

[illegible]

☐ Injured Workers' Benefit Fund (§4(d))

☐ Rate Adjustment Fund (§8(g))

☐ Second Injury Fund (§8(e)18)

☐ PTD/Fatal denied

☒ None of the above

James Wingerter,
Petitioner,

VS.

NO: 08 WC 41999

11IWCC0669

State of Illinois / Menard Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issue of penalties and fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

After considering the entire record, the Commission modifies the Decision of the Arbitrator. The Arbitrator awarded \$20,469.82 in penalties, representing 50% of certain unpaid medical expenses totaling \$40,939.64. The Arbitrator arrived at \$40,939.64 by adding the amounts due under the fee schedule (see bolded figure below) from the following three providers:

The Orthopedic Center for Dr. David M. Brown with a 6+ month past due balance in the amount of \$15,511.51, of which **\$11,788.75** remittance should have already been received pursuant to Section 8.2 of the Act in accordance with the fee schedule.

Timberlake Surgery Center with a 6+ month past due balance in the amount of \$36,911.70, of which **\$28,052.89** remittance should have already been received pursuant to Section 8.2 of the Act in accordance with the fee schedule.

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Premier Anesthesia with a 6+ month past due balance of \$1,445.00, of which **\$1,098.00** remittance should have already been received pursuant to Section 8.2 of the Act in accordance with the fee schedule.

The Arbitrator indicated he was awarding penalties and fees pursuant to both Section 19(k) and Section 19(l) but, based on his analysis and calculations, it is clear that he awarded only Section 19(k) penalties. The Arbitrator also awarded Section 16 attorney fees in the amount of \$8,187.93, representing 20% of \$40,939.64.

In support of his claim for penalties and fees, Petitioner offered a Petition for Penalties and Fees (PX 3). This Petition is not time-stamped but, at oral arguments, the parties agreed that the Petitioner was filed on or shortly before the arbitration hearing of May 12, 2009. Petitioner also offered copies of eleven letters his counsel sent to Respondent's counsel enclosing medical records and/or bills and making demands for payment.

In response to Petitioner's claim for penalties and fees, Respondent offered an undated affidavit of Sue Zellers, an adjuster at Respondent's Department of Central Services Management (CMS), along with a "Voucher Selection" print-out. Zellers' affidavit makes no specific reference to Petitioner's repetitive trauma claim, treatment or bills. Zellers simply attests that she is the adjuster handling "this file at this time." Zellers also attests that she has "conducted an extensive review of the file in all regards," that "no bills to providers are being denied" and that "bills are in the CMS system which are unpaid but approved for payment." Zellers goes on to attest that Respondent "is currently operating under great financial stress," that "all that is preventing payment is the availability of funds" and that CMS is paying interest on unpaid bills as required by Section 8.2(d) of the Act. The "Voucher Selection" print-out bears Petitioner's name and Social Security number but references a completely different date of accident: 7/24/08. The manifestation date in the instant case is August 11, 2008. The print-out lists a variety of providers and voucher amounts. The vouchers bear various dates running from March 13, 2009 through April 10, 2009. The print-out lists no actual voucher numbers. At oral arguments, Respondent's counsel explained to the Commission that only those vouchers bearing numbers represent actual payments. If a voucher lacks a corresponding number, the voucher simply represents an approved payment. Based on counsel's representations, the Commission interprets the print-out to show only approved, and not actual, payments.

The Arbitrator did not list any dates of service but indicated he was awarding penalties and fees only on amounts due per the fee schedule that had been outstanding for six or more months. The Commission notes, however, that the significant treatment in this case, i.e., the upper extremity surgeries of December 12, 2008 and January 9, 2009, took place five months or less before arbitration. Based on the record as a whole, and giving consideration to the time frame, Respondent's fiscal crisis and Respondent's progress in placing certain of Petitioner's bills in line for payment, the Commission elects to modify the Decision of the Arbitrator by awarding Section 19(k) penalties and Section 16 attorney fees only on the bills referenced in Petitioner's first two payment demand letters dated October 21, 2008 and December 23, 2008. These bills include Dr. Brown's bill in the amount of \$500.00 for treatment rendered on October 1, 2008 and bills in the amount of \$16,466.81 and \$172.51 relating to the surgeries Dr. Brown performed on December 12, 2008. These three bills total \$17,139.32. In the Commission's view, Respondent acted in an objectively unreasonable manner in failing to pay any amounts toward

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these bills prior to the arbitration hearing of May 12, 2009. As the Arbitrator noted, Respondent did not object to any of the bills Petitioner offered at arbitration (T.8). Accordingly, the Commission awards Petitioner Section 19(k) penalties in the amount of \$8,569.66, representing 50% of \$17,139.32, and Section 16 attorney fees in the amount of \$3,427.86, representing 20% of \$17,139.32.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 22, 2009 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$612.81 per week for a period of 172.95 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of Petitioner's right hand to the extent of 17.5%, the left hand to the extent of 17.5%, the right arm to the extent of 20% and the left arm to the extent of 20%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$81,767.57 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$8,569.66 in penalties pursuant to Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$3,427.86 in attorney fees pursuant to §16 of the Act.

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

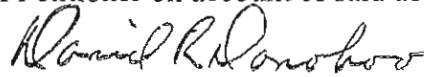
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: JUL 7 - 2011

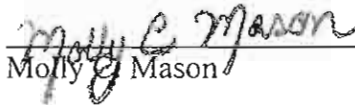
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Daniel R. Donohoo

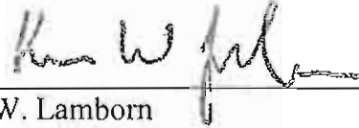


Molly C. Mason

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DISSENT

While I concur with the majority's holding that Arbitrator Dibble's findings did not award Section 19(l) penalties, I respectfully dissent from all other aspects of the majority's decision. I find no evidence of unreasonable or vexatious conduct within the meaning of Section 19(k) and as such would not award penalties under Section 19(k) or attorney fees under Section 16.

A handwritten signature in black ink, appearing to read "Kevin W. Lamborn", is written over a horizontal line.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WINGERTER, JAMES

Employee/Petitioner

Case# 08WC041999

SOI/ MENARD CORRECTIONAL CENTER

Employer/Respondent

11 IWCC041999

On 06/22/2009, 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 0.29% 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:

0969 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794

0557 ASSISTANT ATTORNEY GENERAL
BARRY WESLEY
1001 E MAIN ST BLDG #1
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601

0350 DEPARTMENT OF CORRECTIONS
WORKERS' COMPENSATION CLAIMS
301 CONCORDIA COURT
PO BOX 19277
SPRINGFIELD, IL 62794

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 22 2009



Bertha E. Parker
BERTHA E. PARKER, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)
COUNTY OF Franklin)

<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
ARBITRATION DECISION

James Wingerter
Employee/Petitioner

Case # 08 WC 41999

v.

Whittington

State of Illinois/Menard Correctional Center
Employer/Respondent

11IWCC0669

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 John Dibble, arbitrator of the Commission, in the city of Whittington, on 5/12/09. 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 the 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 the petitioner's employment by the respondent?
- D. ☐ What was the date of the accident?
- E. ☐ Was timely notice of the accident given to the respondent?
- F. ☐ Is the petitioner's present condition of ill-being causally related to the injury?
- G. ☐ What were the petitioner's earnings?
- H. ☐ What was the petitioner's age at the time of the accident?
- I. ☐ What was the petitioner's marital status at the time of the accident?
- J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?
- K. ☐ What amount of compensation is due for temporary total disability?
- L. ☒ What is the nature and extent of the injury?
- M. ☒ Should penalties or fees be imposed upon the respondent?
- N. ☐ Is the respondent due any credit?
- O. ☐ Other _____

FINDINGS

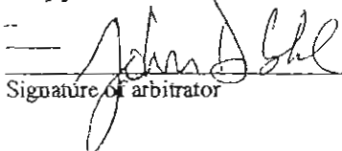
- On 8/11/08, the respondent State of IL/Menard C.C. was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
- On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident *was* given to the respondent.
- In the year preceding the injury, the petitioner earned \$ 53,110.00 ; the average weekly wage was \$ 1,021.35
- At the time of injury, the petitioner was 50 years of age, *single* with 0 children under 18.
- Necessary medical services *have not* been provided by the respondent.
- To date, \$ All TTD paid has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of \$ All TTD paid/week for 9 4/7 weeks, from 12/17/08 through 2/24/09, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of \$ 612.81/week for a further period of 172.95 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to the Petitioner's right hand in the amount of 17.5%, the left hand in the amount of 17.5%, the right arm in the amount of 20%, and the left arm in the amount of 20% .
- The respondent shall pay the petitioner compensation that has accrued from 8/11/08 through 5/12/09, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of \$ 81,767.57 for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay \$ 20,469.82 in penalties, as provided in Section 19(k) and 19(l) of the Act.
- The respondent shall pay \$ 8,187.93 in attorneys' fees, as provided in Section 16 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



 Signature of arbitrator

June 16, 2009
 Date

JUN 22 2009

FACTS

Petitioner has been a correctional officer for Respondent for 13 years. He gave a history to Dr. David Brown of repetitive, hand intensive work. The parties stipulated that Petitioner's job duties constituted an accidental injury within the meaning of the Illinois Workers Compensation Act.

While performing these activities, Petitioner gradually noticed the onset of bilateral wrist and elbow pain along with numbness, tingling, and loss of strength.

On August 11, 2008 he underwent Nerve Conduction Studies which were markedly positive. On October 1, 2008 he sought treatment from a hand specialist, Dr. David Brown who took the history of Petitioner's repetitive hand intensive activities at work. His examination showed positive orthopedic signs. Dr. Brown believed that petitioner had peripheral compression neuropathy and recommended further diagnostic studies. When Petitioner returned to see Dr. Brown on October 15, 2008, his examination was again positive and after reviewing the positive results of the new diagnostic studies, recommended surgery.

On December 12, 2008, Petitioner underwent a right ulnar nerve transposition and cubital tunnel release and had the same procedure done on the left side on January 9, 2009. Following surgery, Petitioner underwent a course of home exercises which improved his condition to the point where he was able to return to work.

Respondent did not have Petitioner examined.

At Arbitration, Petitioner credibly testified that he has noticed pain across his scarring when trying to grip items, he has difficulty attempting to golf and fish, takes

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DECISION

In support of the Arbitrator's Decision relating to "j" were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds that as a result of his repetitive hand intensive work activity, Petitioner developed bilateral carpal tunnel and cubital tunnel syndrome. This was shown on repeated examination and diagnostic workup. When splinting and medication did not help Petitioner's condition, Dr. Brown recommended surgery after which Petitioner improved significantly enough to be allowed to return to work.

Respondent did not have Petitioner examined.

Based on the foregoing, Respondent is ordered to pay the medical bills contained in Petitioner's group exhibit pursuant to Section 8.2, the medical fee schedule contained in the amendment to the Workers Compensation Act. Respondent shall have credit for any and all amounts previously paid.

In support of the Arbitrator's Decision relating to "I" what is the nature and extent of the injury, the Arbitrator finds that as a result of his repetitive hand intensive work activity, Petitioner developed bilateral carpal tunnel and cubital tunnel syndrome. While these were repaired surgically, Petitioner credibly testified that he has noticed pain across his scarring when trying to grip items, he has difficulty attempting to golf and fish, he takes over-the-counter medication for pain, and notices additional discomfort at the end of a shift. His pain is activity driven.

In support of the Arbitrator's Decision relating to "m" should penalties or fees be imposed upon the respondent, the Arbitrator has reviewed the bills contained in Petitioner's group exhibit and notes that there is no evidence of any payment on any bills by Respondent, although Petitioner's bills with Dr. Burrows and to physical therapy were submitted to his group health carrier.

This was one of twelve cases tried where Respondent has not paid large amounts of admittedly reasonable and causally connected bills. Section 19(k) of the Illinois Worker's Compensation Act authorizes a penalty of 50% of the amount payable at the time of an award before a "unreasonable or vexatious delay of payment or intentional underpayment of compensation," and also when "proceedings have been instituted or carried on which do not present a real controversy, but are merely frivolous or for delay." 820 ILCS 305/19(k). Imposition of these penalties is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. The following paragraph appears on page 5-53 of the Illinois Institute for Continuing Legal Education handbook on Worker's Compensation. (Section 5.58)

The following standards for assessment of 19(k) penalties have been articulated in numerous judicial and Commission decisions and are as follows:

1. The employer bears the burden of justifying the delay in benefit payment.
2. Assessment of penalties (and attorneys' fees) is not proper if an employer's nonpayment is based on a reasonable and good faith challenge to liability.
3. Reasonableness is the critical test or standard.
4. It is not good enough merely to assert an honest belief that the employee's claim is invalid or that the award is not supported by the evidence; an employer's belief is "honest" only if justified by the facts that a reasonable person in the employer's position would have."

The Arbitrator has reviewed the cases submitted by Respondent and has

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ascertained that its reason for nonpayment can be stated in two sentences.

“We don’t have the money to pay Petitioner’s admittedly compensable medical bills. We don’t know when we’re going to pay them.”

Respondent has unilaterally decided to place the burden of payment of medical expenses and the risks associated with non-payment on its employees. When an insurance company licensed to do business in the State of Illinois runs out of funds from which it pays its obligations under the Illinois Worker’s Compensation Act the Illinois Guarantee Fund steps in to make the Petitioners whole. Self insured’s like Respondent gain their self insured status through its promise to satisfy its obligations. When insurance company XYZ fails to pay its obligations its license to do business is revoked and the company is forced into receivership or bankruptcy.

While Respondent may claim that Group Insurance is available to pay the bills, Group Insurance must be reimbursed along with reimbursement of the inevitable deductibles and co-pays. The effect that its failure to pay bills has on the Worker’s Compensation Act is a chilling affect designed to stop Petitioners from seeking treatment when they know bills will not be paid. The case which Respondent cites is not applicable since the Motion for Penalties was a result of an unpaid settlement which was deferred by agreement. Here Respondent admits it has obligations and that there is no confusion or uncertainty as to its liability. Petitioner’s have no other remedy.

After appropriate deductions are made pursuant to Section 8.2, the medical fees schedule, contained in the amendment to the Illinois Workers Compensation Act, the Arbitrator finds that the outstanding balances owed to the medical providers are as follows:

- The Orthopedic Center for Dr. David M. Brown with a 6+ month past due balance in the amount of \$15,511.51 of which \$11,788.75 remittance should have already been received pursuant to 8.2 of the Act in accordance with the fee schedule;
- Timberlake Surgery Center with a 6+ month past due balance in the amount of \$36,911.70 of which \$28,052.89 remittance should have already been received pursuant to 8.2 of the Act in accordance with the fee schedule;
- Premier Anesthesia with a 6+ month past due balance of \$1,445.00 which \$1,098.00 remittance should have already been received pursuant to 8.2 of the Act in accordance with the fee schedule;

Therefore pursuant to Section 19(k) and 19(l) penalties are assessed and awarded in the amount of \$20,469.82 which represents 50% on the outstanding balance of the allowed charges for the providers set forth in the Act totaling \$40,939.64.

Furthermore, the Arbitrator awards Attorney fees in the amount of \$8,187.93 pursuant to Section 16 of the Act.