ILLINOIS OFFICIAL REPORTS

Appellate Court

***National Freight Industries v. Illinois Workers' Compensation Comm'n*,**
2013 IL App (5th) 120043WC

Appellate Court Caption	NATIONAL FREIGHT INDUSTRIES, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Andrew Smith and Fischer Lumber, Appellees).–ANDREW SMITH, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Fischer Lumber, Appellee).
District & No.	Fifth District Docket Nos. 5-12-0043WC, 5-12-0047WC cons.
Filed	June 13, 2013
Rehearing denied	September 3, 2013
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	Where claimant suffered two separate work-related back injuries, one in 2006 and the second in 2008, the Workers' Compensation Commission properly found that the second injury was an independent, intervening cause breaking the causal connection between claimant's current condition of ill-being and the injury he suffered in 2006, but the Commission's finding that claimant was not entitled to a permanency award for his first injury was vacated and the cause was remanded for a determination of the permanency attributable to each injury, since the second injury was separate and distinct and claimant was entitled to seek a permanency award as to each injury.
Decision Under Review	Appeal from the Circuit Court of Madison County, Nos. 10-MR-148, 10-MR-305; the Hon. Clarence W. Harrison II, Judge, presiding.
Judgment	No. 5-12-0043WC–Affirmed and remanded. No. 5-12-0047WC–Affirmed in part, vacated in part, and remanded.

Counsel on Appeal

Julie A. Garrison and Robert Maciorowski, both of Maciorowski, Sackmann & Ulrich, LLP, of Chicago, for appellant National Freight Industries.

Leslie N. Collins and David M. Galanti, both of Galanti Law Office, P.C., of East Alton, for appellant Andrew Smith.

R. Kent Shultz, of Holtkamp, Liese, Schultz & Hilliker, P.C., of St. Louis, Missouri, for appellee Fischer Lumber.

Panel

JUSTICE HUDSON delivered the judgment of the court, with opinion.

Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 On December 31, 2008, claimant, Andrew Smith, filed an application for adjustment of claim (No. 08 WC 56873) pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2006)) seeking benefits for injuries sustained in a motor vehicle accident on December 4, 2008, while in the employ of National Freight Industries. That same day, claimant filed a second application for adjustment of claim (No. 08 WC 56874) alleging the occurrence of a work-related accident on November 6, 2006 (prior to the accident alleged in the first application), while in the employ of Fischer Lumber. Following a consolidated hearing held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)), the arbitrator determined that claimant's current condition of ill-being was not a natural consequence of the November 6, 2006, injury and that the accident of December 4, 2008, constituted an independent, intervening accident that broke the chain of causation. As such, the arbitrator found that Fischer Lumber's liability for temporary total disability (TTD) benefits and medical expenses ceased on December 4, 2008, and that National Freight was liable for TTD benefits and medical expenses for the period from December 5, 2008, through the date of the arbitration hearing. In addition, the arbitrator determined that claimant was not entitled to a permanency award against Fischer Lumber because claimant's injury had not reached maximum medical improvement prior to the date of the second accident. The Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. The circuit court of Madison County confirmed the decision of the Commission.

¶ 2 Thereafter, claimant and National Freight filed separate appeals, which we consolidated on our own motion. In appeal No. 5-12-0043WC, National Freight argues that the

Commission's finding that the December 4, 2008, accident broke the chain of causation from claimant's prior work accident is both contrary to law and against the manifest weight of the evidence. In appeal No. 5-12-0047WC, claimant argues that the Commission's finding that he was not entitled to a permanency award from Fischer Lumber is against the manifest weight of the evidence. For the reasons set forth below, we affirm in part, vacate in part, and remand the cause for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing held on August 21, 2009, as well as the record on appeal. On November 6, 2006, claimant was employed by Fischer Lumber as a driver. In the process of pulling boxes off of a truck, claimant felt a "pop" in his lower back followed by a sharp pain in his low back that radiated to his right leg. Claimant had a prior back surgery in 1995 or 1996, but by his testimony, he had been doing well with no ongoing treatment or symptoms.

¶ 5 Claimant presented to the emergency room at St. Francis Hospital on November 7, 2006, with complaints of low back pain and numbness radiating to the right buttock, leg, and knee. Claimant was diagnosed with a back strain. He was prescribed muscle relaxers and pain medication, given work restrictions, and instructed to follow up with Dr. Jerome Epplin, his primary-care physician. When claimant saw Dr. Epplin on November 10, 2006, he provided a history of a burning sensation in the right side of his back with numbness radiating down his right leg after lifting a box at work. Dr. Epplin diagnosed lumbar back pain and took claimant off work through November 13, 2006. Claimant continued to treat with Dr. Epplin, complaining of right-sided back and leg pain, so Dr. Epplin ordered an MRI of the lumbar spine. The MRI was taken on December 14, 2006.

¶ 6 Fischer Lumber sent claimant to Dr. Daniel Kitchens, a board-certified neurosurgeon, on January 10, 2007. At that time, claimant reported the onset of low back pain radiating to the right thigh in November 2006 while unloading boxes at work. Claimant told Dr. Kitchens that he was off work for four days after the injury and then returned to work without restrictions until he was laid off. Claimant reported pain on a daily basis in his lower back and somewhat into his right flank and right thigh. Claimant also described numbness into his right thigh. Claimant denied weakness or difficulty with walking. Dr. Kitchens reviewed the December 2006 MRI and concluded that claimant had a right-sided disc herniation at the L3-4 level (labeled L2-3 level on the MRI), a left-sided disc protrusion at the L4-5 level (labeled L3-4 level on the MRI), a right L4 radiculopathy, and fibrosis on the right side at the L4-5 level. Dr. Kitchens stated that the discrepancy between the level of his findings and those of the radiologist reading the MRI was due to the fact that claimant had a lumbarized sacral spine. Dr. Kitchens diagnosed a disc herniation to the right side at L3-4 and suggested conservative treatment, including physical therapy and pain medication. Claimant was also given work restrictions of no lifting over 20 pounds and limited standing, bending, stooping, squatting, crawling, kneeling, pulling, pushing, twisting, and climbing. Dr. Kitchens related the disc herniation at L3-4 and claimant's right L4 radiculopathy to the November 6, 2006, work accident.

¶ 7 Claimant was hired by National Freight as a "spotter" on January 19, 2007. Claimant worked in this position for six months before becoming a driver. During this time, claimant continued to treat with Dr. Epplin, complaining of back pain and worsening right leg pain. Dr. Epplin continued to prescribe pain medication and muscle relaxers. However, when claimant reported no relief from the medications, Dr. Epplin recommended that he follow up with Dr. Kitchens.

¶ 8 Claimant returned to Dr. Kitchens on September 10, 2008, complaining of continued pain in his low back radiating down into his right thigh. Dr. Kitchens recommended a repeat MRI of the lumbar spine, with and without contrast. The MRI was taken on September 18, 2008. Dr. Kitchens saw claimant in a follow-up visit on September 25, 2008. At that time, claimant continued to have pain in his back and down into his right thigh, and also reported occasional "discomfort" into his left side. Dr. Kitchens reviewed the September 2008 MRI report and observed:

> "[The] MRI report reveals bilateral disc protrusions at the right L2-L3 and L4-5 levels and a disc protrusion to the left at the L3-L4 level. However, [claimant] appears to have residual disc at the Sl-S2 level, and I would label the L2-L3 disc as the L3-L4 disc, as before. There does not appear to be significant change in this disc protrusion."

Dr. Kitchens discussed continued conservative measures versus surgery of a right L3-4 microdiscectomy and instructed claimant to return on an as-needed basis. Claimant ultimately decided to have surgery, and it was scheduled for December 5, 2008.

¶ 9 On December 4, 2008, the day before surgery was scheduled, claimant was involved in a motor vehicle accident while driving a tractor-trailer for National Freight. Claimant testified that he felt a "pop" on the left side of his back and began to immediately experience "a real sharp pain down [his] left side *** and [his] lower back." Claimant also described numbness and tingling down his left leg. Claimant presented to Dr. Kitchens on December 5, 2008, for surgery. Claimant described pain in his back and down into both legs following the motor vehicle accident. Dr. Kitchens described these complaints as different than the ones claimant had previously voiced. Dr. Kitchens cancelled the surgery because claimant did not bring in his MRI films and he wanted to give the pain time to resolve in the event that it was just a flare-up. Dr. Kitchens recommended a new MRI to look for any change in his lumbar spine and referred claimant to Dr. Gordon Chu.

¶ 10 Dr. Chu saw claimant on December 10, 2008. At that time, claimant reported that he began experiencing pain down the right leg in 2006 following an injury at work. Claimant stated that following the motor vehicle accident, he began experiencing left leg pain. Dr. Chu reviewed the September 18, 2008, MRI. He noted a "problem with nomenclature with respect to the levels" because claimant appeared to have a partially lumbarized sacrum. He interpreted the MRI as showing a right-sided L2-3 disc herniation in the foramen and a left-sided L3-4 disc herniation. Dr. Chu's impression was disc herniations at two levels. Dr. Chu noted that the right side herniation has been symptomatic for the past two years. He believed that something may have occurred due to the motor vehicle accident, but noted that this was speculation because the new MRI had not yet been performed.

¶ 11 An MRI was taken on December 10, 2008. The MRI report described: (1) severe

degenerative disc disease, diffused bulging of the discs, and facet hypertrophy causing moderate to severe spinal stenosis at L2-3; (2) a large pleural-based disc herniation extending from the midline to the left intervertebral foramen at L3-4, causing associated moderate spinal stenosis; and (3) severe degenerative arthritis with right-sided diffuse bulging of the disc at L4-5, causing some foraminal narrowing. Dr. Chu had a radiologist compare the December 2008 MRI with the MRIs taken in December 2006 and September 2008. The radiologist noted an interval change between both of the earlier studies and the December 2008 MRI. Specifically, he observed that at L3-4 there was previously a fairly large left paracentral disc herniation which now crosses the midline and reaches almost to the medial aspect of the right neural foramen. As a result, he concluded that the disc herniation was more extensive.

¶ 12 Meanwhile, claimant saw Dr. Epplin on December 17, 2008. At that time, claimant complained of low back pain radiating to the left leg following the motor vehicle accident. Upon reviewing the MRI, Dr. Epplin diagnosed a herniated disc. He referred claimant to Dr. Kitchens for follow-up and authorized claimant to remain off work until medically cleared. Claimant returned to Dr. Epplin's office on December 31, 2008, with bilateral leg weakness, low back pain, and bilateral leg pain. At that time, Dr. Epplin diagnosed lumbar back pain. He kept claimant off work.

¶ 13 On January 21, 2009, claimant was sent by his attorney to Dr. David Kennedy, a board-certified neurosurgeon. Dr. Kennedy's notes reflect the onset of lower lumbar pain at work on November 6, 2006, with the pain radiating "into both legs extending from the buttocks to the posterolateral thigh and calf on both sides as well as into the anterior thighs as well to about the level of the knee." Claimant reported that the pain worsened after the motor vehicle accident "with the bilateral leg pain as described above occurring since that time." Upon physical examination, Dr. Kennedy noted that the range of motion of claimant's lumbar spine was significantly reduced, particularly in forward flexion. Straight-leg raising was positive on the left side at about 45 degrees. Motor and sensory examinations were normal. Dr. Kennedy also reviewed the three MRIs. He concluded that the December 2008 MRI finding of disc herniation at L3-4 did not show significant change when compared to the earlier MRIs. Dr. Kennedy diagnosed persistent lumbar pain with leg pain and a large disc herniation at L3-4. Based on the information available to him, Dr. Kennedy found that claimant's symptoms began in November 2006. He added that claimant's condition "was clearly aggravated by the *** motor vehicle accident." Dr. Kennedy took claimant off work and referred him for a myelogram and postmyelogram CT scan.

¶ 14 Meanwhile, claimant returned to Dr. Kitchens on February 12, 2009, with complaints of continued pain into both legs to about his knee and pain with sitting, standing, and walking. Claimant also described occasional tingling down into his left ankle. Dr. Kitchens reviewed the MRI from December 2008 and noted an interval change in the disc herniation at the L4-5 level (labeled as L3-4 on the MRI) when compared with the September 18, 2008, MRI. He determined that the disc herniation had significantly worsened, explaining that on the September 2008 MRI, the disc herniation was central and to the left side whereas on the December 2008 MRI, the disc herniation is larger, central, and to both the right and left sides with significant nerve root compression. He further noted that the disc herniation at L3-4

(labeled L2-3 on the MRI) appeared to be unchanged. Dr. Kitchens opined that claimant would benefit from surgery at the L3-4 level, which, he noted, previously had been planned. He added that "given [claimant's] new injury and worsening of his disc herniation at L4-5, [claimant] would benefit from operative intervention at this level as well." Specifically, Dr. Kitchens recommended a lumbar laminectomy and fusion with stabilization at L3-4 and L4-5. Dr. Kitchens noted that claimant was unable to work due to the worsening of the L4-5 disc herniation. He also stated that the necessity for surgery is not related to the November 2006 work accident.

¶ 15 Claimant underwent the myelogram studies on March 19, 2009. In a report dated May 12, 2009, Dr. Chu compared the myelogram images and the MRIs. Dr. Chu noted that the myelogram studies showed a right-sided disc herniation at L2-3 and a left-sided disc herniation at L3-4. He also noted degenerative changes at the L4-5 disc space, but was "less convinced" that there is any disc herniation at L4-5. Dr. Chu stated that these findings were not "dramatically different" from the MRI taken in December 2008. He also stated that the December 2008 MRI is not "dramatically different" from the MRIs taken in September 2008, but referred to the comparison done by the radiologist. Dr. Chu concluded that since the MRI of September 2008, claimant has always had two disc herniations, one at the L2-3 level on the right side and one at the L3-4 level on the left side. He added that the degenerative disc disease at the L4-5 level was long-standing and not related to the December 4, 2008, motor vehicle accident.

¶ 16 Claimant returned to Dr. Kennedy on June 25, 2009. At that time, claimant reported that his pain had worsened, that it radiates down both legs, and that he can only walk short distances without significant aggravation of his pain. Dr. Kennedy reviewed the myelogram images, noting high-grade stenosis at L3-4, degenerative spondylolisthesis at L4-5, and a right-sided disc herniation at L4-5. He concluded that claimant "definitely needs both levels fused." Dr. Kennedy opined that the motor vehicle accident worsened claimant's condition and mandated a more extensive operation than Dr. Kitchens had originally contemplated. He explained that in comparison to the MRI from December 2008, the myelogram "is much worse since there is near complete block at this level (L3-4) and it was not as blocked on the MRI." He also concluded that the abnormality at L4-5 was more prominent than on previous studies.

¶ 17 At the arbitration hearing, claimant testified that he continues to experience back pain and pain in the lower extremities bilaterally below the knees. Claimant acknowledged that he had "a light touch" of left leg pain prior to the motor vehicle accident. However, he stated that after the motor vehicle accident, the left-sided pain has become "unbearable sometimes." He explained that prior to December 4, 2008, any left leg pain would go to the knee whereas after the motor vehicle accident, it travels below the knee. He rated the left leg pain prior to December 4, 2008, at level 4 or 5 on a 10-point scale. He rated the pain in the left leg after the motor vehicle accident at level eight or nine. Claimant also stated that his back pain became more severe after the motor vehicle accident. Further, claimant noted that prior to the motor vehicle accident he was working full time, whereas he was taken off work after the motor vehicle accident. Claimant testified that he would like to undergo the two-level fusion.

¶ 18 Dr. Kennedy testified by deposition that a comparison of the myelogram studies and the

prior radiographic studies showed that the motor vehicle accident caused a change in the pathology of claimant's condition. Dr. Kennedy noted that prior to the motor vehicle accident claimant was able to work, but after the motor vehicle accident, claimant could not work. Prior to the motor vehicle accident, claimant was scheduled to undergo a microdiscectomy at L3-4, whereas after the motor vehicle accident, a two-level fusion was needed. Dr. Kennedy opined that until the operation is performed, claimant will not be at maximum medical improvement. On cross-examination by the attorney for National Freight, Dr. Kennedy stated that a comparison of the three MRIs themselves revealed little change in the L3-4 pathology. He reiterated, however, that compared to the MRIs, the myelogram studies indicated a "more clear-cut suggestion of right foraminal encroachment" at L4-5 than had been shown in the MRIs. He added that there was a preexisting finding at L4-5 that, according to the myelogram, may have worsened. He also stated that the myelogram showed the presence of preexisting spinal canal stenosis, which worsened after the motor vehicle accident. He explained that on the earlier MRIs, there was moderate stenosis whereas on the most recent MRI there was almost a complete block. Dr. Kennedy acknowledged that it was possible that these changes could occur naturally over time. However, it was his opinion that this was not the case here as claimant's symptoms changed in direct relationship to the second injury and the myelogram studies showed a "more clear cut abnormality at L4-5 particularly on the right side than there had been previously."

¶ 19 Dr. Kitchens testified by evidence deposition that when he first saw claimant in January 2007, claimant did not provide a history of any pain in the left lower extremity. Dr. Kitchens further testified that the pathology shown on the December 2008 MRI was different from the pathology shown on the September 2008 MRI. Specifically, Dr. Kitchens noted that following the motor vehicle accident, claimant's complaints of pain changed and the December 2008 MRI showed a worsening disc herniation at the L4-5 level (labeled L3-4 on the MRI report) which was consistent with trauma and with claimant's complaints of left-sided radiculopathy. Dr. Kitchens also noted that claimant was not completely off work until after the motor vehicle accident. Dr. Kitchens testified that the fusion surgery is not related to the original work accident on November 6, 2006.

¶ 20 Based on the foregoing evidence, the arbitrator concluded that claimant sustained a work-related injury on November 6, 2006, while working for Fischer Lumber. The arbitrator also concluded, however, that the motor vehicle accident, which occurred on December 4, 2008, while claimant was working for National Freight, constituted an intervening accident which broke the chain of causation between the November 6, 2006, injury and claimant's current condition. In support of this conclusion, the arbitrator found that, as a result of the motor vehicle accident, there was a change in claimant's symptomatic and clinical presentation and an increase in the nature and extent of surgery needed. The arbitrator further concluded that claimant had not reached maximum medical improvement from his original injury prior to the date of the motor vehicle accident and therefore Fischer Lumber's liability for TTD and medical benefits ceased with the new injury of December 4, 2008, and claimant was not entitled to a permanency award from Fischer Lumber. The arbitrator awarded claimant TTD benefits from National Freight beginning on December 5, 2008, through August 21, 2009 (the date of the arbitration hearing), a period of 37-1/7 weeks. In addition, the arbitrator

ordered National Freight to pay $4,479.74 in medical expenses and to authorize and pay for the recommended two-level disc surgery and all necessary follow-up care.

¶ 21 Thereafter, both claimant and National Freight sought review before the Commission of the arbitrator's decision. In separate decisions, the Commission affirmed and adopted the decision of the arbitrator and remanded the cases for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). Claimant and National Freight then sought judicial review of the Commission's decisions in the circuit court of Madison County. The circuit court consolidated the appeals and confirmed the decisions of the Commission. Both claimant and National Freight filed timely notices of appeal. We consolidated the two appeals on our own motion.

¶ 22 II. ANALYSIS

¶ 23 A. Appeal No. 5-12-0043WC

¶ 24 In appeal No. 5-12-0043WC, National Freight argues that the Commission's finding that the December 4, 2008, motor vehicle accident was an independent, intervening accident that broke the causal chain stemming from claimant's November 6, 2006, work injury at Fischer Lumber is contrary to law and against the manifest weight of the evidence.

¶ 25 To obtain compensation under the Act, an injured employee must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). The "arising out of" component addresses the causal connection between a work-related injury and the employee's condition of ill-being. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786 (2005). An injury is said to "arise out of" one's employment if it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc.*, 207 Ill. 2d at 203.

¶ 26 Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury. *Vogel*, 354 Ill. App. 3d at 786; *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742 (1994). Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245 (1970). Whether a causal connection exists between the employee's condition of ill-being and a particular work-related accident is a question of fact. *Vogel*, 354 Ill. App. 3d at 786; see also *Bell & Gossett Co. v. Industrial Comm'n*, 53 Ill. 2d 144, 148 (1972) (whether accident constitutes independent, intervening cause is a question of fact for the Commission); *Bailey v. Industrial Comm'n*, 286 Ill. 623, 626 (1919) (same); *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411 (2009) (same). It is within the province

of the Commission to resolve disputed questions of fact, including those of causal connections, to draw permissible inferences from the evidence, and to judge the credibility of the witnesses. *Mendota Township High School v. Industrial Comm'n*, 243 Ill. App. 3d 834, 836 (1993); *Zion-Benton Township High School District 126 v. Industrial Comm'n*, 242 Ill. App. 3d 109, 113 (1993). "We cannot reject or disregard permissible inferences drawn by the Commission simply because different or conflicting inferences might also reasonably be drawn from the same facts, nor can we substitute our judgment for that of the Commission on such matters unless its findings are contrary to the manifest weight of the evidence." *Zion-Benton Township High School District 126*, 242 Ill. App. 3d at 113. In order for a finding to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Mendota Township High School*, 243 Ill. App. 3d at 837.

¶ 27 In this case, the arbitrator concluded that the December 4, 2008, motor vehicle accident, which occurred while claimant was in the scope of his employment for National Freight, constituted an intervening cause which broke the chain of causation between claimant's current condition of ill-being and the initial accident which occurred while claimant was working for Fischer Lumber. The arbitrator explained that the motor vehicle accident changed claimant's "symptomatic and clinical presentation" in that it "caused new symptoms[,] increased symptoms[,] and [resulted in] a recommendation for a different type, more involved surgery." The Commission affirmed and adopted the arbitrator's decision.

¶ 28 National Freight essentially argues that the motor vehicle accident merely aggravated the injuries claimant sustained as a result of his initial work injury, while employed by Fischer Lumber. Thus, it reasons, the chain of causation from the November 6, 2006, accident is not completely broken and the prior employer, Fischer Lumber, remains liable. We disagree and conclude that the record supports a finding that the December 4, 2008, motor vehicle accident, which indisputably occurred while claimant was in the scope of his employment for National Freight, constituted an independent, intervening accident which broke the chain of causation between claimant's original work-related injury and his current condition of ill-being.

¶ 29 First, the evidence shows that claimant's symptoms changed after the motor vehicle accident. Following the initial injury in November 2006, claimant complained primarily of low back pain and numbness radiating down the right lower extremity. At that time, claimant denied weakness or difficulty with walking. According to Dr. Kitchens, however, claimant's complaints were different after the motor vehicle accident. Immediately following the motor vehicle accident, claimant reported "a real sharp pain down [his] left side *** and [his] lower back." Claimant also described numbness and tingling down his left leg. In addition, claimant began to experience pain with sitting, standing, and walking. Although claimant acknowledged occasional left-sided "discomfort" prior to the motor vehicle accident, the nature of these complaints changed as well. Claimant testified that prior to the motor vehicle accident, the left-sided discomfort would stop at the knee level, whereas following the motor vehicle accident, the left-sided pain traveled further down the leg. Claimant also described an increase in the intensity of the pain after the motor vehicle accident. He rated the left leg pain prior to December 4, 2008, at level 4 or 5 on a 10-point scale, whereas after the motor vehicle accident, the pain increased to level 8 or 9. Further, claimant testified that his back

pain became more severe after the motor vehicle accident. See *Central Rug & Carpet v. Industrial Comm'n*, 361 Ill. App. 3d 684, 691 (2005) (finding that increased complaints of pain coupled with new and different symptoms supported finding that second accident constituted independent, intervening cause that broke the chain of causation between original work-related accident and condition of ill-being).

¶ 30 Second, there is evidence of record that the motor vehicle accident caused a change in the pathology of claimant's condition. Claimant underwent various diagnostic tests during his treatment, including three MRIs and a myelogram/post-myelogram CT scan. Dr. Chu's radiologist compared the three MRIs. He noted an interval change between the two MRIs taken prior to the motor vehicle accident and the MRI taken after the motor vehicle accident. Specifically, he observed that at L3-4 there was previously a fairly large left paracentral disc herniation which, following the motor vehicle accident, is shown to cross the midline and reach almost to the medial aspect of the right neural foramen. As a result, the radiologist determined that the disc herniation was more extensive. Dr. Kitchens also noted an interval change in the disc herniation at the same level when comparing the December 2008 MRI with the September 2008 MRI. Dr. Kitchens opined that the disc herniation had "significantly worsened" after the motor vehicle accident, explaining that on the September 2008 MRI, the disc herniation was central and to the left side, whereas on the December 2008 MRI, the disc herniation is larger, central, and to both the right and left sides with significant nerve root compression. Dr. Kennedy's comparison of the three MRIs revealed little change in the L3-4 pathology. However, even he admitted that a comparison of the myelogram studies taken in March 2009 and the MRIs establish that the motor vehicle accident caused a change in the pathology of claimant's condition. He noted, for instance, that the myelogram showed the presence of preexisting spinal canal stenosis at L3-4 which worsened after the motor vehicle accident to almost a complete block and that an abnormality at the L4-5 level was more prominent on the myelogram than on prior studies. Dr. Kennedy testified that while it was possible that these changes could occur naturally over time, it was his opinion, given the timing of the change in claimant's complaints, that the changes were the direct result of the motor vehicle accident.

¶ 31 Third, the type of surgical intervention claimant required changed as a result of the motor vehicle accident. Following the initial injury at Fischer Lumber, Dr. Kitchens recommended a right L3-4 microdiscectomy. Following the motor vehicle accident, Dr. Kitchens recommended a more extensive procedure–a lumbar laminectomy and fusion with stabilization at L3-4 and L4-5. Dr. Kitchens stated that the necessity of the more extensive surgery is not related to the original work accident in November 2006. Dr. Kennedy agreed that a two-level fusion is needed. In other words, prior to the motor vehicle accident, surgical intervention was limited to one level whereas after the motor vehicle accident, surgery was indicated at multiple levels.

¶ 32 Finally, we note that claimant's ability to work changed following the motor vehicle accident. Claimant was off work for a few days after the initial work injury and then returned to work without restrictions until he was laid off. Thereafter, claimant saw Dr. Kitchens early in January 2007. Dr. Kitchens prescribed work restrictions, and claimant found work within these restrictions with National Freight. By all accounts, claimant worked continuously for

National Freight in various positions until he was taken off work after the motor vehicle accident.

¶ 33 Respondent argues that the foregoing evidence establishes that claimant's condition after December 4, 2008, would not have occurred "but for" the lumbar disc condition and need for surgery in the wake of the November 6, 2006, accident. Respondent notes that Dr. Chu opined that claimant had always had disc herniations at L2-3 and L3-4, that claimant may not have had a disc herniation at L4-5, and that claimant had long-standing degenerative disc disease at L4-5 unrelated to the December 4, 2008, accident. As such, respondent suggests that the motor vehicle accident merely aggravated a preexisting condition. However, given the Commission's role in resolving conflicting evidence, we conclude that it was reasonable for the Commission to conclude that the motor vehicle accident caused more than a mere aggravation of the injuries claimant sustained in the initial work accident. The motor vehicle accident clearly changed the nature of claimant's injury. As noted above, following the motor vehicle accident, claimant reported new symptoms and more extensive pain. Claimant's treating physicians concluded that his symptomatology changed following the motor vehicle accident, which required a more extensive surgical procedure. Further, claimant was taken off work. Dr. Kitchens testified that the necessity for the more extensive surgery was not related to the initial work accident. Accordingly, the Commission's finding that the motor vehicle accident of December 4, 2008, constituted an independent, intervening cause which broke the causal connection between claimant's current condition of ill-being and his initial work injury is not against the manifest weight of the evidence.

¶ 34 In so holding, we find misplaced respondent's reliance on *Vogel*, 354 Ill. App. 3d 780. In *Vogel*, the employee sustained a work-related injury necessitating a cervical discectomy and fusion. The fusion had not "solidified," but had been progressing "nicely," when, on June 9, 1999, the employee was involved in the first of three automobile accidents. Thereafter, the employee began to experience pain in his neck, shoulders, and arms. He also developed pseudoarthrosis (a failed fusion), and his doctor recommended a second surgery consisting of an additional graft and plating. In *Vogel*, we held that the automobile accidents did not break the causal connection between claimant's work injury and his condition of ill-being. *Vogel*, 354 Ill. App. 3d at 785-89. We noted that even if the initial automobile accident was responsible for the failed fusion, "such a condition could not have developed but for the surgery, which everyone agreed was necessary as a result of [the employee's] work injury." *Vogel*, 354 Ill. App. 3d at 788. In the present case, unlike in *Vogel* there was evidence from which the Commission could reasonably conclude that the motor vehicle accident changed the nature of claimant's injury, was the sole cause of his current condition of ill-being, and therefore broke the causal chain from the original accident. Both Dr. Kitchens and Dr. Kennedy reported a change in pathology after the motor vehicle accident. Claimant reported new symptoms, more severe pain, and he required a more extensive surgical procedure after the motor vehicle accident. More important, Dr. Kitchens testified that the more extensive procedure was not related to the original work accident.

¶ 35 Alternatively, National Freight contends that the Commission's decision is incorrect as a matter of law. In this regard, National Freight complains that the Commission erroneously found that claimant's complaints before the December 4, 2008, motor vehicle accident were

exclusively right-sided despite testimony to the contrary. The record does not support this claim. The arbitrator, whose decision was affirmed and adopted by the Commission, expressly acknowledges that claimant had occasional pain going down his left leg prior to the motor vehicle accident. National Freight also complains that the Commission did not apply the "but for" analysis or credit the opinions that claimant's weakened condition after the November 6, 2006, accident made him susceptible to further injury and ultimately was aggravated by the December 4, 2008, accident. There was conflicting evidence on this point, and, given the Commission's role as finder of fact, we cannot say that, as a matter of law, the Commission's decision was improper. Finally, National Freight contends that the Commission ignored the standard that an intervening accident must completely break the chain of causation from the original accident as well as the complete absence of evidence supporting a complete break of causation. Again, there was conflicting evidence on this point and we cannot say that the Commission's decision was improper. Accordingly, we affirm the decision of the Commission finding National Freight liable. We now turn to claimant's appeal.

¶ 36 B. Appeal No. 5-12-0047WC

¶ 37 In appeal No. 5-12-0047WC, claimant challenges the Commission's decision as it relates to permanency in case No. 08 WC 56874 against Fischer Lumber. As noted earlier, the arbitrator determined that the injuries claimant sustained on November 6, 2006, while working for Fischer Lumber, had not reached maximum medical improvement by December 3, 2008, the day prior to claimant's second accident. Therefore, the arbitrator stated, "no permanency is awarded." The Commission affirmed this finding. On appeal, claimant does not dispute the finding that he was not at maximum medical improvement prior to the December 4, 2008, motor vehicle accident. He asserts, however, that he is entitled to a permanency award from Fischer Lumber "for his nonoperated herniated disc at L3-4."

¶ 38 Initially, we note that it is not clear what the arbitrator meant when he stated that "no permanency is awarded." Was he denying claimant a permanency award from Fischer Lumber outright? Or did he conclude that it was premature to assess permanency given that claimant had yet to reach maximum medical improvement? Our difficulty in interpreting the arbitrator's finding is compounded by the fact that, although the Commission affirmed and adopted the decision of the arbitrator, it also remanded the case to the arbitrator "for further proceedings for a determination of a further amount of temporary total compensation *or of compensation for permanent disability, if any*." (Emphasis added.) See *Thomas*, 78 Ill. 2d 327. To the extent that it was the intent of the arbitrator and the Commission to rule on the propriety of a permanency award, we conclude that it was improper to do so at this stage of the proceedings.

¶ 39 As we discuss more thoroughly below, the record establishes that claimant's two applications for adjustment of claim were before the arbitrator and the Commission pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)). Section 19(b) provides in pertinent part as follows:

"The Arbitrator may find that the disabling condition is temporary and has not yet

reached a permanent condition and may order the payment of compensation up to the date of the hearing, which award shall be reviewable and enforceable in the same manner as other awards, and in no instance be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, but shall be conclusive as to all other questions except the nature and extent of said disability." 820 ILCS 305/19(b) (West 2006).

The following cases involving section 19(b) proceedings are instructive to our analysis.

¶ 40 In *Thomas*, 78 Ill. 2d 327, the arbitrator awarded the claimant TTD benefits, but found that the claimant had failed to prove that he sustained any permanent disability. The Commission affirmed the decision of the arbitrator, and the trial court confirmed the decision of the Commission. On appeal to the supreme court, the claimant argued that the arbitrator exceeded his authority under section 19(b) by entering a finding on the issue of permanent disability. The supreme court found that while section 19(b) allows the arbitrator to refrain from ruling prematurely on the issue of permanent disability, the issue of permanency was not properly before the arbitrator. *Thomas*, 78 Ill. 2d at 333. The court noted that the claimant filed a petition for immediate hearing which sought temporary total compensation, but made no allegation related to permanent disability. *Thomas*, 78 Ill. 2d at 333. The court acknowledged that the parties stipulated before the arbitrator that the issues in dispute were " 'the amount of temporary compensation to which [the claimant] is entitled, if any, and the nature and extent of the injury, if any.' " *Thomas*, 78 Ill. 2d at 333. The court stated, however, that this stipulation did not "tender[ ] the issue of permanent disability," for the stipulation must be construed in relation to the claimant's petition for immediate hearing, and that petition limited the arbitrator to the issue of temporary disability. *Thomas*, 78 Ill. 2d at 333-34. The court also found support for its conclusion in the fact that the claimant introduced medical reports of two physicians who concluded that the claimant was unable to return to work, but expressed no opinion related to the issue of permanent disability. *Thomas*, 78 Ill. 2d at 334. While these reports were in contrast to medical summaries introduced by the respondent, which concluded that the claimant was able to return to work and that there was no evidence of residual impairment, the court determined that the respondent cannot unilaterally broaden the scope of the proceeding before the arbitrator by introducing evidence unrelated to the issues presented in the claimant's petition for immediate hearing. *Thomas*, 78 Ill. 2d at 334. As a result, the *Thomas* court declared the finding on the issue of permanent disability "null and void." *Thomas*, 78 Ill. 2d at 334.

¶ 41 Similarly, in *Brinkmann v. Industrial Comm'n*, 82 Ill. 2d 462, 470 (1980), and *Jewel Cos. v. Industrial Comm'n*, 125 Ill. App. 3d 92, 94 (1984), the courts held that it was improper for the Commission to address permanency where the record established that this issue was not raised before the arbitrator or the Commission on review. In *Hudgens v. Industrial Comm'n*, 219 Ill. App. 3d 953 (1991), the trial court reversed a decision of the Commission in favor of the employer and awarded the employee permanency benefits. On appeal, this court concluded that the trial court erred in addressing the issue of permanency. *Hudgens*, 219 Ill. App. 3d at 960-61. In so holding, we acknowledged that the parties introduced evidence regarding the extent of the employee's disability at the hearing before the arbitrator, but noted that a section 19(b) proceeding is limited to the issue of temporary disability. *Hudgens*,

219 Ill. App. 3d at 961 (citing *Thomas*, 78 Ill. 2d 327). Further, we determined that allowing the trial court's decision to stand would diminish the trial court's role as a court of review and usurp the Commission's function as trier of fact. *Hudgens*, 219 Ill. App. 3d at 961. More recently, in *Jording v. Industrial Comm'n*, 254 Ill. App. 3d 318, 320-22 (1993), this court, relying on *Thomas*, held that it was improper for the Commission to make a permanency award in a section 19(b) proceeding. But see *O'Neal Brothers Construction Co. v. Industrial Comm'n*, 93 Ill. 2d 30, 39-40 (1982) (upholding permanency award where the parties did not request an immediate or limited hearing, and the record was devoid of any affirmative indication that the parties wished to limit themselves to the issue of temporary total disability).

¶ 42 In the present case, claimant did not attach a petition for immediate hearing to either of his two applications for adjustment of claim. Further, our review of the record does not disclose that a petition for immediate hearing was otherwise submitted. Nevertheless, it is clear that the parties and the arbitrator intended to proceed under the provisions of section 19(b) as evinced by the following exchange:

> "THE ARBITRATOR: I also have marked and will admit as Arbitrator's Exhibit 3 a copy of the Request for Hearing Form in 08 WC 56874, Andrew Smith vs. Fischer Lumber.
>
> * * *
>
> THE ARBITRATOR: Issues in dispute on [*sic*] this case appear to be causation after December 4, 2008, future medical and future TTD and permanency–
>
> MR. SCHULTZ [attorney for respondent]: Yes, sir.
>
> THE ARBITRATOR: –if appropriate? Does that accurately state the issues for [claimant]?
>
> MR. GALANTI [attorney for claimant]: Yes, it does, Your Honor.
>
> * * *
>
> THE ARBITRATOR: And for Fischer Lumber?
>
> MR. SCHULTZ: Yes, sir.
>
> MR. GALANTI: If I could just make one thing clear though. I don't think it's proper for nature and extent to be considered in this particular case but I understand that–
>
> THE ARBITRATOR: That's an argument, yeah. These are consolidated as a 19(b). I think he just has given me the leeway to enter a permanency award if I deemed that he had reached a state of permanency.
>
> MR. GALANTI: Just wanted my position to be clear.
>
> THE ARBITRATOR: I think that's what's going on?
>
> MR. SCHULTZ: It is, Your Honor."

Thus, although the parties did not request an immediate or limited hearing, the parties clearly intended to proceed pursuant to section 19(b) of the Act. Moreover, the foregoing establishes that claimant did not intend the section 19(b) proceeding to resolve the issue of permanency. Indeed, we note that while some of the doctors were posed questions regarding permanency,

none of them expressed an opinion related to the issue of permanent disability, presumably because claimant had yet to reach maximum medical improvement. As such, to the extent that the arbitrator and the Commission addressed the propriety of permanency with respect to the injury claimant sustained while claimant was employed by Fischer Lumber, we find that it was improper to do so at this stage of the proceedings.

¶ 43 Moreover, we find it would be inconsistent to determine that the injury claimant sustained while working for National Freight constituted an independent, intervening cause and award no permanency for the injury claimant sustained while working for Fischer Lumber. In this regard, we note that our analysis affirming the Commission's finding that the motor vehicle accident in which claimant was involved while working for National Freight constituted an independent, intervening cause was based on the finding that the second accident resulted in a change to claimant's symptoms, the pathology of claimant's condition, the type of surgical intervention, and his ability to work. In other words, we concluded that the second accident did not simply represent a continuation of the injury resulting from the first accident. Rather, it caused a separate and distinct injury that broke the causal chain. Since claimant suffered separate and distinct injuries arising from two different accidents, he should be allowed to seek a permanency award for each accident. If the two injuries are divisible, as the Commission found, it should be able to assign separate permanency awards for each of the two accidents. Accordingly, we vacate the Commission's finding that claimant is not entitled to a permanency award from Fischer Lumber and remand the matter to the Commission with instructions that it determine the permanency attributable to each separate injury.

¶ 44 III. CONCLUSION

¶ 45 For the reasons set forth above, we conclude that the Commission properly determined that the injury claimant sustained on December 4, 2008, while working for National Freight constituted an independent, intervening cause breaking the causal connection between claimant's current condition of ill-being and the injury he sustained on November 6, 2006, while working for Fischer Lumber. However, we vacate the Commission's finding that claimant is not entitled to a permanency award from Fischer Lumber and remand this cause for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327. Accordingly, the judgment of the circuit court of Madison County, which confirmed the decisions of the Commission, is affirmed in part, vacated in part, and remanded.

¶ 46 No. 5-12-0043WC, Affirmed and remanded.

¶ 47 No. 5-12-0047WC, Affirmed in part, vacated in part, and remanded.