

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Clavette,

Petitioner,

vs.

NO: 05 WC 41656
15 IWCC 128

City of Chicago,

Respondent.

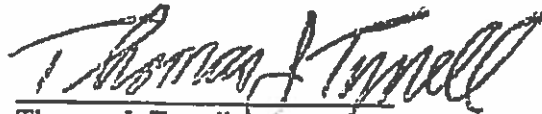
ORDER OF RECALL UNDER SECTION 19(f)

A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Decision of the Commission dated February 11, 2015, 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 11, 2015, 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.

DATED: MAR 23 2015
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 type="checkbox"/> Reverse <input type="text" value="Choose reason"/>	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify <input type="text" value="Choose direction"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM CLAVETTE,

Petitioner,

vs.

NO: 05 WC 41656
15 IWCC 128

CITY OF CHICAGO,

Respondent.

CORRECTED DECISION AND OPINION ON ON §19(h) AND §8(a) PETITION

This case comes before the Commission on Petitioner's §19(h) and §8(a) Petition, alleging a material increase in his work related disability since the January 11, 2008 hearing held before the Arbitrator, requesting additional medical expenses and an increase in his permanent disability award. The previous decision on arbitration (issued on February 11, 2008) awarded Petitioner 60% of the man as a whole pursuant to Section 8(d)(2) of the Act. On Review, the Commission on September 22, 2008 reduced this award to 50% of the man as a whole. Hearings on the pending petition were held before Commissioner Thomas Tyrrell on May 28 and July 10, 2014, in Chicago, Illinois, and a record was made.

Section 19(h) of the Act states that

“. . . as to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award be reviewed by the

Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.”

The Commission, having considered the entire record, finds that Petitioner has shown a material increase in disability, is entitled to additional permanency of 15% of the man as a whole, for the reasons set forth below.

HISTORY OF THE CASE

Petitioner worked, and continues to work, for the Respondent as a bridge operator. He was 41 years old at the time of his injury, and was 50 years old at the time of the recent Section 19(h) hearings. The Arbitrator previously found Petitioner had sustained the loss of use of 60% of the man as a whole. This was based significantly on Petitioner undergoing a posterior fusion surgery at L5/S1, subsequent hardware removal surgery, and having ongoing complaints and permanent restrictions. The restrictions did not prohibit him from returning to his regular job. On review, the Commission reduced the award to 50% of the man as a whole.

The Petitioner continued to work as a bridge operator, but alleged that at some point his voluntary overtime was reduced due to his restrictions and/or ongoing symptoms. After his medical release in 2007, he indicated that in 2008 his symptoms again increased and he began treating again, and he ended up undergoing a revision of the prior fusion, this time in an anterior fashion, with his original surgeon, Dr. Deutsch. Petitioner appears to have had some limited relief as a result, as he continues to note low back pain into the left leg. He also now alleges erectile dysfunction, retrograde ejaculation and a hernia are related to this last surgery.

Between the May 28 and July 10, 2014 hearing dates, the parties resolved outstanding issues with regard to medical expenses and temporary total disability, and thus the only current issue before the Commission is the causal relationship of any ongoing condition to the August 18, 2005 accident, and if such causal relationship exists, whether the Petitioner sustained a material increase in disability since the January 11, 2008 arbitration hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The prior arbitration and Commission decisions were entered into evidence as Respondent's Exhibit 3. Hearing on the pending petitions was held pursuant to Sections 19(h) and 8(a) before the Commission on May 28 and July 10, 2014 in Chicago.

Petitioner testified that following his August 18, 2005 injury, he underwent March 2006 posterior lumbar fusion surgery, followed by a revision hardware removal surgery in February 2007. He was released to return to work with permanent restrictions and returned to his regular job as a bridge operator in 2007. He continued to have back problems after returning to work, and returned to Dr. Deutsch in September 2008, undergoing a February 2009 lumbar MRI. On

October 12, 2009 Dr. Deutsch noted left leg pain in an L5 dermatomal distribution, that the new MRI showed scar tissue encroaching on the left neuroforamina at the S1 level, and that non-operative measures had failed. He recommended a revision L5/S1 anterior fusion. Petitioner initially was taken off work on March 22, 2010 and underwent the surgery on June 1, 2010. He subsequently remained off work and on October 29, 2010 was referred for pain management. Petitioner saw pain specialist Dr. Jaycox at Rush. Petitioner initially saw Dr. Jaycox on December 29, 2010 reporting bilateral buttock pain radiating into the left leg to the foot, noting surgery did improve his back pain but had no effect on his leg pain. Dr. Jaycox performed an initial epidural on February 25, 2011. (Tr. 5-10; Petitioner's Exhibits 1 & 3).

Dr. Deutsch released Petitioner to remain under the care of Dr. Jaycox on March 4, 2011. To Petitioner's recall, Dr. Deutsch released him with restrictions at the final visit of March 4, 2011, however the records of Dr. Deutsch indicate the release was to unrestricted duty. On March 24, 2011 Dr. Jaycox released him with restrictions including no lifting over 25 pounds, no standing or walking more than 2 hours or sitting more than 4 hours without a break. Respondent accommodated the restrictions and Petitioner returned to work on March 28, 2011. Petitioner underwent second and third epidurals on April 8 and April 22, 2011 but continued to have problems. Dr. Jaycox injected the sacroiliac joint on June 13, 2011, but Petitioner reported on July 11, 2011 that this did not help. Dr. Jaycox found Petitioner had reached maximum medical improvement ("MMI") at that time, indicating he would need permanent restrictions, injections and physical therapy in the future. Petitioner returned on October 12, 2011, reporting increased low back pain that was exacerbated at work while clearing debris and lifting metal from a car wreck. Petitioner underwent a fourth epidural on January 25, 2012. On February 22, 2012 he referred Petitioner for a urology consultation for complaints of retrograde ejaculation since his surgery. (Tr. 10-12, 34-36; Petitioner's Exhibits 1 & 3).

Petitioner saw urologist Dr. Levine at Rush on April 27, 2012. He testified that he had no erectile dysfunction issues prior to the June 2010 surgery. Dr. Levine noted Petitioner had no sexual problems for three to six months after surgery, and then developed first retrograde ejaculation, followed by erectile dysfunction. After multiple tests, Dr. Levine believed the problem could be low testosterone due to chronic narcotic pain medication usage, and recommended testosterone replacement therapy, which began in September or October 2012 (Tr. 12-14; Petitioner's Exhibit 2).

On October 22, 2012 Petitioner went to the Rush emergency room with complaints of a three week history of chronic headache and more recent neck stiffness. After hearing news reports regarding epidurals Petitioner was concerned he may have contracted meningitis, however this was ruled out by Rush. He returned to Dr. Levine on February 5, 2013, and advised he wanted to discontinue testosterone replacement due to side effects with the headaches and neck stiffness. (Tr. 14-16; Petitioner's Exhibits 2 & 4).

Petitioner was examined pursuant to Section 12 of the Act by Dr. Candido on April 16, 2013, and he agreed with Dr. Jaycox's February 11, 2013 recommended treatment plan, including another round of epidurals. A fifth epidural on May 31, 2013 didn't help. On June 24, 2013 Dr. Jaycox recommended a new round of three epidurals, which were performed between August 14, 2013 and January 31, 2014. Petitioner believed he had an additional injection after this, and had undergone a total of at least 8 epidurals and the sacroiliac joint injection since the June 2010 surgery (Tr. 16-19; Petitioner's Exhibit 3; Respondent's Exhibit 1).

Dr. Jaycox on March 24, 2014 found Petitioner had reached maximum medical improvement, and prescribed a back brace, medications (Norco, Elavil, Voltaren and Lunesta), a TENS unit and renewed the permanent restrictions (Tr. 19-20; Petitioner's Exhibit 3).

Petitioner has continued working since March 28, 2011, but still had low back pain. He testified: "It's a chronic pinch that's with me all the time", which radiates into his leg to the foot with numbness at the inner thigh, side of shin and top of foot. He also indicated pain across the plane of his back and the upper muscles with overexertion. The pain was at a constant 5 out of 10 and would worsen with weather and prolonged sitting, walking or standing. He uses prescription medications, heat, stretching and rest when it gets bad. He testified he was only taking prescription strength ibuprofen and had not been prescribed a brace and TENS unit when he last testified in January 2008. He was still working as a bridge operator at his regular pay, and he uses sick or vacation time if he has a bad day. (Tr. 20-29).

Petitioner testified on cross examination that he was working his regular bridge operator job after the January 2008 hearing, but at a reduced level in that he didn't volunteer for any overtime, and didn't participate in "trials and boat runs and stuff . . . I would just do my regular assigned assignment." He otherwise has been earning the same money and working the same hours since 2008. He agreed that his current complaints were similar to what they were prior to the last hearing date, but that the symptoms were worse and more constant. He agreed that Dr. Jaycox's March 24, 2011 release to restricted duty was at the medium work duty level, and that is the level at which he was currently working (Tr. 29-38). While Petitioner did report an October 2011 incident involving lifting steel debris from the roadway, he testified he's had no new accidents involving his low back. He was not currently treating for erectile or retrograde ejaculation problems, indicating he felt the prior treatment contributed to his headaches and neck pain, and so he still had to decide what he was going to do about this problem in the future. He takes daily amitriptyline for anxiety, and it serves to help with his nerve pain and sleep. He can drive and drives to work daily (Tr. 39-47).

Based on the above noted treating medical provider evidence, as well as the opinion of Respondent's examiner Dr. Candido, Petitioner's lumbar condition remained causally related to the August 18, 2005 accident. Since the prior arbitration hearing of January 11, 2008, Petitioner had an increase in pain and underwent revision fusion surgery, along with numerous injections, with limited benefit. He also continues to work under physical duty restrictions. While they do

not prevent him from working his regular job, they do contribute to an increase in his disability, as he now must take breaks from prolonged standing and sitting. It also appears that he is having urological issues that, according to Dr. Levine, stem from either his last fusion surgery or from chronic use of narcotic pain medications. The Commission finds that the Petitioner has sustained an additional loss of 15% of the man as a whole since January 11, 2008.

As this matter involves the City of Chicago as Respondent, pursuant to Section 19(f)2 of the Act, no bond is required to be filed if this decision is appealed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) is hereby granted; Petitioner's Petition under §8(a) was withdrawn based on both parties indicating that medical expenses had been resolved prior to final hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$497.29 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of an additional 15% of the man as a whole subsequent to the January 11, 2008 hearing on arbitration.

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.


IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit totaling \$1,544.68, based on an overpayment of temporary total disability.

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.

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 23 2015
TJT: pvc
o 12/16/14
51



Thomas J. Tyrrell



Michael J. Brennan



Kevin W. Lambert

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Miroslav Ivano,
Petitioner,

vs.

NO: 09 WC 50817
14 IWCC 1016

Excel Builders of Illinois,
AAA Thermal Windows,
Respondents.

ORDER

Petitioner filed a timely Petition to Recall the November 24, 2014 Commission Decision in this matter due to clerical error under Section 19(f) of the Illinois Workers' Compensation Act. On February 3, 2015, counsel for Petitioner, Mr. David Barish, appeared before Commissioner Donohoo for hearing on Review in Chicago, Illinois. No named respondent appeared at hearing. Although the Commission found the State Treasurer, as ex-officio Custodian of the Injured Worker Benefit Fund, was not a party to the proceeding, as Petitioner was arguing the State should be a party, Ms. Jill Otte appeared at hearing on Review of the Petitioner's Petition to protect the interest of the State. Upon consideration of said Petition, the Commission is of the opinion that it should be denied.

Petitioner, by and through his attorney, argues that additional respondents should have been named in this claim and that the Commission should vacate and recall its November 24, 2014 Decision to include additional respondents. Petitioner argues that while the Third Amended Application for Adjustment of Claim filed May 24, 2011 named only Excel Builders of Illinois and AAA Thermal Windows, Inc. as respondents, both located at 709 S. Lincoln Ave, Park Ridge, Illinois, the Commission should find clerical error in its decision because Respondents named in prior filings did not contest they were a proper party and participated in the arbitration hearing.

In the alternative, Petitioner argues for recall under Section 19(f) for clerical error because it filed a 4th Amended Application for Adjustment of Claim on December 19, 2014 and later a 5th Amended Application for Adjustment of Claim on December 24, 2014, after the Commission Decision was issued. The 4th and 5th Amended Applications for Adjustment of Claim included Zbigniew Tarnowski, Individually and d/b/a AAA Thermal Windows, Inc. and as Excel Builders, Beatrice Spearman, deceased, and The State Treasurer as Ex-Officio Custodian of the Injured Workers Benefit Fund. Petitioner argues that the Application for Adjustment of Claim should be amended post-decision to conform to the proofs contained in the Record and the Commission Decision has not yet become final.

Petitioner further prayed that the Commission recall its decision due to clerical error and reissue the decision to add only the State Treasurer as ex-officio Custodian of the Injured Worker Benefit Fund as a Respondent. No specific prayer was made for inclusion of Zbigniew Tarnowski individually and d/b/a AAA Thermal Windows, Inc. and Excel Builders or Beatrice Spearman, deceased.

First, the Commission notes that the relief sought by Petitioner is not a correction of a clerical error as delineated in Section 19(f), but a modification of its November 24, 2014 Decision and Opinion on Review. Second, the modifications Petitioner seeks are based on filings that occurred after the Decision was entered or as pieced together from prior applications that were superseded by the Third Amended Application. Third, the amendments Petitioner seeks are not due to mere misnomer or harmless mistake such as referring to the wrong side of the body, but inclusion of parties to the claim not named on the final Application for Adjustment of Claim prior to hearing and closing of proofs. Petitioner argues that the parties he seeks to include as Respondents participated in the hearing at Arbitration. The Commission notes Mr. Tarnowski was never a named party in the first three amended applications and did not appear at hearing. While it is true counsel for Ms. Spearman and the State Treasurer were present at arbitration, the Application for Adjustment of Claim was not included as an exhibit at trial and there is no evidence that the State Treasurer, Mr. Tarnowski or Ms. Spearman were aware of the filing of the Third Amended Application of Adjustment of Claim.


With regard to the State Treasurer as ex-officio Custodian of the Injured Worker Benefit Fund, the Commission notes that the only time prior to December 24, 2014 the State Treasurer was a named party was in the Second Amended Application for Adjustment of Claim filed November 5, 2010. The State Treasurer was not named in the original Application or in the Third Amended Application for Adjustment of Claim. Section 4(d) of the Act states that "the custodian of the Injured Workers' Benefit Fund *shall* be joined with the employer as a party respondent in the application for adjustment of claim." [emphasis added]. The Commission declined to add the State Treasurer as ex-officio Custodian of the Injured Worker Benefit Fund *sua sponte* in this matter.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated November 24, 2014, is hereby affirmed. Petitioner's Petition to Recall the Workers' Compensation Commission's Decision Due to Clerical Error Pursuant to Section 19(f) of the Act is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the parties right to appeal the Decision of the Commission shall commence upon receipt of this Order.

DATED: MAR 11 2015

jd/adc
68


Joshua D. Luskin