

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Feliciano Italiano,

Petitioner,

vs.

NO: 09 WC 21532
14 IWCC 087

Rausch Construction,

Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

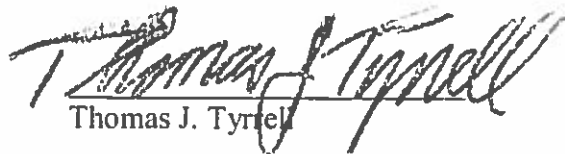
A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Decision of the Commission dated February 5, 2014, having been filed by Respondent herein. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated February 5, 2014 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: **MAR 14 2014**
TJT:yl
51


Thomas J. Tyrrell

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input checked="" type="checkbox"/> Reverse <u>Accident</u>	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FELICIANO ITALIANO,

Petitioner,

vs.

NO: 09 WC 21532
14 IWCC 087

RAUSCH CONSTRUCTION,

Respondent.

CORRECTED DECISION AND OPINION ON REMAND
FROM THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

This case comes before the Commission on remand from the Appellate Court of Illinois, First District, in case number 10 L 051017. On January 10, 2010, Arbitrator Black issued a decision finding that Petitioner failed to prove he suffered an accident arising out of and in the course of his employment with Respondent and did not award any benefits. On February 2, 2010, Petitioner filed section 19(e) special interrogatories asking the Commission five questions. On review, a majority of the Commission affirmed and adopted the Arbitrator's opinion, with one Commissioner dissenting. The Commission issued its decision on June 14, 2010. Petitioner then filed a motion with the Circuit Court on August 19, 2010, to set aside the Commission's decision and remand the case to the Commission with instructions to make findings in response to the section 19(e) interrogatories. The Circuit Court denied the motion on October 27, 2010. The Circuit Court heard the case and affirmed the Commission decision on April 6, 2011.

Petitioner timely appealed his case to the Appellate Court, which reversed and remanded it to the Commission on September 11, 2012. The Appellate Court held:

Where the objective medical evidence established that the claimant sustained an injury and the sole causation opinion attributed the claimant's condition to the repetitive motions of his work, the Commission's decision that the claimant did not sustain injuries that arose out of and in the course of his employment is against the manifest weight of the evidence.

Petitioner filed a timely Petition for Review under §19(b-1) on November 13, 2009. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Appellate Court found the following facts:

Petitioner worked as a union cement mason for about 10 years as of his claimed injury in 2009. In October 2007, Petitioner began working for Respondent as a cement finisher foreman where he replaced sidewalks and handicap ramps.

Petitioner testified that on May 6, 2009, he noticed numbness in his hands up to his elbows and sharp pain in both shoulders as he was using a 12-inch grinder to grind a wall. Petitioner had been using a 15 to 20 pound grinder for four hours that day when he reported the pain. Petitioner added that he had to hold the grinder with two hands. Petitioner testified that he told his supervisor, Matt Kovalsky, about the pain and numbness. As of May 6, 2009, Petitioner had been grinding cement for about a week.

Petitioner testified that he had experienced similar pain symptoms in the fall of 2008 but did not report his issue or seek medical treatment. Petitioner explained he did not report his pain because in his "line of work, you get a lot of stress in your arms and legs and back, and I don't know if it was an injury or just because I was working so many hours and my body don't [sic] recuperate." In November 2008, Petitioner stopped working as part of a general lay off and his pain symptoms ceased while he was not working. However, when Petitioner returned to work in April 2009, the pain also returned. Petitioner continued to work until May 6, 2009, when he experienced so much pain that it interfered with his ability to work. Petitioner then reported his pain.

Respondent presented two witnesses who both testified they did not observe Petitioner showing any indication of pain while working. Bernadino Villasenor testified that he worked for Respondent for 25 years and was the operations manager. While he infrequently spoke to

Petitioner, Mr. Villasenor testified that Petitioner never mentioned any pain in his wrists or shoulders. Mr. Villasenor added that during his regular visits to the job site, he never noticed any indication that Petitioner was in pain or uncomfortable in any way. Mr. Kovalsky also testified at the hearing. He is a project manager for Respondent and saw Petitioner at least once a day. Before Petitioner reported his pain complaints on May 6, 2009, Mr. Kovalsky testified Petitioner never complained of numbness in his arms or wrists and never appeared to be in pain or discomfort while working.

When Petitioner reported his symptoms to Mr. Kovalsky, they discussed the origin of them. Mr. Kovalsky testified that when questioned, Petitioner denied hurting himself on the job. Mr. Kovalsky added that he told Petitioner that if he hurt himself at work, Petitioner needed to go to the clinic to be examined but Petitioner refused. Yet, during cross examination, Mr. Kovalsky admitted that he may have told Petitioner there was no need for him to go to the clinic. He also admitted to sending the following email to Mr. Villasenor on May 7, 2009:

I told him that typically for an injury, [Respondent] will either send you to Concentra or the emergency room. Seeing that this was not an emergency, there was really no reason for him to go. He asked me if this was something that [Respondent] would pay for or if he had to go through his own insurance. I replied with I don't know.

Petitioner did not return to work after May 6, 2009, through the date of the arbitration hearing. His treating physicians continually wrote Petitioner off work or gave him light duty restrictions. Petitioner was told he was not needed at work on May 7, 2009. Mr. Villasenor testified about a telephone conversation he had with Mr. Kovalsky on May 6, 2009. Mr. Kovalsky asked Mr. Villasenor if Petitioner was needed at work the next day, to which Mr. Villasenor replied no based on the weather forecast. Mr. Kovalsky then called Petitioner that evening to tell him that they would not be pouring concrete the next day and Petitioner was not needed at the work site. Mr. Kovalsky admitted on cross examination that other cement masons worked on May 7, 2009, but Petitioner was not needed. Mr. Villasenor also admitted on cross examination that typically the foreman worked if other cement masons were working.

Petitioner returned to the work site on May 7, 2009, asking Mr. Kovalsky if he could fill out an accident report. Mr. Kovalsky would not allow Petitioner to fill one out because they are to be completed immediately after an accident when an employee is injured on the job. Instead, Mr. Kovalsky gave Petitioner an incident report to fill out, which is to make a record of "an incident that may or may not have occurred on the job." Petitioner filled it out and wrote that he sustained a shoulder injury on May 6, 2009 due to the repetitive motion of grinding and chipping concrete.

Petitioner first sought medical treatment on May 7, 2009, with Dr. Marcotte, his primary care physician. Petitioner told Dr. Marcotte that he was a cement finisher and his job required

repetitive motions that strained his back and arms. Dr. Marcotte wrote in his initial report that Petitioner was seen for complaints of bilateral shoulder pain and that Petitioner had been performing the “same job over and over,” which caused him pain radiating down into his hands. Dr. Marcotte diagnosed Petitioner with bilateral acromioclavicular strain and probable carpal tunnel syndrome bilaterally. Petitioner underwent an electromyogram on May 19, 2009. Dr. Bhasin wrote in his report that “the electrophysiological data obtained today is suggestive of bilateral median mononeuropathy at rest secondary to carpal tunnel syndrome, mainly by wrist-palm technique criteria only.”

Dr. Marcotte saw Petitioner again on May 27, 2009. He noted that Petitioner still suffered from numbness and tingling in his first three fingers – his thumb and two fingers – on his hands bilaterally, and pain in his shoulders. Dr. Marcotte wrote that while Petitioner’s symptoms had significantly improved, when Petitioner lifted his arms straight up or over his head, the pain returned. He diagnosed Petitioner with bilateral carpal tunnel syndrome and AC joint strain, and referred Petitioner to Dr. McComis, an orthopedic surgeon. Petitioner first visited Dr. McComis on June 1, 2009; he diagnosed Petitioner with bilateral carpal tunnel syndrome and recommended bilateral carpal tunnel release surgery.

Petitioner then treated with Dr. Corcoran on June 24, 2009. Petitioner underwent x-rays and Dr. Corcoran wrote both shoulders showed type II and type III acromion with mild AC arthropathy. He then diagnosed Petitioner with bilateral rotator cuff tendonitis and bilateral carpal tunnel syndrome. Dr. Corcoran recommended Petitioner attend physical therapy to treat his rotator cuff tendonitis. He also recommended Petitioner have carpal tunnel release surgery on the right side first, as it was worse than the left. Once that side healed, Petitioner should have surgery on the left side. Dr. Corcoran performed right open carpal tunnel release surgery on Petitioner on June 29, 2009.

Dr. Rubinstein then treated Petitioner on July 29, 2009. His impression was that Petitioner suffered from bilateral carpal tunnel syndrome and bilateral rotator cuff tendonitis. Dr. Rubinstein also wrote in his notes that “in view of the repetitive motion activities of cement finishing which also involve a significant amount of forceful pushing and pulling, it would be my opinion that these problems are related directly to his workplace activities.” Dr. Rubinstein performed Petitioner’s left carpal tunnel release surgery on September 17, 2009.

At the arbitration hearing, senior investigator Daniel Lindblad testified for Respondent and Respondent submitted his video surveillance into evidence. Mr. Lindblad testified he has specific recollection of Petitioner because he observed so much activity during the surveillance, which he conducted over several days. The first day of surveillance, June 5, 2009, Mr. Lindblad testified he observed Petitioner running errands, pushing a shopping cart and carrying shopping bags. Mr. Lindblad then saw Petitioner return to his residence, where he removed two trailer tires from the back of his vehicle, jacked up the trailer and then changed the tires. He added that Petitioner did not appear to struggle while doing this. Finally, Mr. Lindblad observed Petitioner

remove a case of water from his vehicle, lift it onto his left shoulder and carry it into his residence.

Mr. Lindblad conducted surveillance again on June 8, 2009. He observed Petitioner load two "full size" suitcases into his car, drive to a church, remove two pieces of luggage from another car and place the luggage into his car. When Petitioner arrived at the church camp near Indianapolis, Mr. Lindblad saw Petitioner take the luggage out of his vehicle. Petitioner put one piece of luggage on his shoulder and carried the other pieces to the entrance. Mr. Lindblad observed Petitioner for a final time on August 14, 2009, when Petitioner was hosting a yard sale. Mr. Lindblad testified he saw Petitioner manually open his garage door and remove various items, such as tables, closet doors, lamps, large plastic containers, a large table umbrella and wood. Petitioner then set up the items and lifted them to show people.

Petitioner testified his medical treatment resolved his symptoms and pain. Petitioner testified he last worked for Respondent on May 6, 2009. While his pain began subsiding in late May or early June 2009, Petitioner stated his numbness did not decrease until he had surgery. He testified that before his surgeries, he found it difficult to perform daily tasks due to his hand numbness. Petitioner testified the surgery was successful in relieving the pain and symptoms in his hands. Petitioner added that the pain in his shoulders made it difficult to lift things. However, after completing a course of physical therapy, his shoulder pain resolved.

Based on the facts above, the Commission finds that Petitioner proved he sustained an accident arising out of and in the course of his employment with Respondent and that Petitioner's condition of ill being is causally connected to the work related accident. We further award Petitioner medical expenses and temporary total disability benefits. We decline to award Petitioner penalties and attorneys' fees.

Per the Appellate Court's statement of facts and directive in its holding, the Commission finds that Petitioner proved he suffered a work related accident. The Appellate Court found that "based on [Petitioner's] testimony and the treating notes of Dr. Marcotte, Dr. Bhasin, Dr. McComis, Dr. Corcoran, and Dr. Rubinstein, there is clear, indisputable evidence that [Petitioner] suffered from an injury to his shoulders, arms and hands." The Court noted that because nature and extent were not at issue, the surveillance evidence presented by Respondent was meant to suggest Petitioner did not suffer an accident at all. However, the Court pointed out that the medical evidence was completely uncontradicted as Respondent failed to present at medical evidence to rebut Petitioner's claim. The Appellate Court also found Petitioner's injury arose out of and in the course of his employment. The Court noted Petitioner traced his repetitive trauma injury to a "specific moment of collapse of his physical structure" on May 6, 2009, when the pain in his shoulders and the numbness in his hands became so severe it interfered with his ability to work. The Court again stressed that Petitioner's testimony and the consistent medical evidence were not negated.

In addition to finding that Petitioner proved he suffered a work related accident, we hold that his condition of ill being is causally connected to his work injury. Petitioner reported his injury on the day he was no longer able to work due to the pain and numbness in his hands and shoulders. Petitioner sought medical treatment with his primary care physician the next day. Petitioner then continually treated his conditions until he no longer experienced the same pain. Petitioner underwent bilateral carpal tunnel release surgery and post operative physical therapy for his wrists and physical therapy for his shoulders. These treatments significantly helped Petitioner as he is now pain free.

Further Petitioner's symptoms significantly subsided when he was not working for Respondent. Petitioner testified that he experienced similar symptoms when he worked through October 2008. Once Petitioner stopped working those symptoms subsided. He testified that he did not begin experiencing such symptoms until he returned to work in April 2009. That Petitioner only experienced pain in his shoulders and numbness in his hands while he was working his manual labor job strongly supports his condition being causally connected to his work. Like other manual laborers, Petitioner attempted to work through the pain and believed it was just soreness from the job and not an actual injury. Once Petitioner sought treatment, it became clear that he suffered from bilateral carpal tunnel syndrome and bilateral rotator cuff tendonitis due to his work for Respondent. After Petitioner stopped working due to his pain and numbness, his symptoms steadily improved with medical treatment. Petitioner eventually experienced full resolution of his symptoms, pain and numbness. Moreover, Respondent offered no other reason as to why Petitioner experienced such pain.

Furthermore, Dr. Rubinstein provided the only causation opinion of record. On July 29, 2009, Dr. Rubinstein wrote in his notes that "in view of the repetitive motion activities of cement finishing which also involve a significant amount of forceful pushing and pulling, it would be my opinion that these problems are related directly to his workplace activities." Petitioner's testimony as to his work, the onset of his symptoms, their improvement with time off work and ultimate recurrence and progression is consistent with his medical records. No contrary evidence was presented. Respondent did not offer any causation evidence that contradicted Dr. Rubinstein's opinion that causation existed.

Because Petitioner was able to work before the May 2009 manifestation date with minimal to no complaints of pain, suffered a work related accident, reported the accident on the same day, continually sought medical treatment and improved with such treatment, we find that Petitioner's condition of ill being is causally connected to his work related injury.

The Commission finds that Petitioner's average weekly wage is \$2,098.35. We included Petitioner's overtime hours in the average weekly wage calculation as he regularly worked overtime. Petitioner testified on May 6, 2009, he worked as a finisher foreman and as such was responsible to finish the work, even if the work day exceeded 8 hours. He added that his

overtime was required. Based on Petitioner's hourly wages and the pay stubs submitted, we hold that his average weekly wage is \$2,098.35.

We award Petitioner temporary total disability benefits for 32 weeks. Petitioner's repetitive trauma injury manifested itself on May 6, 2009, and he sought medical treatment on May 7, 2009. Dr. Marcotte gave Petitioner light duty work restrictions as of that visit. Petitioner then continually received off work or light duty restrictions from Dr. Marcotte, Dr. Corcoran and Dr. Rubinstein. Petitioner returned to work on December 16, 2009. He is entitled to temporary total disability benefits of \$1,231.41 per week for 32 weeks, representing the time period from May 7, 2009 through December 16, 2009.

The Commission further awards Petitioner medical expenses. Petitioner's medical treatment was reasonable and necessary, and not excessive. Petitioner visited several doctors, underwent surgery and participated in physical therapy. This treatment greatly benefitted Petitioner as he testified he no longer feels pain or numbness in his shoulders or hands. Petitioner is awarded his medical bills totaling \$37,276.32, per the medical fee schedule.

Finally, we decline to award Petitioner penalties or attorneys' fees. Respondent did not behave in an unreasonable or vexatious manner when it failed to pay Petitioner medical expenses or temporary total disability benefits. It relied on the Arbitrator's January 10, 2010, decision finding Petitioner did not prove he sustained a work related accident. Respondent reasonably relied on the Arbitrator's decision and hence penalties and fees are not awarded.

For the reasons stated above, the Commission finds Petitioner proved he suffered an accident arising out of and in the course of his employment and his condition of ill being is causally related to his work accident. We therefore award Petitioner temporary total disability benefits and medical expenses.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved he suffered a repetitive trauma accident arising out of and in the course of his employment with Respondent and that his condition of ill being is causally connected to that work related accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's average weekly wage is \$2,098.35.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of \$1,231.41 per week for a period of 32 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of \$37,276.32 for medical expenses under §8(a) and §8.2 of the Act.

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

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

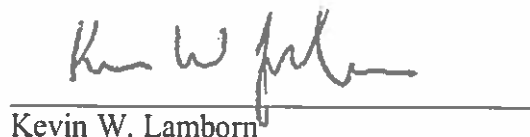
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: **MAR 14 2014**
TJT: kg
O: 8/19/13
51


Thomas J. Tyrrell


Daniel R. Donohoo


Kevin W. Lamborn

STATE OF ILLINOIS)BEFORE THE ILLINOIS WORKERS' COMPENSATION
) SS COMMISSION
COUNTY OF CHAMPAIGN)

Bradford Craig,
Petitioner,

vs.

NO. 08 WC 11812

Prairie Material sales, Inc., d/b/a Prairie Central,
Respondent,

ORDER OF RECALL UNDER SECTION 19(f)

A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Decision of the Commission dated December 9, 2013, having been filed by Respondent. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision dated December 9, 2013 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein. The parties should return their original Orders to Commissioner Mario Basurto.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision shall be issued simultaneously with this Order.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to file for Review in Circuit Court.

DATED: **MAR 19 2014**

MB/mam
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Mario Basurto



Michael J. Brennan



David L. Gore