

ILLINOIS WORKERS' COMPENSATION COMMISSION  
NOTICE OF ARBITRATOR DECISION

**VERWAY, MARTY**

Employee/Petitioner

Case# **12WC021177**

**BOMAG AMERICAS INC**

Employer/Respondent

On 11/16/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.34% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

5354 STEPHEN P KELLY  
2710 N KNOXVILLE AVE  
PEORIA, IL 61604

0507 RUSIN & MACIOROWSKI LTD  
JEFF POWELL  
10 S RIVERSIDE PLZ SUITE 1530  
CHICAGO, IL 60606

STATE OF ILLINOIS )  
)SS.  
COUNTY OF PEORIA )

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input checked="" type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION  
ARBITRATION DECISION

**Marty Verway**  
Employee/Petitioner

Case # 12 WC 21177

v.

Consolidated cases: \_\_\_\_\_

**Bomag Americas, Inc.**  
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Peoria, Illinois**, on **September 25, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

- A.  Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
- B.  Was there an employee-employer relationship?
- C.  Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
- D.  What was the date of the accident?
- E.  Was timely notice of the accident given to Respondent?
- F.  Is Petitioner's current condition of ill-being causally related to the injury?
- G.  What were Petitioner's earnings?
- H.  What was Petitioner's age at the time of the accident?
- I.  What was Petitioner's marital status at the time of the accident?
- J.  Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
- K.  What temporary benefits are in dispute?  
 TPD       Maintenance       TTD
- L.  What is the nature and extent of the injury?
- M.  Should penalties or fees be imposed upon Respondent?
- N.  Is Respondent due any credit?
- O.  Other \_\_\_\_\_

**FINDINGS**

On **2/17/12**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **\$37,080.68**; the average weekly wage was **\$713.09**.

On the date of accident, Petitioner was **51** years of age, *single* with **1** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

The total amount of monies paid by the Respondent up to the date of trial was \$75,508.78.

**ORDER**

Respondent shall pay Petitioner permanent and total disability benefits of **\$483.36/week** for life, commencing **September 25, 2015**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the *Rate Adjustment Fund*, as provided in Section 8(g) of the Act.

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

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



\_\_\_\_\_  
Signature of Arbitrator

**11/15/15**  
Date

**NOV 16 2015**

**STATEMENT OF FACTS**

Petitioner worked for Respondent as a laborer assembling heavy equipment. Petitioner testified his job was to work on rollers for heavy equipment. His job duties required him to maneuver these rollers with a crane with a co-employee. Petitioner testified that on February 17, 2012 (Friday), he was working with a co-employee when his right hand was crushed between a “cab and a roller.” Petitioner testified that he did not notice much pain immediately after the accident but when he went home the pain grew in intensity. Later that evening, the pain was such that he called his employer to report the accident. He was advised to seek treatment “if it was bad” or otherwise wait until Monday. Petitioner stated that he “toughed it and out” and on Monday, February 20, 2012, Respondent directed him to go to Kewanee Hospital.

On February 20, 2012, Petitioner presented to Kewanee Hospital. X-rays were taken of the right hand which revealed soft tissue swelling. Degenerative changes were also noted. (PX 5)

Petitioner presented to Dr. Michael Ahearn that same day, February 20, 2012. Petitioner reported that he injured his right hand at work on Friday while working with a cab and roller. Petitioner was assessed with a right wrist sprain. Dr. Ahearn recommended physical therapy. (PX 5)

On March 23, 2012, at the direction of Dr. Ahearn, an EMG/NCV study was ordered. The findings of the EMG/NCV study were mild sensory neuropathies of the right median, ulnar and radial nerves. There was no evidence of median nerve compression neuropathy at the wrist. (PX 5)

Subsequent to the EMG/NCV, Dr. Ahearn ordered an Upper Extremity Arterial Doppler. The diagnostic study was completed on April 2, 2012. The report documents a history for right wrist trauma with cold right hand. The study was normal. Dr. Ahearn also ordered a MRI of the right wrist which revealed 1.) significant osteoarthritic change of the first carpal-metacarpal articulation; and 2.) subchondral cystic changes in the remainder of the proximal carpal row suggestive of the possibility of crystal deposition disease. (PX 5)

Petitioner testified that subsequent to the diagnostic studies, Dr. Ahearn referred him to an orthopedic specialist, Dr. Maryelizabeth Rashid. Dr. Rashid testified via deposition in this matter. The doctor’s testimony and the records show she first saw Petitioner on July 25, 2012. Petitioner reported a consistent history of accident and medical treatment to date. On physical examination, Petitioner had decreased range of motion of the right thumb. He had subluxation of the first metacarpal on the right side compared to the left. He also had a positive grind test with significant pain. Petitioner was diagnosed with right thumb CMC arthritis. Dr. Rashid noted that same appeared to be post-traumatic in nature. Dr. Rashid opined that the injury at work probably caused inflammation in that area and he continued to experience pain. Dr. Rashid recommended operative intervention including a right thumb CMC joint arthrodesis. The procedure was carried out on September 19, 2012. The post-surgical diagnosis was right thumb carpometacarpal arthritis. (PX 2, dep. 3)

Petitioner continued with Dr. Rashid. On November 20, 2012, Petitioner returned to see Dr. Rashid. The doctor noted Petitioner called the week before noting significant swelling in his right hand and stated it was turning cold. On physical examination, the doctor noted Petitioner did not have any significant mottling or significant right hand temperature change compared to the left. Dr. Rashid stated she was concerned about possible CRPS prior to surgery, but he never seemed to exhibit any findings when she saw him. She indicated that the only symptom Petitioner currently had was post-operative swelling, “although the swelling he has is significant and it is more so than postoperative swelling I think he would have especially at 9 weeks.” (PX 2, dep. 3)

On November 28, 2012, Dr. Rashid recorded that she felt Petitioner did not fit the criteria based on public literature for having CRPS. She noted there was minimal temperature change between the right and left hand. The doctor prescribed therapy, narcotics and gabapentin. When Petitioner returned to the doctor on December 18, 2012, it was noted Petitioner now had some temperature change on the right side compared to the left. He also had some color change. His swelling was still significant. The doctor thought Petitioner had characteristic findings consistent with complex regional pain syndrome. It was recommended Petitioner see Dr. Cory at the pain clinic in order to undergo a stellate ganglion block. (PX 2, dep. 3)

Petitioner reported to Dr. Cory, a pain management specialist, at Central Illinois Pain Center on January 11, 2013. Petitioner advised he had symptoms such as discoloration with swelling in his right hand. It was noted that the trial of right stellate ganglion nerve blocks could be of additional benefit. (PX 2, dep. 3)

Petitioner returned to see Dr. Rashid on January 23, 2013. Petitioner's right hand swelling appeared to be decreased. He still had color changes and temperature changes compared to the other side. Petitioner had significant stiffness in the hand and fingers as well as atrophy of the musculature in the forearm and the arm. Dr. Rashid diagnosed Petitioner with complex regional pain syndrome. Dr. Rashid noted that Petitioner may have had signs and symptoms of CRPS when she initially saw him, and unfortunately it had been aggravated by the surgery. Petitioner's narcotic and Neurontin medications were continued. (PX 2, dep. 3)

Petitioner saw Dr. Rashid on March 12, 2013. Dr. Rashid recorded that she has tried multiple modalities none of which provided good pain relief. She noted that Petitioner had been referred for an injection which did not help. The doctor also recorded the discussion about referring Petitioner to Mayo Clinic. Dr. Rashid provided that there was not anything further she could provide Petitioner. She referred Petitioner back to Dr. Ahearn for any chronic pain medication. Additionally, she prescribed a Fentanyl patch and advised that she would be happy to complete any disability forms he would need. Lastly, she indicated Petitioner was unable to work. (PX 2, dep. 3)

Dr. Rashid testified that she was of the opinion that Petitioner's diagnosis of CRPS and arthritic CMC joint was directly related to the work injuries described occurring while working for the employer. Dr. Rashid testified that when she last saw Petitioner on March 12, 2013, she was very skeptical he could return in any kind of work capacity. (PX 2, pp. 26-28) The doctor also testified this was the worst Complex Regional Pain Syndrome she has seen during her practice. (PX 2, p.35)

On August 4, 2013, Dr. Rashid completed an insurance disability form. On the form Dr. Rashid wrote Petitioner had "Severe Limitation of Functional Capacity, right upper extremity only." She wrote Petitioner had "little to no use with right upper extremity." She indicated he was totally and permanently disabled from any occupation. (PX 2, dep. 7) During the deposition, Dr. Rashid testified that her opinion regarding his disablement was based on the amount of medication's he was taking as well as his impairment of his upper extremity. (PX 2, p.53)

Petitioner's first visit back to Dr. Ahearn occurred on May 29, 2013. Petitioner reported weakness and numbness in his right hand. Petitioner was assessed with reflex sympathetic dystrophy of the right upper limb. The doctor made a physiatry referral and prescribed Hydrocodone and a Fentanyl Transderm Patch. Petitioner was also kept off work. On July 18, 2013, Petitioner conveyed complaints of contractures to right hand. Petitioner requested a brace. He reported that his pain varied from day to day. There was burning pain and pressure at times which was pretty well controlled with pain meds. Dr. Ahearn assessed 1.) spasm of muscle/muscle cramps - right hand and 2.) causalgia of upper limb. He was given a dynamic hand splint. Petitioner continued to follow with Dr. Ahearn over the ensuing months. (PX 5)

On December 18, 2013, Petitioner was seen by Dr. Rashid at Kewanee Hospital. The doctor recorded that Petitioner stated that his symptoms were no better. He thought that it might be progressing to the left side. An examination was relatively unchanged. Petitioner had hypersensitivity on the upper extremity that was unchanged. The doctor wrote that Petitioner continued to have difficulty with complex regional pain syndrome.

She indicated he was at MMI. The doctor further indicated that she did not believe this was going to get much better. (PX 5)

As of December 30, 2013, Dr. Ahearn recorded Petitioner was complaining of Raynaud's phenomenon, spasms, right hand and shoulder syndrome, CRPS, and tobacco-dependent syndrome. It was noted that Petitioner had reached maximum medical improvement and permanent disability would be expected. (PX 5)

The last recorded visit in the record show Petitioner saw Dr. Ahearn on May 30, 2014. Petitioner's complaints were weakness, numbness, and swelling. An examination revealed contracture, tenderness, limited ROM, cyanosis, edema, abnormal sensation, and arm hyperalgesia in right arm. Again it was noted that Petitioner was at maximum medical improvement and there was expected to change. The assessment was Complex Regional Pain Syndrome, Type II, upper limb. Petitioner was to remain off work. (PX 5) The Arbitrator notes the records submitted document orders from Dr. Ahearn indicating Petitioner should remain off work at least through November 2014. (PX 5)

Dr. Ahearn testified in this case. Dr. Ahearn testified he is a board certified family practitioner. Dr. Ahearn testified that Petitioner's diagnosis was that of CMC joint replacement and complex regional pain syndrome. Dr. Ahearn testified this is all work-related. (PX 3, pp. 10-15, 21) Dr. Ahearn testified Petitioner is unemployable. (PX 3, p. 23) The recommended plan of treatment is for Petitioner to attend a pain specialist facility in Alabama. (PX 3, pp17-18)

Petitioner testified since surgery that he has difficulty with movement of his right hand and right wrist. He sometimes has a frozen wrist and hand. Petitioner testified he experiences a lot of pain with his diagnosis of Complex Regional Pain Syndrome of the right upper extremity. He is actively taking six medications to address this pain. The records submitted show Petitioner is taking Hydrocodone, Fentanyl Transdermal patch, Cyclobenzaprine, and multiple medications to address his pain complaints.

Petitioner testified that as a result of medication he has trouble with his balance; he has dizziness, drowsiness, and has problems with concentration. Petitioner testified this medication is taken on a daily basis.

Petitioner was examined by a vocational expert in this matter. Petitioner was examined by Mr. James Ragains who testified in this case. Mr. Ragains testified that he interviewed Petitioner and performed a vocational assessment on May 26, 2015. (PX 4, p. 9) Mr. Ragains took a history from Petitioner as it relates to Petitioner's past transferrable skills. Mr. Ragains testified that he reviewed the medical records which outlined Petitioner's active restrictions and active medication. Mr. Ragains provided an opinion that Petitioner was not employable. Mr. Ragains provided that he considered factors such as Petitioner's age, education, significant disability, geographical job market in Kewanee and the medical records of the physicians. (PX 4, pp. 25-26) Mr. Ragains did not believe Petitioner could be employable at home due to his lack of ability to concentrate and the effects of medication. (PX 4, p. 28-29) On cross-examination, Mr. Ragains testified that because he believed there were no jobs available for Petitioner, he did not perform a labor market survey. Mr. Ragains stated, "I would only recommend a labor market survey if I believed there was some potential for employment and would want to test the market to see if there was a stable labor market." He added, I can tell you within a reasonable degree of vocational rehabilitation certainty that there are no jobs available to [Petitioner] as he is with no use of his dominant right upper extremity and his chronic pain problems." (PX 4, pp. 66-67)

At Respondent's request a "Vocational Assessment & Transferrable Skills Analysis" was conducted by Kathleen Dytrych on July 24, 2015. In her report dated September, Ms. Dytrych provided that in addition to Petitioner's significant medical restrictions, employment gap, and potential need for job modifications, the location in which Petitioner resides presents a huge employment barrier. Ms. Dytrych indicated there were limited available job opportunities in the Kewanee area. She indicated that vocational counseling and job placement services for an individual with Petitioner's level of limitations in a rural area would be costly and may not be successful, depending upon various circumstances. She added that if Petitioner were to participate in

a job search, he would benefit from assistance from a vocational counselor for various reasons. Ms. Dytrych wrote, "The significant factor when considering whether or not to spend the time and money to pursue an extensive job placement program is the location where [Petitioner] resides and the number of job opportunities available in that geographical area. Unfortunately, [Petitioner] resides in a small town that is not located close to larger cities. As [Petitioner] resides in a small town there is a limited number of potential employers and therefore a limited number of current and future job opportunities available, and likely a limited number of employers willing to seriously consider job accommodations." (RX 3)

**WITH RESPECT TO (C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner's un rebutted testimony demonstrate that on February 17, 2012, he was working with a co-employee when his right hand was crushed between a "cab and a roller." Petitioner's medical records are consistent with his testimony and consistent with this mechanism of injury.

Based on the above, the Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent on February 17, 2012.

**WITH RESPECT TO (E) WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner testified that he did not notice much pain immediately after the accident. Later that evening the pain grew in intensity and as a result he called his employer to report the accident. He was advised to seek treatment "if it was bad" or otherwise wait until Monday. Petitioner stated that he "toughed it and out" and on Monday, February 20, 2012, Respondent directed him to go to Kewanee Hospital. Petitioner testimony is un rebutted.

Based on the above, the Arbitrator finds that timely notice of the accident was given to Respondent.

**WITH RESPECT TO (F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner has been diagnosed with complex regional pain syndrome of the right upper extremity. This has been confirmed by Dr. Rashid and Dr. Ahearn. Both of these doctors causally relate Petitioner's diagnosis with the accident that occurred on February 17, 2012. There is no evidence to the contrary.

Based on the above, the Arbitrator finds Petitioner's current condition of ill-being with regard to the right upper extremity is causally related to the accident sustained occurred on February 17, 2012.

**WITH RESPECT TO (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:**

Petitioner was employed as a machine assembler by Respondent on February 17, 2012. Petitioner injured his right hand and wrist when a piece of equipment struck him. He underwent surgery in the form of a fusion at the first CMC joint. Following his surgery, Petitioner began to experience symptoms similar to those of complex regional pain syndrome. Petitioner was subsequently diagnosed with complex regional pain syndrome.

Petitioner treated with Dr. Rashid and Dr. Ahearn. Dr. Rashid testified that when she last saw Petitioner on March 12, 2013, she was very skeptical he could return in any kind of work capacity. The doctor testified this was the worst Complex Regional Pain Syndrome she has seen during her practice. On August 4, 2013, Dr.

Rashid completed an insurance disability form. On the form Dr. Rashid wrote Petitioner had "Severe Limitation of Functional Capacity, right upper extremity only." She wrote Petitioner had "little to no use with right upper extremity." She indicated he was totally and permanently disabled from any occupation. Dr. Rashid testified that her opinion regarding his disablement was based on the amount of medication's he was taking as well as his impairment of his upper extremity.

The last recorded visit in the record show Petitioner saw Dr. Ahearn on May 30, 2014. Petitioner's complaints were weakness, numbness, and swelling. An examination revealed contracture, tenderness, limited ROM, cyanosis, edema, abnormal sensation, and arm hyperalgesia in right arm. The doctor noted that Petitioner was at maximum medical improvement and there was expected to change. The assessment was Complex Regional Pain Syndrome, Type II, upper limb. Petitioner was to remain off work. Dr. Ahearn testified Petitioner is unemployable. Petitioner's current treatment consists of presenting to Dr. Ahearn one time per month to obtain refills of his pain medication.

Petitioner was examined by two vocational experts in this matter. Both of the experts opined that Petitioner employment opportunities would be limited given his condition and the geographical area in which Petitioner resides. Specifically, Mr. James Ragains (Petitioner's vocational expert) provided an opinion that Petitioner was not employable. Mr. Ragains provided that he considered factors such as Petitioner's age, education, significant disability, geographical job market in Kewanee and the medical records of the physicians. Mr. Ragains added that he did not believe Petitioner could be employable at home due to his lack of ability to concentrate and the effects of medication. Respondent's vocational expert, Ms Kathleen Dytrych, also held a similar opinion. Ms. Dytrych provided that in addition to Petitioner's significant medical restrictions, employment gap, and potential need for job modifications, the location in which Petitioner resides presents a huge employment barrier. Ms. Dytrych indicated there were limited available job opportunities in the Kewanee area. She indicated that vocational counseling and job placement services for an individual with Petitioner's level of limitations in a rural area would be costly and may not be successful, depending upon various circumstances. She added that if Petitioner were to participate in a job search, he would benefit from assistance from a vocational counselor for various reasons.

Neither Mr. Ragains nor Ms. Dytrych conducted a formal labor market survey in this matter. Mr. Ragains testified, "I would only recommend a labor market survey if I believed there was some potential for employment and would want to test the market to see if there was a stable labor market." He added, I can tell you within a reasonable degree of vocational rehabilitation certainty that there are no jobs available to [Petitioner] as he is with no use of his dominant right upper extremity and his chronic pain problems." In her report, Ms. Dytrych wrote, "The significant factor when considering whether or not to spend the time and money to pursue an extensive job placement program is the location where [Petitioner] resides and the number of job opportunities available in that geographical area. Unfortunately, [Petitioner] resides in a small town that is not located close to larger cities. As [Petitioner] resides in a small town there is a limited number of potential employers and therefore a limited number of current and future job opportunities available, and likely a limited number of employers willing to seriously consider job accommodations."

Based on the above, the Arbitrator finds that as a result of the accident sustained, Petitioner is permanently and totally disabled pursuant to Section 8(f) of the Act.