

On July 12, 2005, Dr. Yapor reviewed the MRI and was of the opinion that petitioner's increased discomfort was due to a scar formation. Dr. Yapor increased petitioner's Neurontin and recommended epidural steroid injections to shrink the scar and decrease the irritation on the nerve root. Dr. Yapor reduced petitioner's restrictions and released petitioner to light duty lifting no more than 20 pounds. He also referred petitioner to a pain clinic. Petitioner underwent three recommended lumbar epidural steroid injection that only provided him with temporary relief.

On November 2, 2005 and November 9, 2005, petitioner presented to Dr. Gregory Brebach at Lake Cook Orthopedic Associates. Following an examination and record review, Dr. Brebach was of the opinion **[*10]** that petitioner has degenerative disc disease at L3-L4, L4-L5 and L5-S1 as well as a likely herniated disc at L3-L4 and resultant stenosis either secondary to this herniated disc or scar formation. Dr. Brebach recommended an exploratory laminectomy at L3-L4, L4-L5, and likely posterior lumbar interbody fusion at L3-L4 to remove the most degenerative disc and the disc herniation at that level.

On March 16, 2006, Dr. Andersson reexamined petitioner a second time. He recommended petitioner undergo a laminectomy and a fusion.

On July 7, 2006, petitioner underwent a revision laminectomy with a fusion from L3-L5. This procedure was performed by Dr. Brebach. Petitioner followed-up post-operatively with Dr. Brebach. This treatment included physical therapy at Martin Memorial Rehabilitation in Palm City, Florida.

On February 22, 2007, petitioner underwent a third examination by Dr. Andersson. Based on his examination, Dr. Andersson was of the opinion petitioner had a good recovery.

On February 22, 2007, petitioner underwent a functional capacity evaluation at Accelerated Rehabilitation Centers. The overall results of the evaluation were valid secondary to maximum effort demonstrated by petitioner **[*11]** during his performance of a variety of functional tasks. Petitioner demonstrated the physical capabilities and tolerances to function at the Medium category of work, which is indicative of 2-hand maximum lift/carry of 50 pounds from floor to waist level. Based on the job description/information provided by the Dictionary of Occupational Titles for a Truck Driver (DOT code # 905.663-014), petitioner needs to function at the Medium category of work as delineated by the following critical demands: 2-hand occasional lift of # 50 from floor to waist level; 2-hand occasional push/pull of 50 pounds for unspecified distances; occasional crouching, kneeling, walking and standing; constant sitting; occasional squatting, stooping and crawling; occasional climbing into trucks and trailers. Petitioner was found capable of demonstrating the physical capabilities and tolerances to meet all the essential physical demands of the job.

Following the functional capacity evaluation, Dr. Andersson reviewed the results of the examination and opined that petitioner could return to work as a truck driver as envisioned by the Dictionary of Occupational Titles. Dr. Andersson noted that this publication lists **[*12]** truck driving as being in the medium category of work. Dr. Andersson further opined petitioner had reached maximum medical improvement. He based this opinion on the fact that petitioner's fusion had healed, that he had gained good and reliable function and that there was no improvement or change in the petitioner's condition over the last several months. Dr. Andersson was of the opinion that there exists no clinical findings that suggest petitioner should be limited to 2 consecutive hours of driving followed by a half hour of rest each workday. Dr. Andersson opined that petitioner can operate a manual transmission truck using his left and right feet to operate the pedals.

On April 19, 2007, petitioner followed-up with Dr. Brebach. He stated that although he had a setback while lifting 50 pounds during his functional capacity evaluation, he was getting better all the time. Dr. Brebach was of the opinion that petitioner seemed to be improved. He noted that petitioner had subjective complaints of some stiffness and fatiguing of the left leg. He noted that the constant left leg radicular pain that petitioner had preoperatively had disappeared in its entirety. Dr. Brebach noted that pursuant **[*13]** to the results of the functional capacity evaluation, petitioner had met the demands of moderate duty which is the job description as described by the Department of Transportation.

On May 24, 2007, petitioner presented to Dr. Brebach. He stated that he had some difficulty in the functional capacity evaluation lifting over fifty pounds. He reported that this test seemed to exacerbate some of his low back symptoms. Dr. Brebach noted that petitioner's radicular symptoms had responded nicely to the surgery. Dr. Brebach did not believe petitioner was at maximum medical improvement. He believed the primary limiting factor in petitioner's return to his regular work was his inability to lift over 50 pounds. Dr. Brebach did not believe petitioner could return to his regular duty job for respondent. Dr. Brebach released petitioner to light duty work driving a truck with restrictions that included driving no more than 2 consecutive hours without a half-hour break and no lifting in excess of 25 pounds:

Petitioner offered into evidence a job log from June 1, 2007 through July 9, 2007. There were 32 entries on it. Of the 32 entries, 26 were for driving positions. Other positions sought were delivery **[*14]** and dispatch. Petitioner testified that he got his leads from the newspaper. The last application was with Lazarus Group. Petitioner identified the position as one of a driver. Although petitioner's log indicates he applied for a driving position, petitioner testified that he was hired by Lazarus Group as a QC supervisor. Petitioner never looked for any work in Illinois.

On July 5, 2007, petitioner followed-up with Dr. Brebach. Petitioner complained of left leg radicular symptoms with any exertional activity. Dr. Brebach examined petitioner and was of the opinion petitioner had reached maximum medical improvement. Dr. Brebach was of the opinion was capable of light duty work with up to two consecutive hours of driving with a half hour break and lifting up to 25 pounds.

On November 16, 2007, petitioner returned to Dr. Brebach. Petitioner reported that he had done really well following the revision surgery, but still had some chronic low back pain on the right side. He also reported some continued left leg radicular pain that is more intermittent and sporadic but continues to be problematic especially with increased activity. An examination revealed spasms and x-rays revealed a solid **[*15]** fusion. Dr. Brebach was of the opinion petitioner is unable to sustain heavy labor.

Petitioner rated his current pain level at 1-2 on a scale of 10. He stated that this level increases with activity. Petitioner stated that he does take pain medication. He stated that he can walk 1/2 mile before he experiences any pain. He stated that his pain is increased with walking, bending, and sitting over an hour and one-half. Petitioner testified that the worst his pain level gets is 5 1/2 to 6 on a scale of 10. Petitioner testified that in the last month he has taken Norco 3-4 times a week.

As a QC Supervisor for Lazarus Group petitioner's duties include inspecting cable connections, determining accessibility, and designing systems to bring cable to buildings. Petitioner has access to a company truck. Petitioner testified that he currently earns $ 10.00 an hour.

After petitioner was let go from respondent in November of 2004, respondent eventually closed its business. Petitioner never requested and respondent never offered petitioner any vocational rehabilitation. Petitioner never looked for any alternate employment until June of 2007.

On November 8, 2007, Julie Bose, M.S., CRC, with MedVoc **[*16]** Rehabilitation, Ltd., provided respondent with a Labor Market Survey for jobs in the truck driving industry in the Chicagoland area. Fifteen prospective employers were contacted. All but one were hiring and could accommodate petitioner's restrictions as defined in the FCE. The wages per hour ranged from $ 16.00 - $ 32.00 per hour.

On December 10, 2007, Bose and Jacqueline Paver, B.A., Job Placement Specialist with MedVoc Rehabilitation, Ltd., provided respondent with a Labor Market Survey for jobs in the truck driving industry in the Palm City, Florida area. Again 15 employers were identified. None were union affiliated. Twelve of the fifteen employers identified as being able to accommodate petitioner's restrictions as defined in the FCE were hiring. The salaries ranged from $ 12.00 an hour to $ 24.00 an hour.

F. IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

As a result of the accident on August 25, 2004, petitioner underwent an L3-L4 hemilaminectomy and discectomy at L3-L4 and L4-L5. Post-operative treatment included epidural steroid injections and physical therapy. When petitioner's condition failed to improve, Dr. Brebach and Dr. Andersson **[*17]** recommended petitioner undergo an exploratory laminectomy at L3-L4, L4-L5, and likely posterior interbody fusion at 3-L4 to remove the most degenerative disc and the disc herniation that is found at that level. On July 7, 2006, petitioner underwent the revision laminectomy with a fusion from L3-L5. Petitioner followed-up post-operatively.

On February 22, 2007, petitioner underwent a functional capacity evaluation and demonstrated the physical capabilities and tolerances to function at the Medium category of work. Petitioner sustained no other accidents.

Based on the above, the arbitrator finds the petitioner's current condition of ill-being as it relates to his lumbar spine is causally related to the accident he sustained on August 25, 2004.

K. WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of causal connection and incorporates them herein by this reference.

The parties stipulated that the petitioner was temporarily totally disabled from August 26, 2004 through September 14, 2004, and from November 16, 2004 through March 13, 2007. A dispute exists as **[*18]** to whether or not petitioner was temporarily totally disabled from March 14, 2007 through July 15, 2007.

A person is entitled to temporary total disability benefits until the claimant is as far restored as the permanent nature of the injury will permit.

On February 22, 2007, petitioner underwent a functional capacity evaluation. The overall results of the evaluation were valid secondary to maximum effort demonstrated by petitioner during his performance of a variety of functional tasks. Petitioner demonstrated the physical capabilities and tolerances to function at the Medium category of work, which is indicative of 2-hand maximum lift/carry of 50 pounds from floor to waist level. Based on the job description/information provided by the Dictionary of Occupational Titles for a Truck Driver (DOT code # 905.663-014), petitioner needs to function at the Medium category of work as delineated by the following critical demands: 2-hand occasional lift of # 50 from floor to waist level; 2-hand occasional push/pull of 50 pounds for unspecified distances; occasional crouching, kneeling, walking and standing; constant sitting; occasional squatting, stooping and crawling; occasional climbing into **[*19]** trucks and trailers. Petitioner was found capable of demonstrating the physical capabilities and tolerances to meet all the essential physical demands of the job.

Based on the results of this exam Dr. Andersson opined that petitioner had reached maximum medical improvement. Although petitioner claims he had increased pain following the examination after lifting 50 pounds during the examination, petitioner did not seek any treatment for these alleged complaints until nearly 2 months after the functional capacity examination. In fact, on April 16, 2007, petitioner was discharged from physical therapy. Then on April 19, 2007, when he presented to Dr. Brebach, he stated that he was getting better all the time, and Dr. Brebach was of the opinion that petitioner seemed to be improved. Petitioner's only complaints were subjective in nature. Dr. Brebach noted that pursuant to the results of the functional capacity evaluation, petitioner had met the demands of moderate duty which is the job description as defined by the Department of Transportation.

Petitioner followed up with Dr. Brebach on May 24, 2007 and July 5, 2007. Even though petitioner had no specific complaints and only referred **[*20]** to the difficulty he experienced during the functional capacity evaluation and how it had exacerbated his low back symptoms, and Dr. Brebach was of the opinion that petitioner's radicular symptoms had responded nicely to surgery, Dr. Brebach was of the opinion petitioner was not at maximum medical improvement. Dr. Brebach believed the primary limiting factor in his return to his regular duty job was his inability to lift over 50 pounds. Despite the findings of the functional capacity evaluation, Dr. Brebach released petitioner to light duty truck driving with restrictions that included driving no more than 2 consecutive hours without a half

hour break and no lifting in excess of 25 pounds. The arbitrator finds these restrictions not only inconsistent with the results of the functional capacity evaluation but also unsupported by any objective findings. Other than the alleged exacerbation in petitioner's symptoms following the functional capacity evaluation for which he sought no treatment until 2 months later and then only made mention of the exacerbation during the evaluation, the arbitrator sees no credible objective basis for Dr. Brebach's opinion on April 19, 2007 and May 24, 2007 **[*21]** that petitioner had not yet reached maximum medical improvement, or that his restrictions should differ from those determined by the functional capacity evaluation.

Based on the above, the arbitrator reasonably infers from the credible medical evidence that on April 19, 2007, petitioner's condition was as far as the permanent nature of his injury would permit. On that date, the arbitrator finds the petitioner was no longer temporarily totally disabled and was able to return to work and function at the Medium category of work.

The arbitrator finds the petitioner is entitled to temporary total disability benefits from August 26, 2004 through September 14, 2004, and November 16, 2004 through April 19, 2007, a period of 129-3/7 weeks.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

The Arbitrator adopts her findings of fact and conclusions of law contained above with respect to the issue of causal connection and incorporates them herein by this reference.

Petitioner claims he is entitled to a wage differential pursuant to Section **8(d)1** of the Act. The respondent claims the petitioner is not entitled to a wage differential and therefore should be awarded a specific loss of use of **[*22]** his person as a whole pursuant to Section 8(d)2 of the Act.

Pursuant to Section **8(d)1** of the Act, "if, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to the maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in **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."

The first prong of this test is whether or not petitioner as a result of his accidental injury has become partially incapacitated from pursuing his usual and customary line of employment. Petitioner presented unrebutted testimony that his job for respondent required him to lift in excess of 50 pounds, and this would be in excess of the capabilities **[*23]** determined by the functional capacity evaluation. As such the arbitrator finds the petitioner is partially incapacitated from pursuing his usual and customary line of employment.

Having proven he is partially incapacitated from pursuing his usual and customary line of employment, the petitioner must next prove the average amount which he would be able to earn in **full performance** of his duties in which he was engaged at the time of the accident. When petitioner was hired by respondent on July 5, 2004, he was not a union member. However, on August 25, 2004, he was a member of Teamsters Local 301. Petitioner testified that when he was hired by respondent he was earning $ 20.00 an hour for a minimum of 30 hours a week. He further testified that when he became a union member he was paid $ 26.15 an hour.

Following the accident, petitioner was off work for a while, and then returned in a light duty capacity from September 15, 2004 through November 15, 2004. During that period petitioner had two accidents while working and was told by his boss that he could no longer work in a light duty capacity. In December of 2004, petitioner ceased being a union member and moved to the state of Florida **[*24]** to reside with his mother. Thereafter, HBS Excavating ceased operations.

Petitioner claims that if he was still working in the **full performance** of his duties with respondent as a member of Teamsters Union 301 he would be earning $ 27.70 per hour. The arbitrator finds this claim speculative at best for two reasons. First of all, respondent is no longer in business, so any chance that he could still be working in the **full performance** of his duties for respondent is impossible. Additionally, petitioner is no longer a member of the Teamsters Local 301, and has not been since December of 2004. Therefore, any attempt by petitioner to claim he is entitled to the union wages of the Teamsters Local 301, when he is no longer a member and has not been since December of 2004, would result in a windfall to which the petitioner is not entitled. The arbitrator notes that petitioner's tenure as a union member with the Teamsters Local 301 was less than 3 months. The arbitrator finds petitioner's claim that he would be earning $ 27.70 today in the **full performance** of his duties merely speculative. Since respondent is no longer in business and petitioner is no longer a member of the Teamsters Local **[*25]** 301, there is no credible evidence to support a finding that petitioner would be earning $ 27.70, or any other amount, in **full performance** of his duties.

Having failed to prove by a preponderance of the credible evidence the amount of money he could earn in the **full performance** of his duties the arbitrator finds the petitioner has failed to prove by preponderance of the credible evidence that he is entitled to a wage differential pursuant to Section **8(d)1** of the Act. As such, the arbitrator finds the petitioner would be entitled to a loss of use pursuant to Section 8(d)2 of the Act.

As a result of his injuries petitioner underwent an L3-L4 hemilaminectomy and discectomy at L3-L4 and L4-L5. Post-operatively petitioner underwent conservative treatment that included physical therapy and epidural steroid injections. When this treatment did not result in any long-lasting improvement, petitioner underwent a revision laminectomy with a fusion from L3-L5. Petitioner also underwent an FCE that determined petitioner was capable of working at the Medium category of work. Petitioner has found alternative full time work within his restrictions.

Based on the above, the arbitrator finds the petitioner **[*26]** has failed to prove by a preponderance of the credible evidence that he is entitled to a wage differential pursuant to Section 8(d)l of the Act. The arbitrator finds the petitioner sustained a 45% loss of use of his person as a whole pursuant to Section 8(d)2 as a result of the injuries he sustained on August 25, 2004.