

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL SMITH,

Petitioner,

vs.

NO: 03 WC 27555
21 IWCC 0242

MID AMERICAN,

Respondent.

ORDER

This matter comes before the Commission on Respondent's Motion to Correct Clerical Error Under Section 19(f). The Commission agrees that the Decision contains clerical errors regarding average weekly wage and temporary total disability rate, and grants said Motion.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision and Opinion dated May 19, 2021, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Maria E. Portela.

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

July 1, 2021

MEP/se
049

/s/ Maria E. Portela

P: 052421
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STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify <input type="text" value="down"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

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DANIEL SMITH,

Petitioner,

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NO: 03 WC 27555
21 IWCC 0242

MID AMERICAN,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, benefit/wage rate, temporary total disability (TTD), medical expenses and nature and extent, 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

We initially review the procedural history in this case and discuss certain aspects of the previously issued decisions and orders to help guide our analysis.

Arbitrator's Decision – December 1, 2010

Arbitration proceedings, pursuant to Section 19(b) of the Act, were held on multiple dates spanning many years from January 26, 2004 through July 26, 2010. On December 1, 2010, an Arbitration decision was issued by Arbitrator Hennessy finding Petitioner sustained accidental injuries arising out of and in the course of his employment on February 3, 2003. Petitioner's current condition of ill-being was found to be causally related to that accident. Petitioner's average

weekly wage in the year preceding his accident was determined to have been \$1,296.00. He was awarded \$609,501.36 for medical expenses, prospective implantation of a spinal cord stimulator per Dr. Glaser and Dr. Tumlin, \$387,702.26 in TTD benefits (with Respondent receiving credit for payments made through June 30, 2003), and penalties and attorney's fees in excess of \$600,000.00.

Commission Decision on Review – December 19, 2011

Respondent filed a review of the Arbitrator's decision and, on December 19, 2011, the Commission issued its Decision. It was signed by Comm. Dauphin with Special Concurring Opinions, pursuant to *Zeigler v. IC*, 51 Ill.2d 137, 281 N.E.2d 342 (1972), by Comm. DeVriendt (for Comm. Mason whom he replaced) and Comm. White (for Comm. Lindsay whom she replaced). This Decision affirmed the Arbitrator's findings as to accident and average weekly wage but found that Petitioner only established causation through his emergency room (ER) visit on September 22, 2003, "at which time a physician noted significant symptom magnification." *Comm.Dec.12/19/11 at 1*. The Commission modified the TTD period to end as of September 22, 2003, reduced the medical award to \$21,840.74 for expenses rendered through that date, and vacated the awards for prospective medical, penalties and fees. Significantly, for reasons which will be discussed later, the case was remanded to the Arbitrator pursuant to *Thomas v. IC*, 78 Ill.2d 327, 399 N.E.2d 1322,35 Ill.Dec. 794 (1980), but also included "summons language" allowing for the remand to the Arbitrator "only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed." *Comm.Dec.12/19/11 at 25*. This Decision also indicated, "The probable cost of the record to be filed as return to Summons is the sum of \$35.00, payable to the Illinois Workers' Compensation Commission...and deposited with the Office of the Secretary of the Commission." *Id.*

The Commission Decision focused on the September 22, 2003, ER visit on which date Dr. Massimilian noted that Petitioner exhibited questionable pain behaviors. *Comm.Dec.12/19/11 at 24*. Petitioner had mild paravertebral muscle spasm in the central spinous process and negative straight-leg-raising test to 45 degrees bilaterally, "but no other significant abnormalities." *Id.* Dr. Massimilian diagnosed Petitioner with "acute exacerbation of chronic neck and low back pain" and "narcotic dependence." *Id.*

In the Analysis section, the Commission noted, "Dr. Mercier also found Petitioner's subjective complaints inconsistent with the clinical findings." *Id.* The Commission detailed more about Dr. Mercier's June 30, 2003 Section 12 examination (a/k/a, "IME") earlier in the Decision (*Id. at 9-11*). However, it did not overtly state that it found Dr. Mercier's opinion to be persuasive in regard to Petitioner reaching maximum medical improvement (MMI) and being able to return to work full duty due to Petitioner having "no reliable objective findings on physical exam of functional permanent impairment." *Id. at 11*. Instead, the Analysis section continued to focus on Petitioner's prior back problems and injuries from 1987 through August 20, 2002. The Decision stated, "The Commission further notes that Petitioner had chronic back problems prior to the [sic] February 2003." *Id. at 24*.

The Commission concluded by stating, "Finally, despite ongoing complaints of almost

debilitating pain after the work accident, Petitioner failed to fully comply with the treatment prescribed by his doctors prior to [9/22/03], including the physical therapy prescribed by Dr. Goldflies and the epidural steroid injections prescribed by Dr. Diesfeld." *Id.*

Circuit Court Decision – September 6, 2013

Petitioner appealed the Commission Decision and, on September 6, 2013, the Circuit Court of McHenry County issued a "Decision" which concluded:

the determination of the Commission to terminate benefits as of [9/22/03] is reversed and remanded. Furthermore, this Court remands this matter to the Commission to complete its analysis of the impact of its decision regarding Section 19(d). *Cir. Ct. Dec. at 5.*

The Court acknowledged:

The Decision of the Commission addresses the inconsistencies in the petitioner's claims as well as the contradictions between Mr. Smith's testimony and the records of his own physicians. The Commission made specific note of the inconsistencies between the petitioner's testimony and his medical records and cited specific examples from the records of Dr. Kroll, Dr. Lorenz and Dr. Goldflies in the Decision.

Accordingly, the Commission had a basis on which to determine that the petitioner's credibility was lacking. To the extent that this determination played a role in the Decision of the Commission, this Court finds that there was sufficient evidence to support the conclusion and that it was not against the manifest weight of the evidence. *Id. at 3-4.*

However, although the Court agreed with the Commission that Petitioner is not credible, it continued:

The Commission determined that the Petitioner failed to meet his burden of establishing that his condition of ill being extended beyond September 22, 2003. The Commission clearly based its decision on its analysis of the petitioner's credibility and the observations of Dr. Massimilian in the emergency room on September 22, 2003. This Court notes that Dr. Massimilian was obviously suspicious of the petitioner's complaints by virtue of the fact that he made a record of his observation that the petitioner's complaints seemed to arise only when he felt that he was being observed. Furthermore, Dr. Massimilian diagnosed an acute exacerbation of chronic neck and low back pain.

Based on this, the Commission has determined that the condition of ill being had resolved by September 22, 2003. *However, review of the record fails to reveal any evidence that the chronic condition at issue had resolved or returned to its pre-accident state. The Commission makes no reference to any such finding by any physician.* As the Commission has determined that the petitioner has established that he suffered an injury in the incident of February 3, 2003, then *there must be some evidence to support the resolution of that injury by September 22, 2003.* The observations of Dr. Massimilian that the petitioner

exhibited questionable pain behavior on September 22, 2003 does not confirm the resolution of the injury without anything more, particularly since Dr. Massimilian further opined that the petitioner was suffering from chronic neck and low back pain. Dr, Massimilain [sic] does not opine that the petitioner's condition related to February 3, 2003 had resolved or that he wasn't suffering from any condition of ill being, rather that that his current complaints were suspicious and that he had a chronic neck and low back condition.

In the absence of some evidence to support the conclusion that the petitioner's condition had resolved or never even existed, this court must hold that the determination that the Petitioner failed to establish his condition extended beyond September 22,2003 to be against the manifest weight of the evidence.

Id. 4-5. (Emphases added). The Court also discussed the applicability of §19(d) of the Act when it wrote:

Finally, The Commission found that the Petitioner failed to fully comply with the treatment prescribed by his doctors prior to September 22, 2003. Specifically, the petitioner failed to undergo physical therapy and epidural steroid injections prescribed by his physicians. The respondent argues that pursuant to 820 ILCS 305/19(d) 2011, such a refusal permits the Commission to reduce or suspend the compensation of any such injured employee.

While the Commission makes it clear that it finds the petitioner did not comply with this section, the exercise of discretion contemplated by Section 19(d) is not so clear. The absence of any specific finding with respect to this determination leaves the Court to speculate as to the Commission's intent. The absence of a decision prevents this Court from reviewing the applicability of Section 19(d) or whther [sic] the evidence supports any such decision. *Id. at 5.*

We initially note that the Court wrote, “The Commission clearly based its decision on its analysis of the petitioner's credibility and the observations of Dr. Massimilian in the emergency room on September 22, 2003.” *Cir.Ct.Dec. at 4.* However, the Court did not mention these additional Commission findings:

- At the ER on September 22, 2003, Petitioner “reported earlier that day his leg ‘gave out’ and he fell to the floor.” *Comm.Dec.12/19/11 at 24.*
- On June 30, 2003, almost three months prior to that ER visit, Dr. Mercier found Petitioner’s “subjective complaints inconsistent with the clinical findings.” *Id.*
- Petitioner “had chronic back problems prior to the [sic] February 2003.” *Id.*

Respectfully, the Commission maintains that these findings are among those in the record that support terminating TTD and medical benefits because his alleged conditions of ill-being are no longer causally related to his work injury of February 3, 2003. We believe if the Commission had been clearer, and had stated it was specifically finding Dr. Mercier’s June 30, 2003 opinion to be

persuasive, the Court would most likely have affirmed the termination of causation under a manifest-weight standard. However, there appears to have been some confusion due to the Commission's focus on the September 22, 2003 ER record of Dr. Massimilian, which did not provide a clear basis for terminating causation. We do not believe the previous Commission decision intended to base its termination of causation *solely* on the records of Dr. Massimilian. Although these records remain relevant as another example of Petitioner's questionable pain behaviors, the more persuasive opinion for terminating causation was that of Dr. Mercier.

Second, the Court wrote, "review of the record fails to reveal any evidence that the chronic condition at issue had resolved or returned to its pre-accident state. The Commission makes no reference to any such finding by any physician." *Cir.Ct.Dec. at 4*. Again, we point out that the Commission's Decision actually did "reference" Dr. Mercier's June 30, 2003 IME findings and opinion but, since it did not do so in the "Analysis" section, the Court must not have believed that the Commission relied on Dr. Mercier's opinion as a basis for terminating causation. Based upon our review of that Commission Decision, we believe the opinion of Dr. Mercier was a significant reason the Commission terminated causation. Perhaps the Commission's error was to award three additional months of TTD and medical benefits extending until September 22, 2003, since this made the basis for its decision unclear. However, it was at that ER visit that Dr. Mercier's opinion regarding Petitioner's lack of credibility was confirmed by another physician, Dr. Massimilian. In our view, the ER records were not the *sole* basis of the Commission's previous Decision. Rather, they were additional support for the persuasive opinion Dr. Mercier provided three months earlier.

This confusion regarding the basis of the Commission's decision would have been avoided if the Commission had specifically stated that it found Dr. Mercier's opinion persuasive and terminated benefits on June 30, 2003. In any event, the issue facing us now is that the Court did not reinstate the Arbitrator's decision regarding causation nor direct an award of TTD and medical benefits through the date of hearing. Rather, it simply "reversed" the Commission's determination "to terminate benefits as of [9/22/03]" and remanded the matter on that issue along with instructions to "complete its analysis of the impact of its decision regarding Section 19(d)." This seems to have left the question of causation very open-ended. It appears that the Commission, on Remand, had the option to choose a different date to terminate causation as long as it was based on "some evidence to support the conclusion that the petitioner's condition had resolved or never even existed."

Commission Decision on Remand – August 15, 2014

On August 15, 2014, the Commission issued a Decision and Opinion on Remand, which was unanimously issued by three Commissioners, none of them being the same Commissioners who had deliberated and decided the previous Decision and Opinion on Review. The Commission, on Remand, interpreted the Circuit Court's decision as follows:

- "the Judge affirmed the decision of the Commission in regards [sic] to the Petitioner's lack of credibility." *Comm.Dec.8/15/14 at 1*.
- "the Judge found that there was no medical evidence in the record that indicated the chronic condition had resolved or returned to its pre-accident state and

remanded this case back to the Commission for a finding in that regard.” *Id. at 1-2.*

- “In this particular instance the Commission found that Petitioner is not entitled to any further temporary total disability after [9/22/03]. Petitioner has the right to go back to the Arbitrator and try to prove that he is entitled to [TTD] after the date of the Arbitration hearing or to prove that he has sustained permanent disability as a result of the [2/3/03] accident. *The Commission assumes that the Circuit Court Judge remanded this back to the Commission to make a determination of whether Petitioner is entitled to further temporary disability since the hearing date or to determine when and if Petitioner is entitled to any permanent disability as a result of this injury.* The Commission stated in its original decision that ‘as provided in Section 19(b) of the Act, the award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.’” *Id. at 2 (Emphases added).*
- “*The Commission found that as of [9/22/03], based on Petitioner's lack of credibility, the medical records of the various treating physicians, the Petitioner's lack of cooperation with those physicians, and the emergency Room Doctor's findings on that date, the Petitioner was not entitled to further temporary disability and medical treatment thereafter up until the date of the hearing before the Arbitrator. The Commission believes the Circuit Judge had no objection to that finding.* The Commission did not find that Petitioner's condition had fully resolved and if so when that resolution occurred. That is an issue that had yet to be decided and the Petitioner and the Respondent have the right under Section 19(b) to offer evidence for or against it before the Arbitrator. Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322,35 Ill.Dec. 794 (1980).” *Id. (Emphases added).*
- “Therefore the Commission, per the Remand of the Circuit Court Judge, remands this 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, pursuant to Thomas v. Industrial Commission...”

With all due respect to the previous Commission Panel, we believe the Commission on Remand misinterpreted the Circuit Court decision. The Circuit Court ordered that the Commission’s determination “to terminate benefits as of [9/22/03] is reversed.” However, the Commission stated it, “believes the Circuit Judge had no objection to that finding” that Petitioner was not entitled to further TTD and medical treatment after September 22, 2003 to the date of hearing. The Commission further interpreted the Court’s Decision as remanding the case for a determination, pursuant to *Thomas v. IC*, of additional TTD or permanency *since the hearing date*. In other words, the Commission apparently reasoned that, although it found Petitioner was not entitled to TTD and medical benefits after September 22, 2003, it did not actually “terminate benefits” entirely as of that date, because Petitioner could still obtain another hearing on the issues of additional TTD and permanency.

We point out that the Circuit Court decision is also confusing because, at the top of page five under the “Issues” section, it stated, “In the absence of some evidence to support the conclusion that the petitioner’s condition had resolved or never even existed, this Court must hold that the determination that the Petitioner failed to establish his condition *extended beyond September 22, 2003* to be against the manifest weight of the evidence.” *Cir.Ct.Dec. at 5*. This could indicate the Court was finding the evidence showed that Petitioner’s condition *had* “extended beyond” September 22, 2003. However, in the “Conclusion” paragraph, the Court wrote, “the determination of the Commission to terminate benefits *as of September 22, 2003* is reversed and remanded.” The question, therefore, is whether the Commission was being instructed to extend TTD and medical benefits beyond September 22, 2003, to some date to be determined? Or, was the Commission free to choose a different date, possibly even earlier, on which to terminate causation that is better supported by evidence “that the petitioner’s condition had resolved or never even existed?”

On the issue of the Court’s instructions to complete its analysis of §19(d) of the Act, the Commission wrote:

The Judge also remanded this matter back to the Commission "to complete its analysis of the impact of its decision regarding Section 19(d)." Section 19 (d) of the Act provides that "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery, OR shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any injured employee."

Nowhere in the Commission is [sic] decision Section 19(d) cited. The Commission took the Petitioner's lack of credibility, the various inconsistent medical records of treating physicians, as well as his failure to fully comply with the treatment that they prescribed, to come to the conclusion that Petitioner failed to meet his burden of proof regarding causal connection and further temporary total disability. However, even if it was mentioned, that Section of the Act allows the Commission, in its discretion, to use the Petitioner's failure to comply with the reasonable treatment as one of the basis [sic] for denying benefits.

Id. at 3 (Underlines in original). Based on our review of the Commission’s previous decisions, we do not believe Petitioners’ benefits were specifically denied based on Section 19(d). Rather, the Commission used Petitioner’s “failure to fully comply” with recommended treatment as evidence regarding the credibility of Petitioner’s complaints and the issue of causation in general.

In any event, in what has become a significant issue for the current Review before us, the Commission ordered:

IT IS THEREFORE ORDERED BY THE COMMISSION that this case is remanded 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, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

However, unlike the previous Commission Decision and Opinion on *Review*, no summons

language was included in this Decision and Opinion on *Remand*.

This has led to a disagreement between the parties regarding whether the Commission's Decision on Remand was a final, appealable decision or was interlocutory. We find that, since the Commission Decision on Remand did not provide a procedural "vehicle" (i.e., the summons language), there was no way for Petitioner to have appealed the Decision to the Circuit Court at that time. On its face, it was strictly an interlocutory remand to the Arbitrator pursuant to *Thomas v. IC*. Therefore, we also find that the Commission's Decision and Opinion on Remand is not "law-of-the-case" regarding its conclusions because neither party had the opportunity to appeal that decision to the Circuit Court. We find that all the matters before us relate back to the original Commission §19(b) Decision. That original Decision was remanded back to the Commission by the Circuit Court and the issues have never been settled. Since the Commission's Decision on Remand was *not* a final, appealable decision, we find that both parties should be allowed to appeal our current Decision and Opinion on Review *and* the previous Decision and Opinion on Remand.

Arbitration Decision – October 29, 2018

On November 14, 2017, a hearing was held before Arbitrator Ory, pursuant to the Commission's Decision and Opinion on Remand, and a decision was issued on October 29, 2018. This decision is attached, to which we make the modifications outlined below.

ANALYSIS

We are mindful that six different Commissioners, via two unanimous prior Commission decisions, all found that Petitioner was not credible and should have had his benefits terminated by September 22, 2003. We are also uncertain how the Circuit Court confirmed the Commission's finding regarding Petitioner's lack of credibility yet reversed on the issue of causation. As mentioned above, perhaps this is attributable to the Commission's having spent more time discussing the September 22, 2003 ER record in the Analysis section and insufficiently discussing Dr. Mercier's opinion of June 30, 2003.

This is, undoubtedly, a complicated case. We must initially determine the issues that are properly before the Commission at this time. On September 6, 2013, the Circuit Court remanded the previous Commission Decision and Opinion on Review, which had been issued on December 19, 2011 pursuant to §19(b) of the Act. As mentioned above, the Commission's Decision and Opinion on Remand, issued on August 15, 2014, attempted to explain its previous findings and why it believed it was complying with the Circuit Court's decision. However, since the Commission's remand decision did not contain "summons language," there was no opportunity for either party to appeal that Decision to the Circuit Court for a judicial determination regarding whether the Commission's interpretation of the Circuit Court's directives was correct.

In our view, the Commission remains bound by the Circuit Court's decision and directives, which require modifying the first Commission Decision and Opinion on Review, the subsequent Commission Decision and Opinion on Remand and the most recent Arbitration Decision.

Nevertheless, we do so with deference to the *factual* findings made by the Commission in

its §19(b) Decision, issued on December 19, 2011, but we will also consider evidence that was presented at the previous arbitration hearing, even if it was not specifically highlighted in the Commission's Decision. Our understanding is that the Circuit Court's directives require us to re-analyze the *legal* conclusions regarding causation through the date of the first Arbitration hearing, which ended on July 26, 2010, without taking any additional evidence pertaining to events prior to that hearing.

Regarding the most recent Arbitrator's Decision, which actually led to this Review, we have only considered the evidence presented at that hearing on November 14, 2017, that relates to facts, events, medical treatment and medical opinions from July 26, 2010 through November 14, 2017.

Causation Determination as Remanded by the Circuit Court

As discussed above, the Circuit Court's decision was unclear, so we believe it most appropriate to follow the directive in the Conclusion section stating that the Commission's determination "to terminate benefits *as of* September 22, 2003 is reversed and remanded."

Based on the Circuit Court's directive, we find that Petitioner's benefits should actually have been terminated earlier, on June 30, 2003, because we find Dr. Mercier's opinion most persuasive regarding Petitioner's injuries, causation, maximum medical improvement (MMI), prospective medical treatment and ability to work as of that date. We find Dr. Mercier's opinion persuasive, as contained in his June 30, 2003 report, that Petitioner's "alleged injury resulted in a low back muscle ligamentous strain only." He noted that Petitioner exhibited "extensive subjective non-anatomical" sensory and motor loss along with other findings that "represent marked false reporting to clinical testing indicating [his] willingness to not only falsify information regarding his medical history, but on his physical exam. This puts in serious doubt the reliability of [his] subjective complaints." Dr. Mercier reviewed Petitioner's medical records dating back to 1995, which reflected pre-existing conditions, including those involving the lumbar, cervical, bilateral knees and legs. He opined that Petitioner was at MMI and could return to his normal duties because "there is no reliable objective findings on his physical exam of functional permanent impairment."

On April 5, 2007, Dr. Mercier examined Petitioner again. He reiterated his opinion that Petitioner's alleged February 3, 2003 injury was limited to a low back muscle ligamentous strain. He wrote, "Any and all medical care, testing, lost time from work, work restrictions and disability for problems in other areas of his body are not related to alleged events in February 2003." Dr. Mercier stated that his opinions from June 30, 2003 were unchanged.

On September 20, 2007, Dr. Mercier performed an updated records review and, again, stated that his opinions of June 30, 2003 were unchanged.

The previous Commission Decision, issued on December 19, 2011 pursuant to §19(b) of the Act, focused too much on the September 22, 2003 opinion of Dr. Massimilian and was not clear enough in explaining that Dr. Massimilian's observations and findings were simply additional support for the opinions of Dr. Mercier. Although Petitioner was awarded three

additional months of TTD and medical benefits, it was actually Dr. Mercier's opinion that was being relied upon to terminate causation.

Based on Petitioner's lack of credibility, which the Circuit Court already affirmed, we find that Petitioner's alleged complaints after his work accident were not credible. We further find that, to the extent Petitioner may have had any objectively-supported complaints, those were related to his pre-existing conditions and not related to the work accident as of Dr. Mercier's June 30, 2003 opinion. The Commission does not find that Dr. Massimilian's diagnosis of an "acute exacerbation of chronic neck and low back pain," on September 22, 2003, was intended to be a causation opinion. The "acute exacerbation" was due to a fall, which we do not believe was caused or contributed to by any condition of ill-being related to the work accident. We further find that the "chronic neck and low back pain" were not causally related to the work accident because the Commission does not believe Petitioner is credible about his complaints both before and after the work accident. In summary, we do not believe that there was any aggravation of his condition(s) that extended beyond the June 30, 2003 IME of Dr. Mercier.

We reaffirm the previous Commission Decision on Remand's explanation that its discussion of Petitioner's failure to fully comply with the treatment prescribed by his doctors was evidence regarding his lack of credibility, generally; not a specific denial of benefits under Section 19(d).

Temporary Total Disability and Medical Benefits

The Commission finds Petitioner is entitled to TTD and medical benefits through June 30, 2003, the date of Dr. Mercier's IME.

To the extent the Circuit Court intended to order the Commission to find that Petitioner's condition remained causally related *after* September 22, 2003, we find that Petitioner's medical treatment was unreasonable and unnecessary based on Dr. Mercier's opinion and Petitioner's lack of credibility. In other words, since Petitioner is not credible about his symptoms and complaints, the alleged need for treatment is not credible either.

Similarly, to the extent the Circuit Court intended to order "causation" and "benefits" to continue beyond September 22, 2003, because it believed the Commission based its finding on Dr. Massimilian's ER record, we find that the Commission actually denied TTD based on Petitioner's lack of credibility and Dr. Mercier's opinion that Petitioner had reached MMI and was able to return to work full duty. We, too, find Dr. Mercier's opinion most persuasive on this issue.

Based on the Commission's prior determination that Petitioner's average weekly wage in the year preceding his accident was \$1269.60, we find that his weekly TTD rate is \$846.40. The Commission previously determined that Petitioner's period of TTD began on February 10, 2003. *Comm.Dec.12/19/11 at 2*. We note that the Circuit Court did not modify this beginning date in its decision on remand. Therefore, we find Petitioner is entitled to 20-1/7 weeks of TTD from February 10, 2003 through June 30, 2003, at the rate of \$846.40 per week.

Causation Since the Arbitration Hearing that Ended on July 26, 2010

The Review before us also involves the Arbitrator's Decision, issued on October 29, 2018, that addressed the issues of causation, TTD, medical expenses and permanent disability benefits *since* the previous hearing that was held on July 26, 2010.

As the Arbitrator's Decision indicates, much of the testimony and evidence presented was related to Petitioner's conditions and treatment dating back to his accident in 2003. We do not believe the Circuit Court intended to order the Commission to consider new evidence on the issue of causation that would allow the parties to relitigate or supplement the evidence they had presented at the initial Arbitration hearing.

On the issue of causation as it relates to Petitioner's entitlement to additional TTD and medical benefits *after* the arbitration hearing that ended on July 26, 2010, we find that there was no evidence presented at the most recent hearing, on November 14, 2017, that would cause us to alter our determination that Petitioner's condition was no longer causally related to his work accident after June 30, 2003.

TTD and Medical Benefits Since the Previous Arbitration Hearing

Our decision regarding causation results in a denial of additional TTD and medical benefits. However, the Arbitrator's October 29, 2018 decision is hereby modified to reflect that there *was* evidence, submitted at the hearing on November 14, 2017, that could support Petitioner's claim for continued TTD and medical benefits. This evidence includes Dr. Glaser's testimony and records, Petitioner's testimony, and the testimony of Petitioner's witnesses. Nevertheless, we find that this evidence is not as persuasive as Dr. Mercier's June 30, 2003 opinion. Dr. Mercier reaffirmed his opinion on April 5, 2007, September 20, 2007 and October 13, 2015, and in his deposition testimony on April 20, 2017. The Commission finds that the combination of Petitioner's lack of credibility and the opinions of Dr. Mercier support its finding that Petitioner failed to prove he was entitled to TTD or medical benefits after June 30, 2003 or, at the very latest, after the September 22, 2003 ER visit as explained in the original Commission decision.

We also point out that, at the most recent hearing, Petitioner testified that he has not tried to get any other type of job since 2003 and he does not feel capable of doing so. *T.11/14/17 at 33*. However, the March 17, 2016 record of Dr. Glaser states, "the work letter was faxed over to job." The Commission questions what job is being referenced. An entry from later that day indicates, Petitioner "stated that the job did received the fax[. T]hey found where the fax was placed." Although under different circumstances, this reference to a "job" may be overlooked as a typographical or inadvertent error, the already-affirmed findings about Petitioner's lack of credibility cause us to question whether Petitioner actually did have a job (or other jobs) while he has been claiming to be temporarily totally disabled. Furthermore, in the event Petitioner might claim that he was having this letter faxed to Respondent, it does not make sense why Petitioner would have been so concerned about getting an "off work letter" sent to Respondent, which had not paid any benefits to him for years, that he would pester his doctor for it to be faxed immediately. This record seems to reflect a situation of someone needing an off-work note for a job they currently have.

In any event, we base our decision to terminate causation as it relates to TTD and medical benefits, on the persuasive opinion of Dr. Mercier.

Nature and Extent

Since Petitioner's accident occurred prior to September 1, 2011, the permanency factors in §8.1b(b) of the Act do not apply. Based on a thorough review of the evidence, the Commission finds Petitioner sustained a lumbar muscle ligamentous strain, on February 3, 2003, which had resolved as of his IME with Dr. Mercier on June 30, 2003. We find Petitioner is entitled to 37.5 weeks of permanent partial disability benefits, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the person as a whole.

Based on the Commission's prior determination that Petitioner's average weekly wage in the year preceding his accident was \$1269.60, we find that his weekly permanent partial disability rate is \$542.17, which was the maximum allowable under §8(b)4 of the Act on the date of his accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that all prior Commission awards for temporary total disability and medical expenses are hereby vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$846.40 per week for a period of 20-1/7 weeks, from February 10, 2003 through June 30, 2003, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for the \$10,833.92 in temporary total disability benefits it paid through June 30, 2003, and a permanency advance in the amount of \$27,108.50.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses in evidence that were incurred prior to June 30, 2003, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$542.17 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at

the sum of \$21,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 1, 2021

/s/ Maria E. Portela

SE/

/s/ Thomas J. Tyrrell

O: 3/23/21

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/s/ Kathryn A. Doerries