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17 IWCC 0461

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STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

Before the Illinois Workers'
Compensation Commission

LAWRENCE WILLIAMS,

Petitioner,

vs.

NO: 11 WC 34038
11 WC 37451
17 IWCC 0461

ILLINOIS CEMENT COMPANY, LLC,

Respondent.

ORDER

This cause comes before the Commission pursuant to Respondent's Motion to to Recall pursuant to Section 19(f) of the Act. The Commission grants Respondent's 19(f) Motion and hereby recalls its Decision and Opinion on Review dated July 20, 2017 due to a clerical error contained therein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated July 20, 2017, is hereby recalled pursuant to Section 19(f) of the Act and a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order. The parties should return their original Decision to Commissioner Michael J. Brennan.

Dated: **AUG 10 2017**



Michael J. Brennan

MJB/tdm
8-4-17
052

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

<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="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWRENCE WILLIAMS,

Petitioner,

vs.

NO: 11 WC 34038
11 WC 37451

ILLINOIS CEMENT COMPANY, LLC.,

Respondent.

CORRECTED DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of LaSalle County. Per the remand order dated October 4, 2016, Judge Joseph Hettel reversed the Commission's March 9, 2015 Decision. Judge Hettel found the Commission's Decision finding that Petitioner, Lawrence Williams, failed to prove an accident on May 9, 2011 and that he failed to prove that a causal connection existed between the accident and his cervical condition was against the manifest weight of the evidence. The matter was remanded to the Commission for further findings of fact on the issues of temporary total disability (TTD), maintenance, the reasonableness and necessity of the medical expenses, the nature and extent of the disability, whether Petitioner established that he was entitled to an odd lot permanent and total disability award, and whether penalties and attorney's fees are appropriate.

Procedurally, Williams filed two Applications for Adjustment of Claim. The first, case number 11 WC 37451, alleged a date of accident on July 29, 2010. The second, case number 11 WC 34038, alleged a date of accident on May 9, 2011. The matters were consolidated for trial before Arbitrator Granada on May 28, 2014. The Arbitrator found that Petitioner's condition was, in part, causally related to the June 29, 2010 accident. He further found that Petitioner failed

to prove an accident arising out of and in the course of his employment on May 9, 2011 and that his cervical condition was not casually related to the alleged May 9, 2011 incident. The Arbitrator denied Petitioner's claim for TTD and maintenance relative to the May 9, 2011 claim. The Arbitrator awarded medical expenses relative to the left elbow epicondylitis stemming from the July 29, 2010 accident only and denied medical expenses related to the cervical condition. Petitioner was awarded 10% loss of use of the left arm as a result of the July 29, 2010 accident.

Both parties filed a Petition for Review to the Commission. The Commission affirmed and adopted the Decision of the Arbitrator on March 9, 2015.

The Petitioner appealed to the Circuit Court. A hearing was held before Judge Hettel on August 25, 2016, and a record of same was made. During the hearing, the Judge noted there was no question in his mind that there was an accident on May 9, 2011. Judge Hettel noted that while there was some discrepancy as to when the accident actually happened, he was convinced that it did happen. The Judge noted that Williams reported the accident on June 20, 2011 and his version of the accident was consistent with his witness' testimony. The Judge took issue with Respondent's expert noting that Dr. Kern Singh originally found causal connection on November 1, 2011 and only after prompting by Respondent found no causal connection.

The Court noted that the May 9, 2011 injury caused Petitioner's particular complaints. The Judge noted that Dr. Kube related Williams' condition to the alleged May 9, 2011 accident. Dr. Singh, Respondent's expert, initially made similar findings. It was Judge Hettel's opinion that there was enough evidence for Petitioner to overcome the manifest weight of the evidence standard. Therefore, the matter was remanded to the Commission to address all issues, and comment on the so called independent witness.

The Circuit Court initially issued a Remand Order from the bench, by a scant minute Order. The Order was to be supplemented by the transcript of the Court's comments from the bench. That Remand Order was entered August 25, 2016.

Thereafter, Judge Hettel held a telephone conference with the parties on September 22, 2016 resulting in a second Order dated October 4, 2016. The Judge noted that he retained jurisdiction, and amended, amplified and clarified his August 25, 2016 Order. Specifically, Judge Hettel, by his new written Order, dated October 4, 2016, reversed and remanded the matter back to the Commission noting that the Commission's finding that Petitioner failed to prove an accident and causal connection between his cervical condition and the May 9, 2011 accident was against the manifest weight of the evidence.

Though the Commission is of the belief that Petitioner failed to prove that an accident occurred on May 9, 2011 or that Petitioner sustained an injury to his cervical spine on any alleged date, it now must set aside its prior findings and conclusions. Based upon the directive from the Circuit Court, the Commission is required to find that Williams sustained an accident

arising out of and in the course of his employment on May 9, 2011 and that his cervical condition is causally related to said accident.

The Commission finds that Petitioner reached maximum medical improvement (MMI) as of January 8, 2013 and failed to prove that he is permanently and totally disabled. The Commission awards TTD benefits through January 8, 2013. The Commission finds that Williams sustained 25% loss of use of the man-as-a-whole. The Commission denies Petitioner's request for penalties and attorney's fees. In support thereof, the Commission, for reasons stated below, finds the Petitioner not credible and finds the opinion of Dr. Singh persuasive.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Lawrence Williams testified that he has a high school education and has 23 years of experience in quality control. He began working as a quarry truck driver for the Illinois Cement Company on November 26, 2001. He would drive between the plant and quarry. T.1427. He stated that there are a lot of ruts in the quarry, which would cause his truck to vibrate. *Id.* According to the job task sheet for a quarry driver, drivers were responsible for checking the vehicle's condition. It also noted that the quarry floor could be rough due to weather related conditions. PX.5.
2. On July 29, 2010, Williams tripped and fell landing on his outstretched left arm. T.1428.
3. Williams underwent a Section 12 examination with Dr. Eric Ortinau on January 14, 2011. Dr. Ortinau noted that Williams' left elbow complaints were related to his July 2010 accident. In the narrative from the insurance company to the doctor, they noted Williams was a ranch hand at the Cedar Creek Ranch and they did not think that Williams would delve into that information. The insurance company noted that Williams was listed as a ranch hand on the Ranch's website. PX.10.
4. Williams underwent an MRI of the left elbow on January 24, 2011 at Illinois Valley Community Hospital that revealed lateral epicondylitis. PX.14.
5. Petitioner underwent a Section 12 examination with Dr. John Fernandez of Midwest Orthopaedics Hand and Shoulder Center on February 15, 2011. It was noted that Williams worked as a part-time ranch hand for Cedar Creek Ranch. Dr. Fernandez diagnosed Petitioner with left elbow lateral epicondylitis. He noted there were no problems with Williams' arm prior to the July 21, 2010 incident and, as such, this incident was either completely related to or it aggravated the lateral epicondylitis. Williams could work but should restrict significant repetitive activities and use under

20 pounds of force. His condition was not permanent and would go away. Dr. Fernandez recommended two cortisone injections. PX.22.

6. According to the City Center Physical Therapy report dated March 17, 2011, Williams reported some intermittent tingling in his left forearm and hand which had been present for 4 to 5 days. It extended from his elbow down to his hand and his forearm felt heavy. PX.21.
7. Williams was treated by Dr. Robert Mitchell of Illinois Valley Orthopedics on March 24, 2011 for his left elbow pain. He had made excellent progress with occupational therapy. There was no complaint of neck or spine pain. He did, however, complain of occasional numbness and tingling in his whole hand. The heaviness of his upper extremity had decreased. No issues were detected with his musculoskeletal and neurological review of systems. The physical examination revealed that Williams was neurovascularly intact to his left upper extremity. He had full active and passive range of motion of his shoulder. He had no tenderness over the lateral epicondyle. He could return to regular work. The assessment was resolving left lateral epicondylitis. It was explained to Williams that it was possible for his condition to return and he would require another injection. He was to continue with anti-inflammatories. PX.23.
8. Williams alleged that on May 9, 2011, he was shoveling material onto a conveyor when his elbow began to swell and he had pain up into his neck and down into his fingers. He stated the incident aggravated everything. T.1433. He continued to work. Williams stated that he contacted Dr. Mitchell, but could not get an appointment until July 19, 2011, or until 70 days later.
9. Mr. John Olson testified that he worked with Williams on May 9, 2011. He stated that Williams was shoveling heavy, wet clinker material from the lower pit onto a conveyor belt at shoulder height when he experienced a shocking pain to his left arm. PX.45. pg.929. He could see Williams was in pain. *Id.* Mr. Olsen testified that Williams slipped and fell on snow at work a few weeks prior to the May incident, but did not make any physical complaints. PX.45. pg.933.
10. Williams testified that he was off work for vacation from May 31, 2011 to June 12, 2011. T.1434.
11. Williams presented to Dr. Mitchell on June 28, 2011 for recheck of his left elbow pain. It was noted that Williams had returned to regular duty. It was further noted that on May 11, 2011, Williams was shoveling and when he lifted the shovel, which was rather heavy, up high to his head, he felt a burning sensation to his lateral epicondyle. He had pain with soreness and swelling. He tried taking Lodine for 2 weeks without relief. Review of his systems revealed no aching muscles or joints, no back pain,

swollen joints, headaches, dizziness, or numbness. The examination revealed full active and passive range of motion of his shoulder. He had tenderness over the lateral epicondyle with palpation with a small amount of swelling. He had pain with resistance to wrist extension and supination over the lateral epicondyle. He had a negative Phalen's sign, a positive median nerve compression test, and positive Tinel's in the median nerve distribution. There was no numbness in the ulnar nerve distribution. The assessment was left elbow lateral epicondylitis. He was given work restrictions and an injection into the left elbow. PX.23.

12. On July 19, 2011, Williams reported some improvement in his left elbow since his injection. However, he had continued numbness and tingling to his left upper extremity. He was able to drive but noticed numbness after a while, even with sitting. His pain was 7 to 8 out of 10. He would experience a sharp burning pain continuing to his left elbow with numbness that would shoot down to his finger when he lifted his arm. There were no issues detected with his neurological and musculoskeletal review of systems. Examination revealed that he was neurovascularly intact to his left upper extremity. He had minimal tenderness over the lateral and medial epicondyle. He had a positive Tinel's at the medial epicondyle and at the median nerve distribution of the carpal tunnel. He had a negative Phalen's. He had full supination and pronation, and no pain with flexion and extension. An EMG was recommended. The assessment was left elbow lateral epicondylitis. PX.23.
13. Williams underwent an EMG with Dr. Thomas Szyrnke on August 4, 2011. The EMG revealed double crush of the left upper extremity, mild left carpal tunnel syndrome, and left C7 radiculopathy. There was some slowing of the ulnar nerve through the left cubital tunnel. PX.23.
14. On August 11, 2011, Dr. Mitchell reviewed the August 4, 2011 EMG and recommended an MRI of the left upper extremity. He also referred Williams to Dr. Richard Kube. Petitioner complained of paresthesias in the left upper extremity and radiating pain from his shoulder and neck. Examination revealed a positive Tinel's, Phalen's, and median nerve compression testing on the left. He had a negative Tinel's at the elbow and a questionable Spurlings maneuver. A referral to a spine surgeon was recommended. PX.23
15. Williams underwent an MRI of the cervical spine on August 25, 2011 at Illinois Valley Community Hospital. The MRI revealed a central disc bulge at C3-C4 that caused central canal and mild neural foraminal narrowing. At C5-C6, there was a central disc bulge and endplate osteophyte formation that contacted and deformed the cord. At C6-C7, there was an asymmetric disc bulge to the left that caused some central canal and left neural foraminal narrowing. PX.14.

16. Williams was seen by Dr. Richard Kube on August 30, 2011. Per the "new patient: cervical spine" form, Williams indicated that his chief complaint was neck pain and arm pain with numbness. He also indicated back pain. He indicated that his problem had been present for 13 months and was recently worsened over the last 3 to 4 months. The initiating factor was a fall on his extended left arm. Dr. Kube noted that Williams originally had an event where he fell on his outstretched hand resulting in hand numbness and tingling. His symptoms improved a little bit with respect to the elbow pain after the injection. The hand numbness and tingling continued.
17. Dr. Kube noted Williams then had a secondary event 6 months ago when he was shoveling loads from the ground to over his head. He experienced a shock and burn sensation down the left arm. His elbow pain returned and the numbness and tingling increased. He had some pain shooting up from the hand to the elbow at that time. Per the record, "this has gone on since despite some non-operative intervention, but predominately not a lot of it happening since that secondary moment." Examination of the neck revealed decreased extension. Dr. Kube diagnosed Petitioner with cervicgia, degenerative disc disease, spinal stenosis and brachial neuritis.
18. Dr. Kube provided Petitioner with restrictions consisting of sedentary work activities, lifting up to 10 pounds only, no overhead work or floor to waist lifting, rare bending and twisting, no prolonged sitting or standing position, and no vibration. Dr. Kube noted that the imaging studies of the cervical spine revealed some loss of disc height at C5-C6 with some cervical spondylolysis and mild foraminal stenosis to moderate foraminal stenosis. Dr. Kube noted that the MRI revealed significant stenosis at C5-C6 and C3-C4. An annular tear at C5-C6 and the anterior/posterior canal diameter was only 8mm which was frank canal stenosis as the spinal cord should occupy 10 mm. PX.26.
19. Williams underwent a Section 12 examination with Dr. Kern Singh on December 1, 2011. Williams complained of neck pain that was a 2 to 9 out of 10. His pain travelled to his left upper extremity and into his index finger and thumb. He had not worked since August 22, 2011. His pain was increased with sitting and standing, and decreased with laying down. He was able to sit, stand and walk indefinitely. Examination revealed a positive Spurling's maneuver on the left. Dr. Singh reviewed the August 25, 2011 MRI and noted that it revealed a degenerative disc osteophyte complex at C5-C6, and left greater than right foraminal narrowing at C5-C6 and C6-C7. The EMG revealed left sided C7 radiculopathy, mild left carpal tunnel and a suggestion of double crush syndrome.
20. Dr. Singh diagnosed Williams with degenerative disc disease at C5-C6 and C6-C7. Dr. Singh opined Williams sustained an aggravation of an underlying degenerative cervical condition resulting in upper extremity radiculopathy. Dr. Singh provided

Williams with light duty work restrictions. It was Dr. Singh's opinion that Williams' symptoms were emanating from his cervical spine at C5-C6 and C6-C7. He did not believe Williams was suffering from median nerve compression. Williams' symptoms could be explained by his C5-C6 and C6-C7 nerve root irritation. Dr. Singh noted that the C5-C6 nerve root also formed the median nerve in the distal extremity, which would explain Williams' carpal tunnel syndrome. An anterior cervical discectomy and fusion at C5-C6 and C6-C7 was recommended and was related to his work injury. RX.1.

21. Dr. Singh authored an addendum on December 19, 2011 following his review of the records from Dr. Ortinou, Dr. Mitchell and Dr. Fernandez, and his re-review of the August 25, 2011 MRI. Based on his review of those medical records, Dr. Singh found no evidence to suggest Williams' symptoms occurred prior to July 19, 2011. Given the delay in the symptoms, his condition was related to his degenerative condition and not aggravated by his work injury. Dr. Singh noted that the MRI revealed degenerative changes. Given the long gaps in treatment, it appeared there was no causal connection between Williams' current symptoms and his need for surgical intervention relative to his cervical spine and his July 29, 2010 and May 11, 2011 accident. RX.1
22. Dr. Mark Lorenz performed a C5-C6 anterior cervical fusion on March 20, 2012. There was a central disk herniation significantly compressing the thecal sac that was removed.
23. According to the Medical Examination report for Commercial Driver Fitness Determination dated August 8, 2012, Williams did not meet the standards for his license. Williams reported that he had lifting restrictions of 25 pounds maximum, no overhead lifting, a 6 hour work day, he could drive a truck, but no shoveling or jack hammer work.
24. Williams underwent an FCE on August 24, 2012 that was performed by Lucas Schultz at ATI Physical Therapy. Williams was capable of working in the medium demand level and could lift 63 pounds occasionally from the floor to the chair and 43 pounds above shoulders bilaterally. Williams met the level for his job duties as a truck driver. PX.31.
25. Williams testified that he advised the CDL office that he had a 25 pound lifting restriction. T.1490. After learning of the FCE restrictions, however, he never went back to the CDL office to get his CDL approved so that he could return to work as a truck driver. T.1493.

26. Williams underwent a Commercial Driver Fitness Determination on September 12, 2012. It was noted that Williams was released per the FCE. Williams met the standards, but required periodic monitoring. He was qualified for 1 year only.
27. On November 12, 2012, Williams presented to Illinois Valley Community Hospital complaining of neck pain with exacerbation as the result of quarry driving. He began driving around November 6, 2012 or November 7, 2012. His pain radiated to his left arm. Williams was provided with added restrictions of no quarry driving plus the permanent restrictions per the FCE. PX.14.
28. On November 27, 2012, Dr. Lorenz stated Williams could return to modified work on November 27, 2012 with no lifting greater than 30 pounds occasionally, no vibrational exposure, and no shoveling. PX.14.
29. Dr. Singh authored another addendum on "January 8, 2012" indicating Williams met his job demand per the FCE and could return to work without restriction. He was unsure as to the treating physician's arbitrary restrictions as they did not correlate with the FCE that revealed a full and valid effort was given. RX.2. The Commission notes that the date of January 8, 2012 is an obvious error as all the records referred to by Dr. Singh in his report are dated after January 8, 2012. The date of the report should be January 8, 2013.
30. On April 25, 2013, Dr. Mitchell authored a letter to "Whom It May Concern." He noted Williams was diagnosed with double crush syndrome, mild carpal tunnel, and left C7 radiculopathy. His C7 radiculopathy was related to this May 11, 2011 accident. PX.23.
31. Vocational expert, Mr. Bob Hammond prepared a vocational report on June 20, 2013 at the request of Petitioner's attorney. He opined that Williams could work at the minimum wage level, but he would likely not be hired. PX.32.
32. Vocational expert, Ms. Natalie Maurin conducted a vocational rehabilitation review and labor market survey on December 30, 2013 at the request of the Respondent. Based on Dr. Singh's restrictions, Williams was employable at an entry level wage of \$12.58 per hour and \$17.35 per hour if he targeted so-called no touch positions. He could earn more with advancement. RX.10.
33. Williams submitted his job log showing that he applied for numerous jobs, the vast majority of which were not hiring. See PX.37. He testified that he applied for work at approximately 200 places of employment, and has not received a job offer. Williams testified that he is ready, willing and available for work. T.1442.

34. Williams testified that he experiences some tingling and pain in his arm that will shoot to his neck and down his arm. T.1446. He cannot do all the things he used to be able to do. *Id.* He stated that driving in the quarry causes him pain. T.1505. He avoids activities that cause vibration or bouncing. T.1505.
35. On cross-examination, Williams stated that he did not have any neck complaints following the first injury. T.1449. He stated that the shoveling incident made his neck worse. T.1452. He was previously diagnosed with chronic back pain on September 5, 2006, nearly four years prior to the alleged accidents.
36. Williams testified that his son owns the Cedar Creek Ranch, which has a Kawasaki ATV. He does not now ride on the ATV for more than 10 minutes at one time. It does not cause vibration to the extent of the quarry truck and does not cause an increase in his pain complaints. T.1507. While on an ATV, he travels gradually over ditches. *Id.* It is not the same jostling he experiences while driving in the quarry truck. It is gentle. T.1508. He has ridden on the ATV 10 times in 2014. He usually gets a ride on the ATV across the creek so he can walk for exercise. T.1513.
37. Williams also testified that he renewed the license for his 16 foot silver craft boat in April 2012. He stated that riding in a boat does not bother his neck. T.1510. The vibration and movement is not as serious as what he experiences while driving the quarry truck. *Id.* He does not go across waves and fishes in a gate locked lake community only. T.1511. He is, however, able to drop off and load the boat at the dock. *Id.*
38. Williams testified that he assists his son at the Cedar Creek Ranch. He painted a 120 foot by 10 foot section of decking, which took 10 hours over several days. T.1515.
39. Mr. Rick Struglinski was deposed on May 7, 2014 and is employed by Illinois Cement. RX.12. He saw Williams on a ladder painting a wood beam at the Gunsmoke Bar. RX.12. pg.1407.
40. On cross-examination, he stated that Williams was lifting a paintbrush only. RX.12. pg.1408. He did not observe Williams driving a vibrating vehicle. *Id.* He was not aware of Williams' medical restrictions. RX.12. pg.1409.
41. Dr. Mitchell is board certified in orthopedic surgery and was deposed January 29, 2014. PX.24. Dr. Mitchell thought Williams had some underlying radiculopathy in the cervical spine, which was work-related. PX.24. pg.421. He opined Williams had work-related injuries consisting of lateral epicondylitis, mild carpal tunnel syndrome, cubital tunnel syndrome, and double crush syndrome. PX.24. pg.432.

42. Dr. Mitchell opined that the May 11, 2011 injury contributed to the progression of Williams' already underlying problems for which he had sought treatment. PX.24. pg.437. He stated that the cubital and carpal tunnel, and lateral epicondylitis were caused by the first accident. He would defer to Dr. Kube regarding the cervical issues. PX.24. pg.438. However, the cervical condition could have been aggravated by the second accident.
43. On cross-examination, Dr. Mitchell stated that his treatment prior to May 9, 2011 did not reveal any cervical spine issues serious enough to warrant treatment. PX.24. pg.449. He did not see any definitive signs of cervical radiculopathy during his first visit following the May 9, 2011 incident. As of April 11, 2013, he was of the opinion Williams could work full-duty. PX.24. pg.450. Dr. Mitchell stated that the mild cubital and carpal tunnel would resolve with anti-inflammatory medication. Williams did not sustain any permanent impairment or permanent loss of function as a result of the cubital tunnel, carpal tunnel, or epicondylitis. PX.24. pg.453. But for the Order of the Circuit Court, the Commission would have considered Williams at MMI as of the date of Dr. Mitchell's comments.
44. Dr. Kube is board certified in spine surgery, orthopedic surgery and independent medical examinations, and was deposed March 9, 2012. PX.27.pg.560. He diagnosed Williams with neck pain along with degenerative disc disease, spinal stenosis, and radiculopathy. There was some indication of double crush syndrome and carpal tunnel.
45. Dr. Kube stated that the May 2011 event aggravated his underlying cervical stenosis and led to radicular pain that Williams continues to experience. The radiculopathy was diagnosed on the EMG. PX.27. pg.571. This event caused the need for the surgery. PX.27. pg.572.
46. On cross-examination, Dr. Kube stated that if there was an absence of complaints after the May 11, 2011 accident for a significant period of time, it would cause him to question that portion of his opinion. PX.27. pg.580. Dr. Kube formed his opinion based on the history Williams provided to him. PX.27. pg. 581. Dr. Kube testified that he did not review any records from Rezin Orthopedic Group from December 2010 through his visit in August 2011. PX.27. pg.576. He had no records of contemporaneous complaints from March 1, 2011 through May 10, 2011. PX.27. pg.577.
47. Dr. Lorenz is board certified in orthopedics and was deposed September 24, 2012. PX.30. He performed a surgery upon Williams on March 20, 2012. Williams had a C5-C6 disk herniation with myelomalacia. The surgery revealed a disk herniation that was primarily central at C5-C6 with some fairly significant indentation of the cord.

- There was also some stenosis in the foramen on that side, in part spur, and in part disk. PX.30. pg.682. Postoperatively, the shoulder pain was gone as was the numbness and pain going down the left arm. *Id.* Williams had some mild neck aches more toward the right, which were not present prior to surgery. Dr. Lorenz returned Williams back to light duty work on July 9, 2012 and limited his exposure to vibration in addition to the FCE restrictions. The restrictions were permanent.
48. Dr. Lorenz opined there was a causal connection between the accident, his condition, and the need for surgery. His epicondylitis was primarily due to a diskogenic issue in the cervical spine and the fall was a competent cause for the disk herniation. PX.30. pg.689. He stated that the May 2011 event was causally related to his cervical condition. *Id.* The disk herniation was directly related to the fall and the underlying degenerative disk disease was aggravated by the fall. PX.30. pg.691.
 49. On cross-examination, Dr. Lorenz stated that he was unaware of the May 2011 shoveling incident. T.693. He noted the FCE indicated Williams could perform truck driving duties. Dr. Lorenz stated that he never saw a job description for Williams' job duties. T.700.
 50. Dr. Singh is board certified and was deposed May 31, 2012. He diagnosed Williams with degenerative disc disease at C5-C6 and C6-C7. He opined that Williams sustained an aggravation of his underlying degenerative cervical condition that resulted in upper extremity radiculopathy. RX.1. pg.960. He recommended an anterior cervical discectomy and fusion at C5-C6 and C6-C7.
 51. Dr. Singh authored a report on December 19, 2011 after reviewing additional medical records. Those records affected his opinion in that there was a gap between Williams' complaint of neck and upper arm pain. His original opinion changed as Williams' complaints did not begin until July 2011. RX.1. pg.962.
 52. In regards to the first accident on July 29, 2010, Williams did not have complaints consistent with radiculopathy, and was diagnosed with lateral epicondylitis. RX.1. pg.963. Regarding the May 2011 accident, in light of Williams' delay in seeking treatment for his arm symptoms and his radicular complaints, Dr. Singh found no causal connection. Williams' complaints were related to his underlying degenerative discogenic condition. RX.1. pg.964. His condition was not aggravated by his work accident. Dr. Singh stated that he would have expected complaints to begin within 2 to 6 weeks after the event. The first neck symptoms were not reported to Dr. Mitchell until June 28, 2011, or approximately one year later. RX.1. pg.965.
 53. On cross-examination, Dr. Singh noted that left arm pain can be a symptom of left radiculopathy. If Williams had numbness, tingling, or pain in his left arm and neck

pain following the alleged second accident, those findings would be consistent with an accident, depending on the timing of the symptoms. RX.1. pg.970. If, however, Williams had left trapezius pain and paresthesia in the left hand shortly after the work accident, that likewise could affect Singh's opinion. RX.1. pg.973.

54. Mr. Hammond was deposed November 1, 2013. He contacted some of the places where Williams stated he applied for work, and they confirmed that Williams did apply for a position. PX.33. pg.764. However, they could not accommodate his restrictions. Hammond opined Williams could not go back to work as a truck driver due to the vibration. He was a semi-skilled worker that could read and maintain logs. PX.33. pg.767. He had no computer experience and was 70 years old. The vocational guidelines state that training and education is not something to be utilized with somebody over 60 years of age. Williams did not have any transferrable skills based on his age, education and experience. PX.33. pg.773. While Williams could work, he would not find a job. Williams would earn between \$8.35 and \$9.00 per hour. PX.33. pg.776. Williams sustained a significant loss of earnings. PX.33. pg.778.
55. Ms. Natalie Maurin is a certified rehabilitation counselor and was deposed February 7, 2014. She completed a labor market survey and noted Williams had a strong work history. She focused on the restrictions placed by Dr. Singh per the FCE. RX.10. pg.1319. Williams' restrictions met the job requirements at Illinois Cement. Williams would have been able to return to his prior position. RX.10. pg.1320. Maurin opined Williams was employable in the truck driving industry. RX.10. pg.1322. Based on the labor market survey, Williams was capable of earning \$12.85 per hour and \$17.35 for no touch driving. He could command a wage in excess of those minimum wages based on his experience. His age would present an obstacle to his hire. RX.10. pg.1335. However, Williams would have an advantage over a younger applicant with less experience. RX.10. pg.1336.
56. On cross-examination, Maurin stated that she was not provided with a job description. She did not know what the road conditions were in the quarry. She was not provided with a copy of Dr. Lorenz' work restrictions imposed on Williams. RX.10. pg.1345. Exposure to vibrations would be relevant in her consideration as to whether a person has the ability to be a truck driver. *Id.* She was not given any information that Illinois Valley Community Occupational Clinic would not certify his DOT certificate to continue his CDL license. RX.10. pg.1359.

Based upon the totality of the record, the Commission finds petitioner lacks credibility. The Commission further finds the opinion of Dr. Singh persuasive and finds that Williams reached MMI as of January 8, 2013. Williams further failed to prove that he is permanently and totally disabled. The Commission awards Williams 25% loss of use of the man-as-a-whole.

In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

The Commission finds that Petitioner is not credible. His actions run counter to his alleged disability such that the Commission has serious doubts as to the significance of his alleged disability and his inability to find work.

Following the May 9, 2011 accident, Williams continued to work and then went on vacation from May 31, 2011 through June 12, 2011. While Williams' ability to continue to work has no impact on its credibility determination, the Commission is troubled by the fact that he went on a two week vacation. When he received treatment following his vacation, there was no mention of the May 9, 2011 accident or any complaints relative to his neck. Rather, his complaints were strikingly similar to his complaints made prior to May 9, 2011.

It was not until Williams saw Dr. Kube on August 30, 2011 that he finally mentioned the May 9, 2011 incident. That record, however, indicated that Williams had neck pain, among other issues, and numbness and tingling for 13 months. While he did report an increase 3 months prior, the record further indicated that while this has "gone on since despite some non-operative intervention, predominately not a lot of it has gone on since the secondary moment." By the record, the Commission notes that Williams' symptoms pre-dated the May 9, 2011 accident. The Commission is left to speculate as to whether the alleged May 9, 2011 accident caused a temporary aggravation to Williams pre-existing condition, or whether some other event after the alleged accident truly aggravated his condition.

Thereafter, Williams underwent a C5-C6 anterior cervical fusion on March 20, 2012. It was noted there was a central disc herniation significantly compressing the thecal sac, which was removed. Dr. Kube and Dr. Lorenz both opined that the surgery was causally related to the work accident. Based upon the directive from the Circuit Court resolving accident and causal connection in favor of Williams, the Commission finds that the fusion was causally related to the accident.

Subsequent to the fusion, the Commission is troubled by Williams' actions. On August 8, 2012, Williams underwent a Commercial Driver Fitness determination. He did not meet the standards for his license. Williams then underwent an FCE that was valid and revealed that he met the demands of his job as a truck driver. Williams then met the standards for his job duties per the Commercial Driver Fitness Determination. He returned to work for a few days in November 2012, but complained that driving aggravated his condition. Dr. Lorenz then provided restrictions of no lifting greater than 30 pounds, no vibration exposure and no shoveling. Dr. Singh then, on January 8, 2013, authored a report indicating that Williams could work without

restrictions as he was unsure as to the arbitrary restrictions from the treating physician as they did not correlate with the FCE.

The Commission is troubled by the admissions of Williams, which the Commission finds undercut the severity of his subjective complaints. Williams admitted that he rides an ATV. Per his testimony, he only rides the ATV for 10 minutes and it does not cause vibration to the extent of the quarry truck nor does it increase his pain complaints. He also only goes over ditches gradually.

Williams also testified that he renewed his 16 foot silver craft boat license in April 2012. Per his testimony, riding in the boat does not bother his neck as he does not go over waves and he fishes in a gate lock lake. He is also able to drop off and load the boat at the dock.

Williams further testified that he painted a 120 foot by 10 foot section of decking at his son's ranch. Furthermore, information provided by the insurance company indicated that Williams was listed as a ranch hand on his son's website for Cedar Creek Ranch.

The Commission is not persuaded by Williams' testimony that he is only able to perform the above events as they are relatively mild and do not cause him pain. The Commission finds it inconceivable that Williams is able to ride an ATV, load and unload his boat to go fishing, and paint as those events do not aggravate his condition, but he is unable to work as his work activities cause him too much pain. The Commission finds the above activities inconsistent with his claimed level of disability.

Based upon the Commission's belief that Williams' is not credible and the Commission's doubt as to Petitioner's claimed level of disability, the Commission finds the opinions of Dr. Lorenz and Dr. Kube not persuasive. There is no indication in the medical records that Williams informed his doctors that he was able to ride an ATV without issue, or trailer and unload his boat to go fishing, or that he was capable of painting. As Dr. Kube and Dr. Lorenz did not have an accurate understanding of Williams' true level of disability, the Commission finds their opinions not persuasive.

During his deposition, Dr. Kube admitted that his opinion was based largely on Williams' subjective statements. Dr. Kube testified that, if there was an absence of complaints after the accident, it would make him question his opinion. Dr. Kube also did not review all of the medical records. Additionally, Dr. Lorenz admitted that he did not review the job description for Williams and was not aware of the shoveling incident.

Without a complete understanding of Williams' activity level outside of work and what his job duties entail, the Commission is left with little option but to afford little weight to those opinions. Accordingly, the Commission finds the opinion of Dr. Singh more persuasive. Dr. Singh's opinion on January 8, 2013 was that Williams could work full-duty per the FCE. The FCE represented a valid effort on the part of Williams.

The Commission affords no weight to Williams' subjective testimony regarding his alleged neck pain and resulting restrictions when he attempted to return to work in November 2012 following the FCE. The Commission notes that Williams' neck pain is not bothered whatsoever during his recreational activities; however, when tasked with work activities by an employer, he suddenly experiences pain that precludes him from work.

Accordingly, the Commission finds Williams reached MMI as of January 8, 2013, the date of Dr. Singh's report. The Commission awards medical expenses through January 8, 2013 only.

A claimant is temporarily totally disabled from the time an injury incapacitates her from work until such time as she is as far recovered or restored as the permanent character of her injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 149 Ill. Dec. 253 (1990). The dispositive test is whether the claimant's condition has stabilized, *i.e.*, whether she has reached MMI. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759, 800 N.E.2d 819, 279 Ill. Dec. 531 (2003). In determining whether a claimant has reached MMI, a court may consider factors such as a release to return to work, and medical testimony or evidence concerning the claimant's injury, the extent thereof, and, most importantly, whether the injury has stabilized. *Mechanical Devices*, 344 Ill. App. 3d at 760. Once an injured claimant has reached MMI, the disabling condition has become permanent and she is no longer eligible for TTD benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118. The time during which a claimant is temporarily totally disabled presents a question of fact to be determined by the Commission, and the Commission's decision will not be upset on review unless it is against the manifest weight of the evidence. *Archer Daniels Midland Co.*, 138 Ill. 2d at 119-20.

Based upon Dr. Singh's finding that Williams was capable of working full-duty as of January 8, 2013, the Commission finds Williams is entitled to TTD through January 8, 2013 only.

An employee need not be reduced to complete physical incapacity to be entitled to PTD benefits. *Ceco Corp. v. Industrial Comm'n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 845, 69 Ill. Dec. 407 (1983). Instead, a PTD award is proper when the employee can make no contribution to industry sufficient to earn a wage. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544, 865 N.E.2d 342, 357, 310 Ill. Dec. 18 (2007). "The focus of the Commission's analysis must be upon the degree to which the claimant's medical disability impairs his employability." *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534, 668 N.E.2d 21, 24, 217 Ill. Dec. 836 (1996). A person is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life. *Interlake, Inc. v. Industrial Comm'n*, 86 Ill. 2d 168, 176, 427 N.E.2d 103, 107, 56 Ill. Dec. 23 (1981).

The Commission finds that Williams failed to prove that he is permanently and totally disabled. Based upon the opinion of Dr. Singh and relying upon the FCE, the Commission is of the opinion that Williams was capable of performing his work duties. The FCE revealed that Williams met the demands of his job duties as a quarry truck driver. Dr. Singh reviewed the valid

FCE and noted that Williams was capable of returning to work. The sole limitation to Williams' ability to work is his desire. The evidence establishes that Williams is in no way limited from enjoying his recreational activities of fishing and riding his ATV. His disability only impacts his ability to work. The Commission finds that his disability did not impair his employability as the FCE revealed he was capable of returning to work. Williams failed to prove that he is unable to work.

The odd-lot category for purposes of a PTD award arises when a "claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability." *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill. 2d 538, 546-47, 419 N.E.2d 1159, 1163, 50 Ill. Dec. 710 (1981). In these situations, the claimant can establish that he is entitled to PTD benefits under the "odd-lot" category by proving the unavailability of employment to persons in his circumstances. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 204, 904 N.E.2d 1122, 1133, 328 Ill. Dec. 612 (2009).

The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." *Westin Hotel*, 372 Ill. App. 3d at 544, 865 N.E.2d at 357. If the claimant establishes that he fits into the odd-lot category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id.*

The Commission finds that Williams failed to prove that he is permanently and totally disabled under the odd-lot theory. The Commission has reviewed the opinions from vocational expert Bob Hammond and Natalie Maurin. The Commission is not persuaded by the cursory review of the record and opinion of Mr. Hammond. Mr. Hammond finds Williams essentially unemployable based upon his age, education and skill level. The record reveals that Mr. Hammond provided no meaningful assistance to Williams other than providing the pre-determined opinion that Williams is unemployable.

The Commission does not believe that Williams put forth a diligent but unsuccessful job search. After reviewing the job search log, the Commission finds Williams' efforts not credible. The job search logs demonstrate that Williams applied for a number of jobs, knowing that the employers were not hiring. The logs also indicate that a number of employers could not accommodate the work restrictions imposed by Dr. Kube or Dr. Lorenz. The Commission finds the FCE restrictions and Dr. Singh's opinion relative to Petitioner's ability to work more persuasive than the restrictions from Dr. Lorenz and Dr. Kube.

Because of this, the Commission finds Williams failed to prove that because of his age, skills, training, and work history, he is not able to be regularly employed in a well-known branch of the labor market.

The Commission finds that Williams' sustained a 25% loss of use of the man-as-a-whole, pursuant to Section 8(d)(2) of the Act. As a result of the accident, Williams underwent a C5-C6 cervical fusion. As a result of the fusion, Williams underwent an FCE giving him permanent restrictions albeit restrictions that did not preclude him from his job duties as a quarry truck driver. Accordingly, the Commission finds Williams sustained a 25% loss of use of the man-as-a-whole.

The Commission declines to award penalties and attorneys' fees in this matter. The Respondent's defense of this matter was not unreasonable or vexatious as they had a good faith objection to liability based upon the opinions as stated by Dr. Singh and Williams' significant lack of credibility.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of \$735.05 per week for 80-3/7 weeks, commencing August 25, 2011 through January 8, 2013, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$661.54 per week for a period of 125 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 25% loss of use of the man-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses relating to the cervical spine through January 8, 2013 under §8(a) of the Act, and subject to the medical fee schedule.

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.

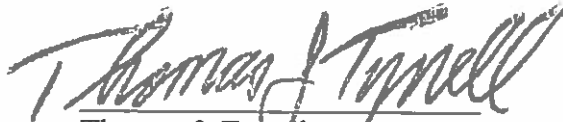
Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: **AUG 10 2017**

MJB/tdm
D: 5-22-17
052



Michael J. Brennan



Thomas J. Tyrell



Kevin W. Lamborn