

No. 4-13-0298WC

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FOURTH DISTRICT

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P.A.M. TRANSPORT d/b/a ALLEN FREIGHT SERVICES, INC.,	)	Appeal from the Circuit Court
	)	Sangamon County, Illinois
Appellant/Cross Appellee,	)	
	)	
v.	)	No. 10 MR 577
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION,	)	
	)	
(Penny Lomelino, Widow of Mark Lomelino, Appellee/Cross Appellant).	)	Honorable Patrick J. Londrigan, Judge, Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Holdridge and Justices Hudson, Harris, and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* The Illinois Workers' Compensation Commission's award, including temporary total disability, medical expenses, and permanent partial disability benefits, was reinstated where its findings were not against the manifest weight of the evidence.

¶ 2 The claimant, Penny Lomelino<sup>1</sup>, the surviving spouse of Mark Lomelino (decedent), appeals, and, the decedent's employer, P.A.M. Transport doing business as Allen Freight Services, Inc. (Allen), cross-appeals from the circuit court order which confirmed in part and set aside in part the decision of the Illinois Workers' Compensation Commission (Commission) awarding the decedent temporary total disability (TTD) and permanent partial disability (PPD) benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). For the reasons that follow, we affirm in part and reverse in part the judgment of the circuit court, and reinstate the Commission's award.

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on May 5 and 6, 2009. The decedent filed an application for adjustment of claim following an injury he sustained while working as a truck driver for Allen. The decedent testified that he had been a truck driver since 1971. On October 23, 1996, he was reaching overhead to pull down and unload car tires from his truck when he felt a “kink” in his neck, which proceeded to get worse. The decedent subsequently drove to another State, at which point he decided to contact Allen to report that he had hurt his neck and was having problems.

¶ 4 Upon his return, the decedent saw Dr. Lowell Brown, his family physician, who treated him throughout the claim. Dr. Brown referred him to Dr. David Mack, who administered an injection to help alleviate the decedent's pain, and sent him to physical therapy. The decedent believed the injection only made his pain worse.

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<sup>1</sup> During the pendency of this appeal, Mark Lomelino died. We granted the unopposed motion of his surviving spouse, Penny Lomelino, to substitute her name as the claimant as she is the heir to his estate.

¶ 5 The decedent testified that at some point thereafter, his wife had to rush him to the hospital, where he was treated by Drs. Mehra and Lyle Wacaser. On November 18, 1996, the decedent underwent neck surgery performed by Dr. Wacaser, which consisted of an anterior cervical discectomy with a fusion at C5-6. Following surgery, the decedent continued treatment with Dr. Wacaser. According to Dr. Wacaser's records through February 1997, the decedent was complaining of radiating pain and numbness in his thumb, and sleeplessness due to pain. On orders from Dr. Wacaser, an MRI of the decedent's cervical spine was performed on March 6, 1997. The scan was reviewed by Dr. Matthew Kuhn and disclosed a central disc bulge at C6-7. Dr. Wacaser's notation, however, indicated that the MRI was normal and that the decedent was "putting [him] on." The decedent testified that he no longer desired to see Dr. Wacaser. As a consequence, Dr. Brown referred him to Dr. Terrence Pencek, a neurosurgeon, for a second opinion.

¶ 6 Dr. Pencek examined the decedent on two occasions in April and May 1997, and noted that the decedent suffered from persistent neck pain, shoulder spasms and numbness in his left thumb. Dr. Pencek was concerned about a possible non-union, and sent the decedent for a bone scan. He ultimately concluded that the likely etiology for the decedent's pain was a myofascial strain, but that he was not a candidate for surgery.

¶ 7 In August 1997, the decedent saw Dr. David Fletcher at the request of Allen. Dr. Fletcher testified that the decedent was still having persistent radicular symptoms at the C5-6 level and down the inside of his left arm, and that he was concerned the surgery had not resolved the problem. Dr. Fletcher was also concerned about the decedent's apparent overuse of narcotics which had been prescribed for his pain. According to Dr. Fletcher, the decedent had an extremely restricted range of motion in his neck, and he sat with his head cocked to one side. Dr.

Fletcher performed tests on the decedent, including a functional capacity exam (FCE), and referred him to Dr. Edward Trudeau, where he underwent an EMG/NCV.

¶ 8 Dr. Trudeau reported a positive EMG, showing a mild to moderate left C6 root irritation and continuing radiculopathy as suspected by Dr. Fletcher. Dr. Fletcher testified that on November 6, 1997, he released the decedent to return to work subject to a 20-pound lifting restriction and recommended that he not drive because of his use of pain medication.

¶ 9 Allen arranged with Corvel Corporation to begin vocational rehabilitation services for the decedent. Jill Simms of Corvel filed a preliminary report on March 28, 1998, indicating that she made eight telephone calls attempting to contact the decedent. Simms subsequently contacted the decedent's attorney who attempted to speak with him about his lack of effort; however, the decedent's file at Corvel was ultimately closed due to his lack of cooperation. In his testimony, the decedent acknowledged being contacted by a representative from Corvel who wanted him to look for work, but he stated that he did not do so because he had not quit his job and was planning to return to work with his original employer when he felt better.

¶ 10 In January 1999, the decedent returned to Dr. Fletcher at the request of Allen. Dr. Fletcher testified that he examined the decedent and found that his condition was unchanged since his last examination. The decedent exhibited significant pain behavior, his range of motion remained extremely limited, and his head remained tilted to one side. Dr. Fletcher testified that x-rays showed the integrity of the fusion and no instability. Functional capacity testing was performed and revealed inconsistencies that Dr. Fletcher testified were consistent with his clinical observations. In particular, a report from Midwest Industrial Rehabilitation indicated a poor tolerance for activity, but stated that the evaluation results did not reflect a consistent, maximal voluntary effort on the part of the decedent, and that the test results were not a valid

representation of his abilities. Dr. Fletcher testified that the decedent would not benefit from any further medical intervention and was employable in some capacity, though not driving due to use of pain medication.

¶ 11 On February 12, 1999, on referral from Dr. Brown, the decedent was examined by Dr. Timothy Van Fleet who also reviewed the decedent's x-rays. According to Dr. Van Fleet's report, the decedent was seated with a cervical collar, and his neck was cocked to the right and flexed. Dr. Van Fleet observed that, when the collar was removed, the decedent had minimal range of motion in his neck, and when he attempted to turn, he began to tremble in the neck in an unusual fashion. Dr. Van Fleet's impression was that the decedent suffered from neck strain. He also noted that the decedent had symptom magnification signs and "unusual behavior qualities." The doctor further found no positive confirmatory physical indications which would point to a treatable disorder.

¶ 12 On April 20, 1999, the decedent saw Dr. Daniel Riew, an orthopedic surgeon, on recommendation of Dr. Brown. In his deposition, Dr. Riew testified that the decedent presented with acute neck pain, left-sided arm pain and numbness in his left hand. According to Dr. Riew, the decedent felt he had received no benefit from his November 1996 surgery. Dr. Riew testified that the decedent had symptoms emanating from several conditions: a nonunion of the fusion at C5-6 that was causing him axial neck pain; stenosis at C6-7 causing his arm symptoms; and narrowing between C4 and C5, along with kyphosis (the forward-bent posture of his neck). Dr. Riew believed that the decedent's MRI did not reveal these conditions, most likely because of his positioning during that test. He indicated that this is the reason he recommended additional tests.

¶ 13 On July 16, 1999, the decedent underwent surgery performed by Dr. Riew, consisting of a posterior fusion at C4-5 and C6-7. The doctor indicated that the decedent had resultant

pseudoarthrosis secondary to tobacco use. Dr. Riew subsequently determined that the decedent required a second procedure, and on February 2, 2000, he performed surgery that involved fusions at C4-5 and C6-7 with anterior augmentation of these levels that were previously fused posteriorly. According to his post-operative report, the decedent had some residual neck pain but was "doing much better" than before surgery. Dr. Riew recommended that he return to work subject to a 50-pound weight restriction, with a 30-pound limitation on overhead lifting.

¶ 14 On October 2, 2000, the decedent was evaluated by Dr. James Hussey, who found that he qualified for truck driving. He also saw Dr. Paul Sheehan, who indicated that the decedent was fit for duty as a driver. Efforts were then made to return the decedent to work with Allen, however, he never returned to work.

¶ 15 At a follow-up examination on February 7, 2002, Dr. Riew noted that the decedent had normal sensory-motor reflexes, with the exception of numbness in his left thumb when he moved his neck. The doctor also stated that the decedent's x-rays showed solid arthrodesis from C4 to C7, and that he "believe[s] the decedent is eventually going to need surgery at the adjacent levels, but not at this point."

¶ 16 On December 20, 2006, the decedent went for an examination by Dr. Sunil Bansal. Dr. Bansal reported that, in his opinion, the decedent's current condition was caused by his work injury of October 23, 1996. Dr. Bansal further recommended that the decedent be placed on permanent work restrictions of no lifting greater than 10 pounds, and no frequent bending, squatting, or prolonged kneeling.

¶ 17 On March 6, 2008, the decedent was examined by Dr. Friedrich Von Bun. Dr. Von Bun testified that the decedent would not be able to unload a truck, and could not drive due to his pain

medication. In Dr. Von Bun's opinion, the decedent's condition was permanent, and he was permanently disabled from employment, other than to sit in a chair and answer the telephone.

¶ 18 The decedent testified that he had not done physical activity from 2002 to 2009. He acknowledged that he was taking Oxycontin twice a day as prescribed by his family doctor and that, if it were not for this medication, he would be in bed. He reported pain in the left side of his neck and in his left arm down to his thumb. The decedent testified that he kept his head tilted because, if he attempted to straighten it, it began aching and caused his blood pressure to rise. According to the decedent, after the February 2, 2000, surgery with Dr. Riew, he thought he was getting better, but he had pain all of the time and his arm would "kink up." The decedent testified that he could not recall any change in his restrictions following his appointment with Dr. Riew in 2004.

¶ 19 At the conclusion of the hearing, the arbitrator determined that the decedent's condition of ill-being was causally related to his injury of October 23, 1996, and that the medical treatment he received, including that of Dr. Riew, was reasonable and necessary. The arbitrator found, in relevant part, that the decedent was entitled to TTD benefits pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2008)), in the amount of \$425.75 per week for 209 1/7th weeks, for the time period of October 24, 1996, through October 27, 2000, plus medical expenses. The arbitrator further found that the decedent sustained PPD of 50% loss of man as a whole under section 8(d)(2) of the Act. 820 ILCS 305/8(d)(2)(West 2008). The arbitrator stated that the opinions of Drs. Riew, Bansal, and Von Bun were entitled to greater weight than those of Dr. Fletcher and another non-treating physician.

¶ 20 The decedent and Allen both sought a review before the Commission. The decedent requested that the arbitrator's PPD award be increased to 60% loss of man as a whole on the

basis that the evidence proved he was totally and permanently disabled. Allen contended that the arbitrator's findings as to causal relationship, TTD, the decedent's average weekly wage, and medical expenses were all against the manifest weight of the evidence. The Commission affirmed and adopted the arbitrator's findings as to causal relationship, TTD, average weekly wage, and medical expenses, but increased the PPD award to 75%, man as a whole. In arriving at its decision to increase the award, the Commission observed that the decedent had undergone two previous fusion procedures and that one of his physicians believed he would eventually need additional surgery. The Commission also noted the opinions of two other treating physicians that the decedent was going to be confined to desk work and could no longer be gainfully employed in his pre-injury position.

¶ 21 Both parties sought judicial review of the Commission's decision in the circuit court of Sangamon County. On March 14, 2013, the circuit court entered an order setting aside the Commission's decision as to PPD, and reinstating the arbitrator's award of 50% loss of person as a whole. The court found that the Commission's increase of the PPD award was "based upon speculation and conjecture," in that it relied upon the treating physician's opinion that the decedent would eventually need additional surgery. The court confirmed the remainder of the Commission's decision. The claimant now appeals, and Allen cross-appeals.

¶ 22 The claimant argues that there was sufficient evidence to sustain the Commission's decision to increase the decedent's PPD benefits to 75% person as a whole. Accordingly, the trial court had no basis to decrease that amount to 50%. We agree.

¶ 23 It is well established that, because of the Commission's expertise in the area of worker's compensation, its findings on the issue of extent or permanency of a disability will be given substantial deference. *Mobil Oil Corp. v. Indus. Comm'n*, 616, 624, 722 N.E.2d 703 (1999); see

also *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833, 769 N.E.2d 66 (2002). It is the Commission's role to resolve disputes in the evidence, particularly medical evidence, and to draw reasonable inferences therefrom. A reviewing court should not disturb the Commission's decisions on these issues unless they are contrary to the manifest weight of the evidence. *Mobil Oil*, 309 Ill. App. 3d at 624; *Grischow v. Industrial Comm'n*, 228 Ill.App.3d 551, 559, 593 N.E.2d 720 (1992). A decision is against the manifest weight of the evidence only when no rational trier of fact could have agreed with that decision. *Mobil Oil*, 309 Ill. App. 3d at 624. Whether a reviewing court might have made a different finding is not the test. *Id.* Rather, the appropriate analysis is whether there is evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450, 440, 440 N.E.2d 90 (1982).

¶ 24 In its decision to increase the award, the Commission relied upon the fact that the decedent had undergone several cervical fusion procedures, after which Dr. Riew released him to restricted duty in May of 2000, precluding him from lifting more than 50 pounds or 30 pounds overhead. By 2002, Dr. Riew believed the decedent was "eventually going to need [additional] surgery." Although the circuit court viewed this statement as a speculative basis upon which to increase the award, we see no real support for this perception, since there was evidence that the decedent's condition deteriorated after that point. The Commission observed that by 2006, Dr. Bansal had increased the decedent's work limitation to a permanent restriction of no more than 10 pounds of lifting and no frequent bending. By 2007 and 2008, Dr. Von Bun determined that the decedent would be unable to work in the trucking industry, and both Drs. Bansal and Von Bun determined that the decedent would be permanently limited to desk or other sedentary work. We note Allen's argument that the decedent "indicated that there was no change in his complaints or condition after 2004," rendering the opinions of Drs. Bansal and Von Bun "worthless" as to

the decedent's abilities after that point. Our review of the record discredits this assertion, however, and indicates that, when Dr. Von Bun examined the decedent, he continued to experience symptoms of cervical radiculopathy and numbness in his arm. Dr. Von Bun also reported the development of secondary symptoms resulting from the decedent's fusion procedures. The arbitrator specifically found that the opinions of Drs. Riew, Bansal, and Von Bun were entitled "to greater weight under the circumstances of this case" than that of Dr. Fletcher and another non-treating physician, a finding which was adopted by the Commission. As there are sufficient facts to support the Commission's award of 75% of a man as a whole, the circuit court erred in substituting its own view of the evidence to modify that award.

¶ 25 On cross-appeal, Allen first argues that the Commission's finding, that the decedent's condition of ill-being was causally related to his employment, is against the manifest weight of the evidence. Allen does not dispute that the injury of October 26, 1996, arose out of and in the course of the decedent's employment. Rather, the sole basis for its contention in this regard is that the reports of Drs. Wacaser, Pencek, and Van Fleet showed that, by February of 1999, the decedent required no further surgery, no longer had a treatable neck disorder, and demonstrated a tendency to malingering and exaggerate his symptoms. Allen points to the notes of Dr. Wacaser, that the decedent's MRI of March 10, 1997, was normal and that the decedent was "putting [Wacaser] on." Allen urges us to disregard the testimony of Drs. Bansal and Von Bun, who treated the decedent over ten years after his accident and accept its version of events.

¶ 26 However, this court is not at liberty to reweigh the evidence as to causation in this case. Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v.*

*Industrial Comm'n*, 101 Ill.2d 236, 244, 461 N.E.2d 954 (1984). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting medical evidence. *O'Dette v. Indus. Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223 (1980).

¶ 27 The evidence at the arbitration hearing established that from the date of his injury until the hearing, the decedent continued to have persistent, severe pain symptoms in his neck, left shoulder and thumb so as to require ongoing medical treatment and pain medication. The findings of Drs. Pencek, Van Fleet, and Fletcher all corroborated this fact. Both Drs. Fletcher and Van Fleet reported that the decedent sat with his neck cocked to the right side, and in February 1999, Dr. Van Fleet stated that, when the decedent's cervical collar was removed, he had minimal range of motion in his neck, and, when he attempted to turn he began to "tremble in the neck in an unusual fashion." Although the first surgery with Dr. Riew improved the decedent's condition for a period, the arbitrator noted that the decedent sat with his neck cocked to one side all throughout the hearing. Although Dr. Wacaser believed that the decedent's MRI was "normal," Dr. Riew explained that the MRI would not necessarily disclose the decedent's condition due to his positioning during the scan. There was no evidence that the decedent suffered from any neck problems prior to his injury in 1996, or that he had any additional accidents from his 1996 surgery through the date of the hearing. There is no basis to disturb the Commission's finding as to causation.

¶ 28 Next, Allen argues that this court should set aside the Commission's award of TTD benefits. Allen again contends that, in light of the report of Dr. Wacaser that the decedent's MRI was normal and that he was "putting [him] on", and that of Dr. Pencek, who "essentially confirmed" Dr. Wacaser's view, the TTD benefits should have ended March 10, 1997, or,

alternatively, May 29, 1997, when the decedent was last seen by Dr. Pencek. Allen argues that, if this court rejects those dates, benefits should be terminated sometime in the first few months of 1998, by reason of the decedent's failure to cooperate with vocational rehabilitation efforts. As a final alternative, Allen asserts that TTD benefits should be terminated as of May 16, 2000, when Dr. Riew released the decedent to restricted duty.

¶ 29 Again, Allen's arguments rest upon evidentiary and credibility issues all within the province of the Commission. The Commission adopted the arbitrator's award of TTD benefits through October 27, 2000, based upon the finding that the decedent had been released to restrictive duty by Dr. Riew, passed his DOT physical examination, and had been offered a job by Allen, yet did not return to work. We do not find this determination to be against the manifest weight of the evidence.

¶ 30 Next, Allen disputes the Commission's average weekly wage calculation. Specifically, it argues that the Commission erred under our decision in *United Airlines, Inc. v. Illinois Workers' Comp. Comm'n*, 382 Ill. App. 3d 437, 440, 887 N.E.2d 888 (2008), by including in its wage calculation the decedent's *per diem* traveling expenses.

¶ 31 The arbitrator determined that the decedent's average weekly wage was \$638.63, based upon proof of \$24,906.59 in earnings over a 39-week period prior to the decedent's injury. The earning sheets introduced in evidence established that the decedent earned \$21,736.25 from the date he commenced employment in January 1996, until his injury in October. The statement further reflected "reimbursements" to the decedent in the amount of \$2,888.20, and *per diem* payments of \$3,170.34. Both of these amounts were excluded from federal taxable wages. The arbitrator expressly excluded the expense reimbursements from the calculation, but included the *per diem* payments of \$3,170.34.

¶ 32 The determination of an employee's average weekly wage is a question of fact for the Commission, which will not be disturbed on review unless it against the manifest weight of the evidence. *Ogle v. Industrial Comm'n*, 284 Ill.App.3d 1093, 1096, 673 N.E.2d 706 (1996). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill.App.3d 288, 291, 591 N.E.2d 894 (1992).

¶ 33 Generally, when calculating an employee's weekly wage, amounts paid as reimbursement for travel expenses are not considered part of that employee's earnings. The rationale behind this rule is that such payments merely reimburse the decedent for employment-related expenses that he would not otherwise incur; thus, the decedent will not suffer any economic loss if he fails to receive such reimbursements once the employment ceases. *United Airlines*, 382 Ill. App. 3d at 440, citing *Swearingen v. Industrial Comm'n*, 298 Ill.App.3d 666, 670–71, 699 N.E.2d 237 (1998). However, payments designated as *per diem* expenses are included in a claimant's average weekly wage to the extent that such payments represent real economic gain to the claimant rather than reimbursement for actual expenses incurred. *Swearingen*, 298 Ill.App.3d at 671, 699 N.E.2d 237.

¶ 34 In this case, the decedent's wage sheets show that he was paid regular reimbursement funds for his expenses, separate and apart from his *per diem* pay. Unlike in *United*, there is no evidence that any portion of the *per diem* payments were used for travel expenses. Instead, the decedent testified that those amounts were part of his salary to be spent entirely as he chose; he was not required to turn in expense reports accounting for his expenditure of these funds. Therefore, the Commission properly included the *per diem* payments in its average weekly wage calculation, and its resolution of the issue is not against the manifest weight of the evidence.

¶ 35 Next, Allen argues that it should not be held responsible for the medical bills arising from the treatment and surgery performed by Dr. Riew, and that the Commission's findings on this issue are contrary to the manifest weight of the evidence. This argument is premised upon Allen's earlier contention, which we have rejected, that there was no causal link between the decedent's condition of ill-being and his work injury. Alternatively, Allen argues that the expenses from Dr. Riew's treatment should have been disallowed because the decedent exceeded his two choice physician limit set forth under section 305/8(a) of the Act. 820 ILCS 305/8(a) (West 2010). The Commission rejected this contention, and there is no basis to disturb the Commission's finding. Dr. Riew's treatment consisted of "medical, surgical and hospital services" which were recommended based upon a referral by the decedent's "initial physician," Dr. Brown, and which therefore must be covered by the employer under section 305/8(a)(2) of the Act. 820 ILCS 305/8(a)(2) (West 2010).

¶ 36 Finally, Allen argues that it should not have been required to cover a medical bill for \$227 from SIU Physicians and Surgeons, because this represented services for a condition unrelated to the accident. However, a review of this bill indicates that it was in fact for a physical examination conducted by Dr. Brown after the decedent presented with acute pain radiating to his back, which could initially have been thought to have arisen from his injury or surgery. The bill did not cover treatment for the unrelated condition. Accordingly, Allen has failed to demonstrate that the award of this expense is against the manifest weight of the evidence.

¶ 37 Based on the foregoing analyses, we reverse that portion of circuit court judgment which reduced the Commission's award of PPD to 50% loss of man as a whole, we reinstate the

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Commission's award of 75% loss of man as a whole, and we affirm the remainder of the court's judgment.

¶ 38 Affirmed in part; reversed in part, and the Commission's award reinstated.