

06 WC 45589

16IWCC151

Page 1

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

Anabel Cortez n/k/a Anabel Moore,
Petitioner,

vs.

NOS. 06 WC 45589
16 IWCC151

Menards, Inc.,
Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

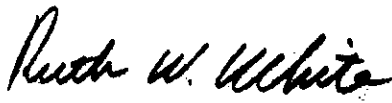
This matter comes before the Commission on its own motion to correct a clerical error in the Decision and Opinion on Review of the Commission filed March 3, 2016 *sua sponte*. After reviewing the Decision on Review, the Commission recalls the Decision for the purpose of correcting the clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated March 3, 2016, is hereby recalled pursuant to Section 19(f).

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

DATED: APR 1 - 2016

RWW/rm
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Ruth W. White

James W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

<input checked="" 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="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

Anabel Cortez n/k/a Anabel Moore,
Petitioner,

vs.

NO: 06 WC 45589
16 IWCC 151

Menards Inc.,
Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2014, 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 \$50,400.00. 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:
02/24/16
RWW/rm
046

APR 1 - 2016


Ruth W. White


Charles J. DeVriendt


Joshua D. Luskin

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Robert W. Whitely

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

16 IWCC0151

CORTEZ, ANABEL N/K/A MOORE, ANABEL

Case# 06WC045589

Employee/Petitioner

MENARDS INC

Employer/Respondent

On 12/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above 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.

A copy of this decision is mailed to the following parties:

0190 LAW OFFICES PETER F FERRACUTI
JENNIFER KIESEWETTER
110 E MAIN ST
OTTAWA, IL 61350

1296 CHILTON YAMBERT PORTER LLP
DANIEL T CROWE
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
 COUNTY OF WILL)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
 CORRECTED ARBITRATION DECISION

Anabel Cortez n/k/a Anabel Moore
 Employee/Petitioner

Case # 06 WC 45589

v.

Consolidated cases: _____

Menards, Inc.
 Employer/Respondent

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **10/8/14**. 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

- A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
- B. Was there an employee-employer relationship?
- C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
- D. What was the date of the accident?
- E. Was timely notice of the accident given to Respondent?
- F. Is Petitioner's current condition of ill-being causally related to the injury?
- G. What were Petitioner's earnings?
- H. What was Petitioner's age at the time of the accident?
- I. What was Petitioner's marital status at the time of the accident?
- J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
- K. What temporary benefits are in dispute?
 TPD Maintenance TTD
- L. What is the nature and extent of the injury?
- M. Should penalties or fees be imposed upon Respondent?
- N. Is Respondent due any credit?
- O. Other _____

FINDINGS

On 7/21/2006, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned \$19,919.64; the average weekly wage was \$383.07.

On the date of accident, Petitioner was 27 years of age, *single* with 3 dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of \$0 for TTD, \$0 for TPD, \$0 for maintenance, and \$0 for other benefits, for a total credit of \$0. The parties stipulated at hearing that all TTD has been paid and any underpayment will be resolved directly by Respondent.

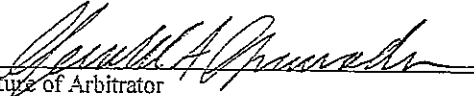
~~Respondent is entitled to a credit of \$0 under Section 8(j) of the Act.~~

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of \$251.32/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 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

12/18/14
Date

DEC 22 2014

FINDINGS OF FACT

This case was previously tried on a Section 19(b) petition on March 6, 2009. The Arbitrator's Decision, filed on March 26, 2009, found that Petitioner sustained a compensable accident; that her current low back pain with radiculopathy was causally connected to the accident; that she was entitled to temporary total disability compensation for the period of time she was prescribed off work; and that she was entitled to a discogram as prescribed by Dr. Mark Lorenz, treating orthopedic spine surgeon. Upon review, the Commission reduced the period of TTD because it found that the Respondent had offered modified duty. The Respondent subsequently paid the award and the case was remanded to the Arbitrator.

On April 7, 2010, the case was again tried on a Section 19(b) petition. The Arbitrator's Decision, filed on April 26, 2010, found that Petitioner was entitled to the fusion surgery as prescribed by Dr. Mark Lorenz and denied further temporary total disability benefits prior to surgery. The Commission affirmed and adopted the Decision on December 5, 2011.

While the appeal was pending, Petitioner returned to Dr. Lorenz on October 19, 2011. He continued to recommend the L5-S1 decompression and fusion and continued to recommend pain medication and that she remain off work. (P3, p.28)

Following the Commission Decision, the Petitioner underwent the lumbar fusion on April 27, 2012 at Adventist Hinsdale Hospital. (P2; p.3, p.48) The postoperative diagnosis was L5-S1 central disk herniation with left radiculopathy and L5-S1 lumbar spondylosis with axial instability. She returned to Dr. Lorenz on May 9, 2012 for a follow up visit. At that time, he noted moderate surgical pain. He continued to recommend that the Petitioner remain off work and on pain medication. (P3, p.23)

From July 2012 through September 2012, Petitioner underwent physical therapy at ATI. (P4) She continued to complain of pain particularly at the surgical site and hardware removal was recommended.

On January 11, 2013, Petitioner returned to Adventist Hinsdale Hospital for hardware removal surgery with Dr. Lorenz and Dr. Stanley Fronczak. (P2; P3, p.40) The history noted that she had undergone local injection at the hardware sites and had complete relief of her symptoms so that she was being admitted for removal of the previously placed instrumentation. At this time, she was in general experiencing low back pain, somewhat greater on the left side than the right side. The postoperative diagnosis was status post L5-S1 fusion with retained hardware. (P3, p.35)

Petitioner returned to Dr. Lorenz on January 23, 2013 with lower left side back pain and swelling and discomfort when walking. She further did complain of some pain sensation in the lower extremities. Dr. Lorenz recommended that she remain off work and on pain medication. (P3, p.30)

Petitioner underwent a Functional Capacity Evaluation on May 1, 2013. The evaluation was determined to be a valid representation of her present physical capabilities. (P4, p.9) The test demonstrated that she was capable of a 1 to 2 hour work day and that her physical tolerances were sitting for 1 to 2 hours per day but for a 25 minute duration, standing 1 to 2 hours per day with a 15 minute duration, and waking 1 to 2 hours per day but occasional short distances. Further, she was able to occasionally lift 17 lbs. bilaterally from desk to chair or

above shoulders but not from chair to floor. (P4, p.10)

On June 24, 2013, Petitioner returned to Dr. Lorenz for a follow up. At that time, he indicated that she had reached maximum medical improvement and that he would recommend vocational rehabilitation as she could not return to her previous medium level duty job. (P3, p.27) He further released her to modified work of a 2 hour work day with no lifting greater than 17 pounds, alternate sitting, standing, and walking every 30 minutes, sedentary work only. He also recommended continued medications. (P3, p.21)

Dr. Mark Lorenz, treating orthopedic surgeon, testified via evidence deposition on June 3, 2014. He testified that the Petitioner's restrictions were permanent and were related to her work accident. (P5, p.9-10) He further indicated that he recommended pain management. (P5, p.10) On cross-examination, Dr. Lorenz also performed Waddell testing on the petitioner, which he admitted was positive. Dr. Lorenz explained that the Waddell testing was designed as social testing for Anglo-Saxons so he did not document which signs may have been positive for the Petitioner. (P5, p.12) However, Dr. Lorenz could not provide any authority for his statement regarding the inapplicability of the Waddell testing to Hispanics (P5, p.12) He further explained that the hardware injection performed did resolve Petitioner's pain for a period of time so that was suggestive that the hardware was causing inflammation. (P5, p.13) Dr. Lorenz admitted that all of the physical examinations he performed on the Petitioner after the hardware removal were normal. (P5, p.14) Dr. Lorenz also admitted that the MRI that was performed after the hardware removal was normal; he stated that the MRI showed some mild degenerative changes, but they were of no consequence. (P5, p.15) The straight leg raising tests performed were normal. (P5, p.15) Her strength was normal. (P5, p.15) She was neurologically fine. (P5, p.15) The Petitioner complained of numbness and tingling on June 24, 2013; Dr. Lorenz testified that he did not find any objective basis to support this claim. (P5, p.15)

Petitioner was evaluated by Dr. Steven Mather of M&M Orthopedics, on January 13, 2014 at the request of the Respondent for a repeat Independent Medical Examination. Dr. Mather testified via evidence deposition on July 11, 2014. Dr. Mather reviewed all of the petitioner's medical records and diagnostic films. To Dr. Mather the Petitioner stated that she did not get any relief from the fusion surgery, and that her left leg was more numb after the surgery. She also told Dr. Mather that her left leg was weak and that she could barely walk. Dr. Mather performed a physical examination. He noted that the diffuse tenderness she complained of across the lumbar region of her spine was nonphysiologic. Dr. Mather noted several positive Waddell findings. Dr. Mather noted that her reflexes were normal. Dr. Mather testified that the petitioner was magnifying symptoms; that she was malingering. Dr. Mather stated a diagnosis of status post L5-S1 fusion and hardware removal with significant functional overlay. Dr. Mather opined that the petitioner did not sustain any permanent disability as a result of the accident of July 21, 2006. Dr. Mather was of the opinion that the petitioner could return to work with a forty-pound lifting restriction. These opinions were based on several reasons: The only findings the petitioner had on MRI were age-appropriate degeneration at L5-S1; if this was the cause of her pain, the L5-S1 fusion would have provided her with excellent relief, which, per the petitioner, it did not. If she had hardware pain, its removal would have provided her with relief, which it did not. Thus, Dr. Mather opined that the petitioner's original pathology was not L5-S1. In addition, the petitioner had several nonorganic pain findings and she demonstrated these on each examination performed. Thus, Dr. Mather concluded the petitioner's complaints cannot be taken at face value.

Petitioner testified at hearing that she was granted social security disability benefits and continues to receive those benefits. Other than her low back condition, she is not under treatment for any other conditions of ill-

being. She has low back pain often and experiences numbness and loss of feeling in her legs. She testified that she is on pain medications including Morphine which she receives from a pain management doctor that she sought out on her own for care.

She testified that she did apply for jobs prior to her surgery but has not applied for any jobs within the past two years. It is her understanding that she was only released to work two hours per day. She testified that when she left her employment with Menards they had offered her work but they were not honoring her restrictions and were having her do activities which she was unable to do.

The parties stipulated at hearing that Respondent would resolve any underpayment of temporary total disability and would resolve the unpaid anesthesia bill without the necessity of an award on either of the issues.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. This findings is based on both the "law of the case" and the fact that there was no evidence of any intervening incident or condition that could have broken the causation chain. Under the "law of the case," this Arbitrator is bound by the prior decisions in this case in which the issue of causation has already been resolved in favor of the Petitioner. There was no evidence presented to suggest the Petitioner's condition is due to anything other than her original work accident. Therefore, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her July 21, 2006 accident.
2. Regarding the issue of the nature and extent of the Petitioner's injuries, the Arbitrator finds that the Petitioner has sustained injuries resulting in 40% loss of use of the person as a whole. In support of this finding, the Arbitrator relies on the medical evidence, which show that the Petitioner sustained a back injury requiring her to undergo surgery involving an L5-S1 fusion. Petitioner underwent a subsequent surgery to remove the hardware in her spine. The medical evidence shows that her objective tests were normal, despite Petitioner's continued complaints of pain. Petitioner's normal medical findings are at odds with her current complaints, as both Dr. Mather and Dr. Lorenz could not pinpoint an explanation for these complaints. It is also difficult to reconcile these normal findings with the limitations set forth in the FCE, which indicates Petitioner cannot work more than 2 hours per day. The evidence appears to indicate that the Petitioner is no longer working for Respondent in order to take care of her three small children, and that the Petitioner is currently on social security disability. It is more likely that these additional factors are why the Petitioner has not sought employment in the last 2 years. Despite the questions regarding the Petitioner's credibility, the Arbitrator finds that she is still entitled to permanency as indicated above.