STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tonya Woods,
Petitioner,

v. Case No. 02 WC 23779
05 WC 12783

Bank of America,
Respondent.

ORDER

Respondent's "Motion to Dismiss Appeal for Want of Prosecution" having been filed by attorney Michael C. Milstein, of the law firm of Bryce Downey & Lenkov, on July 29, 2015, and Petitioner's "Motion to Supplement Record" having been filed by attorney Robert A. Wilson on September 14, 2015, due notice having been given with respect to both motions, these causes came before Commissioner Thomas Tyrrell for hearing on September 24, 2015 in Chicago, Illinois. The Commission having jurisdiction over the persons and subject matter and after being advised in the premises, finds:

By way of procedural history, Commission records show that these consolidated claims were initially dismissed by the arbitrator for want of prosecution on 9/2/09 and subsequently reinstated on 11/2/09 and 11/5/09, respectively. The cases were again dismissed for want of prosecution on 2/8/11. Petitioner's counsel filed a motion to reinstate the claims as well as a motion to withdraw on 3/23/11 and the arbitrator denied both motions on 7/2/12.

Thereupon, Petitioner filed a Petition for Review on 8/1/12 contesting the arbitrator's denial of both motions. Petitioner was given a return date on review of 10/12/12 for the submission of an authenticated transcript. Petitioner failed to submit an authenticated transcript by that date. On 10/17/12 the Commission issued a Rule to Show Cause set for 11/29/12 allowing Petitioner the opportunity to file an authenticated transcript within ten days before said date. Petitioner eventually filed an authenticated

transcript on 11/5/12, with counsel for Respondent signing said transcript but noting that Respondent did not agree or affirm that the transcript was authenticated within the time limits set forth in the statute as well as the Rules Governing Practice before the Commission.

A hearing was subsequently held before Commissioner Thomas J. Tyrrell on 12/20/12 on Petitioner's combined motions. In an order dated 5/3/13 the Commission determined that it did not have jurisdiction over Petitioner's claim as the timely filing of a transcript is a prerequisite for same. The Commission therefore denied Petitioner's motion for leave to submit an authenticated record as well as Petitioner's motion to supplement the record and extend the time to file a brief. As a result, the Commission dismissed Petitioner's Petition for Review.

The matter was appealed to the Circuit Court of Cook County. In an order dated 9/4/14, Judge Robert Lopez Cepero reversed and remanded the matter to the Commission for further proceedings. In his order, Judge Cepero ruled that "[t]he timely filing of a transcript is not a dispositive prerequisite to the Commission's obtaining jurisdiction. The Court retains jurisdiction for any further appeals."

Pursuant to the aforementioned circuit court order, the Commission subsequently issued an order on 3/23/15 finding that it has jurisdiction over the case and granting Petitioner's motion for leave to submit an authenticated record and for extension of time to file a brief. In this order, the Commission noted that "[w]e will consider Petitioner's Motion for Leave to Supplement the Record upon presentation of Petitioner's additional material and comment from Respondent."

On 7/29/15 Respondent filed the present "Motion to Dismiss Appeal for Want of Prosecution", and Petitioner filed a response thereto on 8/13/15. An initial hearing on review was set before Commissioner Tyrrell on 8/14/15 and was continued to 9/24/15. In the interim, Petitioner filed a "Motion to Supplement Record" on 9/14/15, in regards to which Respondent filed a response on 10/21/15.

Based on the above, and the record taken as a whole, the Commission denies Respondent's Motion to Dismiss Appeal for Want of Prosecution for the reason that the circuit court has already ruled that the Commission retains jurisdiction in this matter given that, in Judge Cepero's opinion, "[t]he timely filing of a transcript is not a dispositive prerequisite to the Commission's obtaining jurisdiction." The Commission is obligated to adhere to the circuit court's order in this regard, and given the long and tortured history of this appeal, considerations of equity and fairness dictate that the matter proceed on Petitioner's Petition for Review for final adjudication on the merits. In addition, in its discretion, the Commission chooses to allow oral arguments in this matter, despite the previous late filing of the authenticated transcript.

With respect to Petitioner's "Motion to Supplement Record", the Commission notes that in its previous order dated 3/23/15, we stated that such a motion would be considered upon presentation by Petitioner and comment from Respondent. In its

subsequent motion to supplement the record, Petitioner appears to offer a copy of the Statement of Exceptions and Supporting Brief she previously submitted on 12/18/12 as well as an "Affidavit in Support of Petition for Review" by Petitioner's counsel. Given the Commission's previous ruling, in its 3/23/15 order, allowing for an extension of time for the filing of such a brief, the Commission finds that another such finding is unnecessary.

With respect to the affidavit by Petitioner's counsel, the Commission finds the document self-serving and nothing more than an attempt to submit additional evidence on review, in contravention of the dictates of §19(e) of the Act. The Commission further notes that Petitioner's counsel was afforded adequate opportunity to submit this evidence at the time of the hearing before the arbitrator with respect to the Petition to Reinstate, and has offered no justification as to why such evidence was not submitted and/or available at that time.

Therefore, based on the above rulings, the Commission finds that the matter will be continued on Review pending the assignment of an oral argument date on Petitioner's Petition for Review and the claimed errors noted therein. Having previously granted, in its order dated 3/23/15, "Petitioner's Motion for Leave to Submit the Authenticated Record and for Extension of Time to File Petitioner/Appellant's Summary Brief", the parties will be allowed the opportunity to file said authenticated record by March 11, 2016 after which Petitioner's Statement of Exceptions will be due by April 11, 2016 and Respondent's response brief will be due by April 26, 2016. Thereafter, the Commission will assign a date for oral arguments and the parties will be notified of said date.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's "Motion to Dismiss Appeal for Want of Prosecution" filed 7/29/15 is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's "Motion to Supplement Record" filed 9/14/15 is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the parties will be allowed the opportunity to file an authenticated record by March 11, 2016, after which Petitioner's Statement of Exceptions will be due by April 11, 2016 and Respondent's response brief will be due by April 26, 2016.

DATED: FEB 4 - 2016

r-9/24/15
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leopoldo Zarco,
Petitioner,

vs.

NO: 07 WC 52098

Harrington & King,
Respondent.

16IWCC0079

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, permanency and medical and temporary total disability credits 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.

The Commission notes that while the Arbitrator awarded a credit for temporary total disability payments in the amount of $12,527.84, which is equivalent to 26 weeks at Petitioner's temporary total disability rate of $481.84, the Arbitrator did not award temporary total disability benefits. Based on RX4, the Commission finds that Petitioner was paid temporary total disability benefits of $982.84 from August 27, 2007 through September 9, 2007, was paid temporary total disability benefits of $462.66 from September 10, 2007 through September 16, 2007 and was paid temporary total disability from September 17, 2008 through November 25, 2007 for a period of 11 weeks at Petitioner's temporary total disability rate of $481.84, was paid temporary total disability benefits of $963.68 for the week of December 10, 2007 through December 23, 2007, was paid temporary total disability from December 24, 2008 through February 17, 2007 for a period of 8 weeks at Petitioner's temporary total disability rate of $481.84 and was pay a lump sum payment of $1,445.52 , which is equivalent to 3 weeks for the period of February 18, 2008 through March 9, 2008 for a grand total of $13,009.66/27 weeks at Petitioner's temporary total disability rate of $481.84. The Commission further finds that Petitioner underwent a functional capacity evaluation on February 27, 2008. As such the Commission finds that in addition to the credit for temporary total disability payments in the amount of $12,527.84, which is equivalent to 26 weeks at Petitioner's temporary total disability rate of $481.84 , the Arbitrator

16IWCC0079

should have awarded temporary total disability benefits for a period of 26 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $481.84 per week for a period of 26 weeks, 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 pay to Petitioner the sum of $433.65 per week for a period of 35 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7% loss of a man as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $48,381.70 for medical expenses under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for $48,381.70 for payment of medical services and $12,527.84 for payment of temporary total disability benefits paid 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 $15,300.00. 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.

DATED: JAN 2 9 2016

MB/jm

O: 12/3/15

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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZARCO, LEOPOLDO
Employee/Petitioner

Case# **07WC052098**

08WC027726

16IWCC0079

HARRINGTON & KING
Employer/Respondent

On 4/1/2015, 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 0.13% 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:

0226 GOLDSTEIN FISHMAN BENDER ETAL
ARTHUR GERMAN
1 N LASALLE ST SUITE 2600
CHICAGO, IL 60602

0445 RODDY LAW LTD
RICHARD S ZENZ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

16IWCC0079

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Leopoldo Zarco
Employee/Petitioner

v.

Harrington & King
Employer/Respondent

Case # **07** WC **52098**

Consolidated cases: **08 WC 27726**

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 Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on February 20, 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 _____

16IWCC0079

FINDINGS

On **8/13/2007**, 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 $**37,583.52**; the average weekly wage was $**722.76**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**12,527.84** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**12,527.84**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay to Petitioner for the services of Dr. Malek, La Clinica, Fullerton Surgical Center, Preferred Open MRI and MRI Lincoln Imaging, i.e. $48,381.70, for reasonable and necessary medical services pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall to given a credit of $48,381.70 for payments of medical services for the petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of $433.65 per week for 35 weeks because the injuries sustained caused 7% loss of a person as a whole, pursuant to Section 8(d)2 of the Act.

Respondent shall have a credit of $12,527.84 for temporary total disability paid to Petitioner.

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.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Conroy,
Petitioner,

vs. NO: 08 WC 25778

City of Chicago,
Respondent.

16IWCC0092

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with correction and clarification, said decision attached hereto and made a part hereof.

The Commission notes a clerical error found at page 13 of the arbitrator's decision wherein reference was made to "permanent temporary disability benefits." The Commission hereby corrects the decision in this respect to show "permanent total disability benefits." Furthermore, the Commission clarifies the arbitrator's decision to show that Petitioner was entitled to maintenance benefits from 10/5/11, the day after the last §19(b) hearing, through 8/15/13, the day before the commencement of PTD benefits, for a period of 97-2/7 weeks, and that Petitioner was entitled to PTD benefits in the amount of $1,178.24 per week for life commencing 8/16/13 pursuant to §8(f) of the Act.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,178.24 per week for a period of 97-2/7 weeks, that being the period of maintenance benefits under §8(a) of the Act.

16IWCC0092

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,178.24 per week for life, commencing 8/16/13, as provided in §8(f) of the Act for permanent and total disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,447.88 for medical expenses under §8(a) of the Act, including APAC Medical Center ($475.44), Petitioner out-of-pocket ($268.80) and Midwest Operating Engineers Benefit Fund Subro ($703.64).

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.

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.

DATED: FEB 3 - 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-01/20/16
jdl/pmo
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CONROY, JAMES
Employee/Petitioner

Case# 08WC025778

CITY OF CHICAGO
Employer/Respondent

16IWCC0092

On 5/12/2015, 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 0.08% 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:

0391 HEALY SCANLON LAW FIRM
MATTHEW J HEALY
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0010 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☒ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JAMES CONROY
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # 08 WC 25778

16IWCC0092

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **April 21, 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 **January 31, 2008**, 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 $ **91,902.72** ; the average weekly wage was $ **1,767.36**

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**319,977.47** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**319,977.47**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of $**1,178.24**/week for life, commencing **August 16, 2013**, 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.

Medical Bills

Respondent shall pay medical bills presented per the medical fee schedule (see attached).

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.

David A. Kane
Signature of Arbitrator

May 11, 2015
Date

MAY 12 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION OF ILLINOIS

JAMES CONROY, Petitioner,	)	
v.	)	No. 08 WC 25778
CITY OF CHICAGO, Respondent.	)	ARBITRATOR DAVID KANE

16IWCC0092

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT:

The Petitioner has testified three times previously at 19b hearings. Each time the Respondent had either terminated TTD and/or withheld medical benefits. The Arbitrators found in the Petitioner's favor each and every time. The Arbitrator awarded penalties as a result of one of the denials when the Respondent had denied prescription medications that were designed to alleviate the Petitioner's neuropathic pain arising out of his work related injury. The Petitioner has been in pain management since February, 2010. The prior decisions show that the Petitioner underwent a L2-5 laminectomy with instrumental fusion on December 17, 2008 performed by Dr. Frank Phillips. Dr. Phillips ordered the Petitioner into pain management to get his pain under control. The Respondent has once again terminated TTD/Maintenance and refused to authorize pain management.

THE PETITIONER'S TESTIMONY

The Petitioner last testified on October 4, 2011. The Petitioner followed up with Dr. Thomas Pang, a pain management doctor. The Petitioner testified he has been prescribed various medications over the years by Dr. Pang in the attempt to alleviate his pain. He has also had had injections from Dr. Pang. The treatment didn't alleviate his pain and some made it worse. Petitioner has continuing pain in his low back and legs and numbness in his legs going down into his feet. The Petitioner testified that he experiences pain and numbness in low back and legs if he sits, stands or drives too long. Dr. Pang told the Petitioner on August 15, 2013 that he was permanently and totally disabled.

The Petitioner was asked to rate his level of pain on a 0-10 scale on good days and bad days, with 0 being no pain and 10 being his hair on fire. The Petitioner rated his pain on a 4 on a good day with medication and an 8 on a bad day with medication. Petitioner testified that when he has an 8, he is required to lie down for hours on end. Petitioner testified that he has no way of knowing when he is going to have a good day or a bad day. Petitioner testified that he has been using a cane for several years following his discharge from his surgeon, Dr. Frank Phillips.

The Petitioner testified that the City of Chicago required him to engage in a job search. The Petitioner presented over 400 job contacts between 2010 and 2013. (PEX"D") Petitioner also attended two interviews held by the City of Chicago. The Respondent hired MedVoc in 2013 after the Petitioner had spent three years looking for a job. The jobs at MedVoc were jobs in restaurant greeting. The Petitioner has testified that he has worked in construction type jobs and mechanic like jobs all his life. The Petitioner attended the trial wearing a flannel shirt, jeans and boots. Petitioner denied owning any business causal clothes, although the record shows that MedVoc encouraged him to dress business casual for interviews. The Respondent on cross examination asked the Petitioner about discontinuing his vocation rehabilitation with MedVoc. Petitioner admitted that he got frustrated and depressed with the job search.

DR. PANG

The records from Dr. Pang says the patient has post laminectomy pain syndrome with some neuropathy, stenosis and degeneration of the lumbar spine as well as chronic pain syndrome and myofacial pain with radiculopathy. The patient is complaining of slightly worsened pain most likely due to some arthritic conditions on top of his current issues. (PEX "A", pg. 10)

Dr. Pang reported the following in August, 2012:

The patient is a 64 year old white male, who comes in very aggravated and frustrated. He had a work injury while working for the city and was seen at Mercy Works. While he was at Mercy Works, he stated the company doctor put him into therapy for several months and he just felt worse. He failed injections and was not getting better and searched out a spine surgeon. He ended up meeting Dr. Frank Phillips, who did his surgery and the patient feels that the surgery is okay. He does not feel shifting or any other pathology, but the remaining parts of his buttock and back still hurts. (PEX "A", pg. 151) He was subsequently referred over to our practice with Dr. Chang in February, 2010. Dr. Chang has tried him on multiple oral medications and his workers' compensation verbally would deny them, not approve of them or the patient would not tolerate them and when I asked him about his past tolerance to medications, again he was frustrated and says I cannot really remember the reactions. He would be started on other medications that would initially be approved and then not approved. (PEX "A", pg. 151)

This patient is having significant soft tissue pain, which is related to muscle spasms, myofascial pain due to the suboptimal body habitus with flexion across the knee, hip and protuberant abdomen. Tissues involve include the thorasic paraspinal muscles, insertion of these muscles to the iliolumbar fascia and bilateral piriforms muscles. (PEX "A", pg. 152)

Dr. Pang reported the following in January, 2013:

The patient is an angry gentleman, who complains of pains ever since an injury in 2008 resulting in back and buttock pain. The patient is a 65 year old gentleman, who I have not seen in some time secondary to Workers' Compensation insurance issues. He comes with a whole list of questions interjected by complaints. Our interaction lasted over an hour and 10 minutes.

He takes include tramadol 50 mg q.i.d., Valium 2 mg q.h.s., Naprelan 750 mg b.i.d. which he feels helps him the most and Flector patch.

I tried to answer a number of his questions. He still complains of low back pain with symptoms of numbness to both legs, which occur especially after he sits for any prolonged period of time. When he is standing due to the numbness, he has fallen. He complains of stiff neck with no relief on the medications and his balance is off to an abnormal gain when his legs have pins and needles sensation. Right leg hurts more than the left leg after prolonged sitting He has not had significant weight loss. He complained about the initial city referral to their work comp doctor, who did not do anything but put him in physical therapy for the first few months. The patient recalls having had epidural steroid injections, but never had injections subsequently.(PEX "A", pg. 146)

Dr. Pang put the Petitioner on permanent total disability on August 15, 2013. (PEX "A", pg. 136) Dr. Pang refuted Dr. Lanoff, Respondent's Section 12 examiner, in a narrative report of April 4, 2013. (PEX "A", pp. 144 & 145)

MED VOC

There are a number of evaluations from MedVoc. The biographical data from MedVoc said that the Petitioner was 65 years of age with a high school diploma and a below average student. The Petitioner indicated he had no additional training after high school. No military experience. MedVoc was concerned that the Petitioner had a learning disability or required special education classes. The vocational history for the Petitioner shows that he was a hoisting engineer mechanic for the Respondent since December of 1999 working as a heavy equipment mechanic.

The Petitioner advised MedVoc at the first meeting that he is not a people person and he prefers to keep to himself and not be around people and he had no computer experience. MedVoc sought positions for the Petitioner in employment such as a greeter at Ghiradelli, a greeter at McCormick and Schmidt's Restaurant, an information clerk at a mall, a greeter at a car dealership as well as some security guard type jobs. The wages vary from $8.25 per to $14.25 per hour with a mean entry level wage of $10.25 per hour. MedVoc sought positions for the Petitioner that required no lifting over 23 pounds occasionally 6 inches to the waist, no lifting over 38 pounds from waist to shoulder, no lifting over 35 pounds occasionally overhead. There appeared to be no consideration of the Petitioner's treating physician's opinions which stated that he was permanently and totally disabled.

MedVoc was unable to place the Petitioner. MedVoc has advised that the Petitioner was periodically uncooperative and unprepared for interviews including refusing or being unable to wear professional business like attire. The Petitioner testified that he did not own professional business like attire and could not afford to purchase such. There is no indication that Respondent offered a clothing allowance for such interviews.

The Respondent submitted a letter from a Ms. Ashley Pack of the City of Chicago's Department of Water Management asking the Petitioner to fill out a

questionnaire on which a position as a watchman was contingent. The letter says that the questionnaire must be successfully completed confirming his readiness to perform duties of this position. The Petitioner testified that he completed the questionnaire to the best of his ability in an attempt to "play ball with the City." The Petitioner answered multiple times that he was willing to do certain activities but other activities he was unable to do. Most if not all of the questions would require a medical rather than a laymen's opinion. The Petitioner's responses are consistent with the medical diagnosis from his treating physicians. The Petitioner testified that he was never offered a position with the City of Chicago.

JAMES BOYD, VOCATIONAL COUNSELOR, PEX "C"

The Petitioner saw Jim Boyd a vocational counselor. Mr. Boyd met with the Petitioner on June 5, 2014. He interviewed the Petitioner and administered vocational testing. Mr. Boyd found the Petitioner was a 66 year old, high school graduate with no further formal education other than a 6 week mechanical course in General Motors training. Mr. Boyd felt that the Petitioner was not competitively employable. The Petitioner's age, injury and extended time away from work were all detriments to his employability. Mr. Boyd said that the Petitioner demonstrated skills, production speed and physical /emotional symptoms that were not compatible with any full or part time jobs and a transferable skills analysis did not yield any job matches.

MARK REULE

Mark Reule has known the Petitioner for 25 years. Mr. Reule owns F&F, a mechanic shop in Posen IL. The shop is three miles from Petitioner's home. The Petitioner has never worked for F&F repair, nor has F & F ever paid the Petitioner. The Petitioner stops into see Mr. Reule to make small talk, sometimes multiple times a week depending on his physical condition. There are weeks where he does not visit at

all. He spends much of the time sitting down. He does not work. Mr. Reule, the Respondent's witness, confirmed that this was the Petitioner's typical attire of uniform.

DR. LANOFF, SECTION 12 REPORTS

The Respondent submitted two Section 12 reports from Dr. Martin Lanoff. Dr. Lanoff acknowledges that on December 17, 2008 the Petitioner had his lumbar spine fused from L2 through L5 and a froaminotomy from L2 to S1. Dr. Lanoff admits that having a 3 level fusion is a disabling phenomenon in and of itself independent of any pain. In addition, Dr. Lanoff notes Dr. Phillips stated that the Petitioner was doing poorly from his lumbar decompression and fusion in June of 2010 two years after the surgery. Dr. Lanoff then refers to exams, reports and evaluations of the Petitioner which he believes calls into question the Petitioner's level of effort. Each of the exams which are referenced by Dr. Lanoff occurred prior to the Petitioner's testimony in October 4, 2011 and the 19(b) decision of October 11, 2011.

VIDEO SURVEILLANCE

The Respondent submitted video surveillance of the Petitioner. The surveillance reinforces the Petitioner's permanent total disability claim rather than weakening it. The video surveillance was taken over three days in October of 2014. The surveillance confirms that the Petitioner has severe restrictions on his physical limitations. Each of the video tape days shows the Petitioner using a cane to assist him in going about his basic day activities. In one instance the Petitioner was shown shopping in a supermarket and using a shopping cart to maintain his balance.

The Respondent submitted in support of the video surveillance a report dated October 3, 2014. The report indicates that the Petitioner was observed on October 2, 2014 walking with and without a cane. The Arbitrator did not observe the Petitioner walking without a cane and certainly not for any length of time or with any purpose or meaning. The report is contradictory. The summary the report of the October 2 says

that the Petitioner was observed walking without a cane. The minute by minute report does not mention any observations of the Petitioner walking without a cane. In fact it says the Petitioner was leaning on a shopping cart in a grocery store to support his walking.

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CONCLUSIONS OF LAW:

F.) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

There are three prior decisions which confirm that the Petitioner has chronic lumbar and leg pain for multiple years as a result of a 3 level fusion that was performed due to his work related injury. It is the law of the case.

The law of the case doctrine applies to matters before the Workers' Compensation Commission. Guerra I McShane Const. Corp, 07 ILWC 36628 (2011). Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. Help at Home v. Ill. Workers' Comp. Comm'n, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). The Commission decision becomes the law of the case for subsequent stages of the litigation. Id.

The Petitioner testified four times to identical complaints of pain and numbness in his low back and leg. The Petitioner has already been found to be credible on these complaints three different times by two different Arbitrators.

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work related injury of January 31, 2008.

L). WHAT IS THE NATURE AND EXTENT OF THE INJURY?

The Petitioner is a 65 year old high school educated hoisting mechanic with severe if not permanently disabling restrictions. He has a work history which is exclusively requiring physical medium to heavy type work. By all evaluations the Petitioner has limited communication and personal skills. The Petitioner has engaged in 4 years of vocational and job seeking activities to no avail. Even putting aside the Petitioner's treating doctor opinion that he is permanently totally disabled, it is highly unlikely that there is a reasonably stable job market for someone with the Petitioner's age, education, work history and physical limitations. The Arbitrator had the opportunity to review the Petitioner's physical demeanor during the hearing. The Petitioner was obviously experiencing pain and discomfort during the two hour hearing.

Our Supreme Court summarized that which renders an employee wholly and permanently disabled, is in the case of *Ceco Corp. V. Industrial Commission.* (1983), 95 Ill.2d 278, 447 N.E.2d 842, 69 Ill.Dec. 407 as follows: an employee is totally and permanently disabled when he "is unable to make some contribution to the work force sufficient to justify the payment of wages." (e.g., *Gates Division, Harris-Intertype Corp., v. Industrial Commission*, (1980), 78 Ill.2d 271, 275, 35 Ill.Dec.778, N.E.2d 1306.)

The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted. *Interlake, Inc. v. Industrial Com.* (1981), 86 Ill.2d 168, 176, 56 Ill.Dec.23, 427 N.E.2d 103, *Inland Robbins Construction Co. v. Industrial Com*, (1980) 78 Ill.2d 271, 275, 35Ill.Dec. 778, 399 N.E.2d 1306). Rather, a person is totally disabled when he is incapable of performing services except for those which there are no reasonably stable market. (*A.M.T.C. Of Illinois, Inc., v. Industrial Commission*, (1979), 77 Ill.2d 482, 487, 34 Ill.Dec. 132, 389 N.E.2d 804). Conversely, an employee is not entitled to total and permanent disability compensation if he qualified for and capable of obtaining gainful employment without serious risk to his health or life. (*E.R. Moore Co. V. Industrial Commission*, (1979), 77 Ill.2d 353, 362, 17 Ill.Dec. 207,

376 N.E.2nd 206). In determining a claimant's employment potential, his age, training, education and experience should be taken into account. A.M.T.C. Of Illinois, Inc., v. Industrial Commission, 77 Ill.ed 482, 489, 34 Ill.Dec 132, 397 N.E.2d 804; *E.R. Moore Co. v. Industrial Commission*, (1978), 71 Ill.ed353, 362, 17 Ill.Dec. 207, 376 N.E.2d 206.

In considering the propriety of a permanent and total disability award, the Ceco court stated:

"If the claimant's disability is limited nature so that he is not obviously unemployable, or if there is no medical evidence to support of total disability, the burden us upon the claimant to establish the unavailability of employment to a person. However, once the employee has initially established that he falls in what has been termed the 'odd-lot' category (one who, though not altogether incapacitated for work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market (2 A. Larson, Workmen's Compensation sec. 57.5 1, at 10-164.24 (1980), then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant (2A. Larson, Workmen's Compensation sec. 57.61 at 10-164.97 (1980). (Emphasis added). *Valley Mould & Iron Co. V. Industrial Commission,* (1981), 84 Ill.2d 538, 546-47 50 Ill.Dec. 710, 419 N.E.2d 1159; *Interlake Inc., v. Industrial Commission,* (1981), 86 Ill.2d 168, 177, 56 Ill.Dec. 23, 427 N.E.2d 103.

The Petitioner has successfully shifted the burden to the Respondent to demonstrate that some kind of work is regularly and continuously available to the claimant. The Respondent has not met that burden.

Section 8(f); PTD Benefits states as follows:

In case of complete disability, which renders the employee wholly and permanently incapable or work, or in the specific case of total and permanent disability as provided in subparagraph 18 of paragraph (e) of this Section, compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life.

An employee entitled to benefits under paragraph (f) of this Section shall also be entitled to receive from the Rate Adjustment Fund provided in paragraph (f) of Section 7 of the supplementary benefits provided in paragraph (g) of this Section 8.

Section 8(b)(2) states as follows:

The compensation rate in all cases other than for temporary total disability under this paragraph, (b), and other than for serious and permanent disfigurement under paragraph (c) and other than for permanent partial disability under subparagraph (2) of paragraph (d) or under paragraph (e), of this Section shall be equal to 66 2/3% of the employee's average weekly wage computed in accordance with the provisions of Section 10. The Petitioner's average weekly wage has been established as $1,767.36.

Based on all of the foregoing including but not limited to Dr. Pang's opinion that the Petitioner is permanently and totally disabled, the Respondent shall pay the Petitioner permanent and total disability benefits of $1,178.24 per week for life commencing August 16, 2013, as provided in Section 8(f) of the Act. The Respondent shall receive a credit for amounts previously paid.

MAINTENANCE

The Respondent withheld TTD / Maintenance for the Petitioner since May, 2014 based on a perceived lack of cooperation with the vocational rehabilitation specialists. By the Arbitrator's count, this was the 4th year of the Petitioner engaging in vocational activity. There were no job offers during this time and few if any interviews other than those provided by the Respondent. There are over 500 job searches from the years 2010 through the years 2013 which were submitted directly to the Respondent. The job searches are detailed providing dates, names, contact information and responses as well as phone numbers. The Respondent was clearly satisfied with job search as they continued benefits during this time until they hired MedVoc. Moreover, the Respondent would not hire the Petitioner despite the fact that the Respondent is a well known large employer/municipality. The MedVoc job search required the Petitioner to physically attend interviews. The medical history and the video surveillance demonstrate the difficulty of this requirement.

However, pursuant to the previous findings the Arbitrator has found that the Petitioner was permanently and totally disabled beginning August 16, 2013. All benefits due and owing since that date are in the form of permanent temporary disability benefits. The Respondent shall receive a credit for payments made as maintenance through May 2nd, 2014.

MEDICAL BILLS – PEX "E"

1. APAC Medical Center - $475.44,
2. Petitioner out-of-pocket - $268.80 and
3. Midwest Operating Engineers Benefit Fund Subro- $703.64

The bills are reasonable and necessary for the treatment of the Petitioner's pain. The Arbitrator directs the Respondent to pay these outstanding bills directly to the providers along with the outstanding balance to Blue Cross Blue Shield in the amount of $6,765.00 pursuant to the medical fee schedule. This reflects an agreement of the parties regarding these bills. Respondent hall have credit for all amounts paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leopoldo Zarco,
Petitioner,

vs.

NO: 08 WC 27726

16IWCC0080

Harrington & King,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability, permanency and medical and temporary total disability credits and being advised of the facts and law, with the exception noted below affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner testified that on June 6, 2008 he was taking parts coming from a washer machine and putting them on a wagon then onto a long skid. He was shaking the skids to put one of the parts down onto the wagon. He does not know how much the skid he was pulling weighed. He knows it was approximately 10 feet long. As he tried to pull the skid, it stuck and he had to yank it to get it loose. When he yanked on it he felt a sharp/pinching pain with weakness in his right shoulder.

Mr. Digby testified he is currently retired but was a supervisor for Respondent for 47 years. When Petitioner came to work on the day shift with him Petitioner had restrictions of no lifting more than 10-15 pounds. At first, he had Petitioner walking around and picking up paper and rages. One day at around 7:30 a.m., he had the Petitioner work on the degreaser/washer machine, which takes the oil off the parts. The parts go through a washer, a rinser and then they are blown dry. He assigned Petitioner to stand at the back of the washer and to put the parts onto a skid to be shipped. The machine was running 22 gauge aluminum, which is pretty thin, with 3/32 holes, punched in it with a 3/16 feed. The pieces were 12 x 12 and they weighed less than a pound. Petitioner was responsible for placing four pieces on a skid. He then would put a piece of paper over the pieces so that they would not be scratch. He would layer the pieces until they had approximately 500 pieces on a skid. Other than the aluminum parts, Petitioner did not have to lift

anything. All he had to do was to take the pieces of metal off the washer and put it on the skid. After the skid was filled, a jeep driver would come by and pick it up and take it to shipping. Petitioner did not stay at work the whole day.

Mr. Jakosz testified his title is the vice president of manufacturing but he is the plant manager and the human rights person as well for the Respondent, which is a perforating company. All of the presses are automatically fed. A computer drives the machines. The operator set up the program and then the material is automatically fed into the machine with feed rolls that pull it through, perforates it and it comes out the end. The machines run coils or sheets. If it is a coil, it is mounted on a coil winder by a forklift. The sheets are put under the feed rolls and they are automatically pulled through so the operator has no hands in the die area. The specifications of the job are set into the machine's computer by the operator. Once the sheet comes out of the press, there is a wagon at the back of the press, so the operator slides (there is no lifting) the sheets off. The wagons are maybe three feet off the ground.

Petitioner contends he got hurt when he came back to work after being given a light duty restriction. The first couple of weeks, we had Petitioner cleaning up/picking up papers. Then we moved Petitioner to the degreaser machine. There he was asked to catch pieces of 12 x 12, 22 gauge aluminum, which weighed approximately 1-1/2 pounds. The piece would be put in one end of the machine. It would go through a conveyor line where it was washed. It would then come out the other end. Petitioner was supposed to start work at 7:30 a.m. Petitioner did not finish his shift. He did not see the Petitioner at work after that day. Since then, he has seen Petitioner out in the community. He has seen Petitioner a number of times at a Mexican restaurant in the area. He saw Petitioner jump in/out of van. He saw him at Menards six months ago where he was with a young guy. Petitioner had drywall on his cart. When Petitioner spotted him he took off. Although a light duty job was offered to Petitioner in 2009, Petitioner never came back to work for the Respondent. He performed an accident investigation on June 6, 2008 with Petitioner's supervisor and the guy Petitioner was working with. Petitioner just left work that day.

The Commission notes that on June 6, 2008 Petitioner was at work and assigned to the washing machine around 7:30 a.m. The very same day Petitioner treated with Dr. Malek. While there is not a time for the appointment listed it appears that the appointment took place after 7:30 in the morning and after Petitioner left Respondent's premise. Dr. Malek's June 6, 2008 records do not address the alleged June 6, 2008 accident. All Dr. Malek's records state on that date is that Petitioner reported that the Respondent has not found him a light duty job. The Commission finds that the first time Petitioner mentioned a June 6, 2008 work accident is on June 13, 2008, approximately one week later, when he again saw Dr. Malek. At this time, Petitioner reported he was lifting a box weighing more than 120 pounds. This history differs from Petitioner's testimony that on June 6, 2008 he was pulling a skid that was stuck. Furthermore, Petitioner claimed that he injured his back and neck and was dizzy. This is also contrary to Petitioner's subsequent testimony that he injured only his right shoulder. Lastly, he states that the June 6, 2008 accident was because the Respondent did not observe his light duty restriction. However, this testimony is rebutted by both Mr. Jakosz and Mr. Digby. The Commission notes that Petitioner's medical records indicate that Petitioner continues to treat with Dr. Malek from June of 2008 forward with no mention of the second alleged incident or the fact that the same allegedly caused his right shoulder pain. The second mention of the alleged June 6, 2008 work accident does not occur until April 3, 2009, some 9 months later, when Petitioner sees Dr. Levi for the first time. At this time Petitioner provides a very generic statement of the alleged June 6, 2008 work accident in which he states he was lifting when he noticed pain again in his back and right elbow. On that same date it was noted that Petitioner brought with him a right shoulder MRI dated February 19, 2009 which shows a tear of the supraspinatus tendon. The MRI itself was

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never placed into evidence. As such, it is unknown who ordered it. Dr. Levi's notes are contained in an April 3, 2009 letter which was addressed to a Dr. Jarava at 848 N. Ashland. Dr. Jarava's records were never admitted into evidence. The only other history that is contained in the record is even more generic in nature. It comes from the June 30, 2009 Suburban Physical Therapy records. It states that Petitioner has a history of a sudden onset of right shoulder pain after a lifting injury at work. There is no mention of a date of accident or the particulars surrounding the alleged injury at work.

Given all of the above, the Commission affirms the Arbitrator's finding that Petitioner failed to prove he sustained an accident on June 6, 2008 work of no accident

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 1, 2015 is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit of $27,671.37 for temporary total disability benefits and $32,758.21 for medical services paid to or on behalf of the Petitioner on account of said accidental injury.

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.

DATED: JAN 2 9 2016

MB.jm

O: 12/3/15

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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ZARCO, LEOPOLDO
Employee/Petitioner

Case# **08WC027726**

07WC052098

16IWCC0080

HARRINGTON & KING
Employer/Respondent

On 4/1/2015, 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 0.13% 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:

0226 GOLDSTEIN FISHMAN BENDER ETAL
ARTHUR GERMAN
1 N LASALLE ST SUITE 2600
CHICAGO, IL 60602

0445 RODDY LAW LTD
RICHARD S ZENZ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Leopoldo Zarco
Employee/Petitioner

v.

Harrington & King
Employer/Respondent

Case # **08** WC **27726**

Consolidated cases: **07 WC 52098**

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 Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on February 20, 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

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FINDINGS

On **6/6/08**, 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 not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**37,583.52**; the average weekly wage was $**722.76**.

On the date of accident, Petitioner was **55** years of age, ***single*** with three dependent children.

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

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

Respondent shall be given a credit of $**27,671.37** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $27,671.37.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that an accident occurred which arose out of and in the course of his employment by Respondent therefore, no benefits are awarded, pursuant to the Act.

Respondent shall be given a credit of $27,671.37 for temporary total disability payments paid to Petitioner.

Respondent shall be given a credit of $32,758.21 for payment of medical services for the petitioner.

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.

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FINDINGS OF FACT

07WC52098

The disputed issues in this matter are: 1) causal connection; 2) medical bills; and 3) the nature and extent of Petitioner's injuries. *See,* AX1.

Leopoldo Zarco (the "Petitioner") testified at trial that on August 13, 2007, he was feeding metal pieces into a machine and that while doing so, felt pain in his lower back on the right. He testified that he was lifting a 60-70 pound sheet of metal in order to put in on the machine. Harrington & King, ("Respondent") sent him to Michael Clinic on Cermak Road in Chicago, on August 16, 2007.

Petitioner's treatment

He was seen by Dr. Anita Shah on August 16, 2007; and diagnosed with acute lumbar muscular strain, with no radiation. An MRI, taken on that date, was read to show "vertebral body heights, alignment and disc spaces are maintained. There appear to be degenerative changes with spurring laterally, mainly at the level of L2-3 and L3-4... Note is made of degenerative changes with anterior spurring in the lower dorsal spine". The radiologist's impressions were "degenerative changes of the lower thoracic and lumbar spine". The patient states that he has no pain radiating down his legs. It is just his lower back". The assessment was acute lumbar strain and the Petitioner was returned to work with five (5) pounds restrictions and no bending or twisting. For treatment, he was given an analgesic balm and cold pack to apply to the area. PX1.

On August 20, 2007, Petitioner presented to Cermak Clinic with pain stated to be "4 to 5 out of 10, now radiating into his right leg", with weakness. The diagnosis was lumbar strain, physical therapy was recommended and his work restrictions were maintained.

On September 6, 13 and 27, 2007, Petitioner presented complaining of low back pain, radiating down his right, lower extremity "3 to 4 out 10" but by the last visit in September, the pain was non-radiating.

On October 4, 18 and 30, 2007, Petitioner presented complaining of pain in his lower back, "2-3 out of 10", non-radiating. Bending forward and backward was uncomfortable and there was some question of a disc protrusion at L3-L4 and disc herniation at L5-S1. Dr. Andrew Zelby was consulted. PX1.

On November 9, 16 and 30, 2007, Petitioner presented complaining of lower back pain "2 out of 10", and having had a poor response to a medical branch block. Physical examinations at the clinic showed that the petitioner had a negative straight leg raising test and was diagnosed with a lumbar strain. Review of image studies, performed at the clinic, indicated that vertebral body heights and alignment of disc spaces were well maintained. There appeared to be degenerative changes without spondylolysis or spondylolisthesis. There were degenerative changes, with anterior spurring, in the lower dorsal spine.

On October 8, 2007, Petitioner began treatment with Dr. Andrew Zelby, who diagnosed him as having degenerative, lumbar disc disease and recommended an MRI. On October 24, 2007, Petitioner was seen by Dr. Zelby and further diagnosed with right leg pain, of unknown etiology. Dr. Zelby recommended epidural injections but no surgical intervention.

In November 1 & 28 2007, the petitioner underwent epidural injections and was then referred to Dr. Malek, who diagnosed him with degenerative disc disease from L3 to S1, with a right-sided disc herniation. Dr. Malek recommended a discogram, which was performed on January 18, 2008; and was read to reveal an L3-4, L4-5 and L5-S1 concordant pain response with L2-3 non-concordant pain.

Dr. Malek again evaluated Petitioner on February 8, 2008 and recommended either an L3-S1 posterior fusion with instrumentation or a functional capacity evaluation ("FCE"). The petitioner declined to have surgery as he testified that "the doctor could not guarantee that it would work".

On February 27, 2008, an FCE was performed at Elite Physical Therapy, which was valid for light-demand level employment. A second FCE was performed on October 2, 2008, with no mention of validity but placing Petitioner into a medium-demand level employment. RX1 & PX10.

CONCLUSIONS OF LAW

F. Is Petitioner's current condition of ill-being causally connected to the injury?

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much

his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also, Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

After a review of Petitioner's medical records wherein it is stated that Petitioner has degenerative changes without spondylolysis or spondylolisthesis but with anterior spurring in the lower dorsal spine; and testimony the Arbitrator finds and concludes that he has proven, by a preponderance of the evidence that he sustained a low back strain on August 13, 2007. This condition does not require surgical intervention, as opined by Dr. Zelby.

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?

Petitioner claims $48,381.70, in outstanding medical services for reasonable and necessary medical services from MRI Lincoln Imaging, Preferred Open MRI, Fullerton Surgical Center, La Clinica and Dr. Malek.

The parties have stipulated that the respondent has paid a total of $81,139.91 in medical expenses in both this and the companion case of 08 WC 27726. With regards to the medical expenses occurred for 07 WC 52098, the respondent has credit for all medical bills paid which amounts to $48,381.70. Any unpaid medical expenses for this injury would be awarded pursuant to Sections 8(a) and 8.2 of the Act. Because there is not itemization of bills paid by Respondent, the remaining amount paid, i.e. $32,758.21, will be credited to case number 08 WC 27726.

L. What is the nature and extent of the injury?

The Arbitrator, based upon the conflicting medical evidence, concludes that the petitioner suffered a back strain, as a result of the accident on August 13, 2007. The Arbitrator finds that the petitioner suffered the permanent partial loss of use of the whole person to the extent of 7% thereof.

08 WC 27726

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) and temporary total disability credit to Respondent; and the nature and extent of Petitioner's injuries. *See,* AX2.

The petitioner testified that on June 6, 2008, he was working on a perforator machine, catching washers when he attempted to pull the top skid of washers down to put it on a wagon. He further testified that the skid was heavy and he hurt his right shoulder and felt a sharp pain, with weakness. He stated that the respondent would not send him to the clinic so he went to his own doctors, at La Familia and Suburban Physical Therapy. PX2

Upon cross-examination, the petitioner stated that he did not have any prior or later accidents involving his right shoulder and that currently; he is unable to do tune-up work on his car or repairs on the houses that he owns and rents. He takes prescription medication for pain and to help him sleep. He further testified that Respondent requested that he return to work some time in July of 2009, which he did.

The petitioner testified that he currently has low back pain that he rates between 8 and 10 out of 10. He was off work from August 27, 2007 through November 25, 2007 and then again from December 10, 2007 through March 9, 2008. All of his temporary total disability benefits ("TTD") were paid for that period. However, Petitioner is claiming additional TTD owed from June 13, 2008 through October 19, 2009, in his second claim, which Respondent is disputing. The petitioner also testified that in addition to his back problems, he has problems with his sex life.

The Respondent's first witness

The respondent presented the testimony of William Jakosz, the vice president and manager at Harrington & King; and he investigated this accident so that he could report to the insurance company. He is the person who hired Petitioner in 2005.

Mr. Jakosz testified that there is really no lifting that the petitioner needs to do while working on the perforating machine. One may have to slide a piece of metal from the machine to a pallet but he does not actually need to stack the pallets. In essence, the machine does most of the work, as there is no stacking needed or moving of skids. Mr. Jakosz also testified that on June 6, 2008, the petitioner was working in a light duty capacity, lifting approximately ten to fifteen (10-15) pounds and cleaning up. Then the petitioner was asked to catch pieces and he abruptly left the premises and did not finish the shift. This witness also testified that he has seen the petitioner outside of work, in Menards buying drywall and the petitioner "took off when he saw me".

Lastly, Mr. Jakosz testified that Petitioner was offered a union position on July 23, 2009, as a clerk in the shipping office. It is an air-conditioned office and the job consisted of making labels and packing slips, faxing documents and paperwork, with no lifting or overhead reaching. RX2.

Respondent's second witness

Mr. Halon Digby testified that he worker for the respondent for approximately forty-seven (47) years, as the day shift supervisor, before he retired five (5) years ago. He testified that he knows the

petitioner as well as the machine the petitioner was working on, i.e., a degreaser, which washes and dries metal pieces. The person working the machine places the pieces onto to skid. The pieces are 22-gauge metal, thin enough to bend and weigh less that a pound. Paper is place between each piece of aluminum and after approximately five hundred (500) pieces are accumulated on the skid, someone other than the person working the machine, takes the skid to the shipping room. The person operating the machine can sit or stand while working.

On June 1, 2009, Petitioner presented to Dr. Kern Singh, of Midwest Orthopaedics at Rush, by request of Respondent. Noted in Dr. Singh's IME report, the petitioner has had prostate surgery. The petitioner never stated that he underwent prostate surgery when he testified at trial and there is no medical evidence that differentiates between back problems arising from injury versus problems due to prostate issues. In addition, the medical records do not reveal any issues or treatment relating to sexual problems.

Dr. Singh felt that the petitioner had degenerative disc disease from L3-S1 and opined that the petitioner's current symptoms, as of the date of his examination in 2009, were not causally related to the June 6, 2208, work incident. Dr. Singh noted that the petitioner had minimal changes on his lumbar spine image studies and did not believe that surgical intervention was warranted, as recommended by Dr. Malek. RX1.

Petitioner also had what Dr. Singh opined was an unreliable discogram. The doctor explained that there were four levels that reproduced pain; which in itself, negated the reliability of the discography. Dr. Singh opined that Petitioner was not a surgical candidate because the discogram, reproducing four levels of pain, was invalidated on that basis. The doctor further explained that a three-level, positive discogram with concordant pain, is a poor prognostic indicator for surgical intervention. Moreover, the petitioner underwent chiropractic treatment by Miguel Jimenez, at La Clinica. The respondent introduced a Utilization Review ("UR"), which opined that the chiropractic treatment was not necessary and was of no benefit to the petitioner, under these circumstances. The chiropractor never responded to the UR. RX3.

The records of Dr. Levy, dated April 3, 2009, note that when Petitioner told him that he had been offered surgery for his lumbar spine, Dr. Levy commented that he did not see any reason why the petitioner would need to have surgery on his lumbar spine. PX7.

The Arbitrator further notes that the petitioner underwent occupational and physical therapy where it is noted on September 4, 2007, that the petitioner was not tremendously compliant with the physical therapy and continually reported little changes in his back pain since the start of his care. The therapist also noted that the petitioner did not wear appropriate footwear to the clinic and that some of his treatment had been limited secondary to the inappropriate footwear. A note of August 30, 2007 noted very poor compliance with the recommended interventions for his back health, particularly with

regard to footwear and posture. The therapist noted that the petitioner would sit with a forward slumped posture with rounded shoulders. PX1.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his or her claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his or her testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of ***all facts and circumstances*** [emphasis added] support the decision. *See generally, Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also, *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009).

After a review of the testimony of all witnesses and the petitioner and a review of the medical records, the Arbitrator finds Drs. Kern and Levy's opinions to be more persuasive than those of Dr. Malek. The Arbitrator further concludes that Petitioner has not proven, by a preponderance of the evidence that an accident occurred, which arose out and in the course of his employment by Respondent. As the petitioner has not proven that an accident occurred, all other issues are moot and will not be addressed.

16IWCC0080

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
07WC52098 & 08WC27726
SIGNATURE PAGE

L Thompson

Signature of Arbitrator

April 1, 2015
Date of Decision

APR - 1 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Susan McGill,
Petitioner,

vs.
Luther Oaks,
Respondent,

NO: 08 WC 47783

16IWCC0107

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical, wage rate, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 22, 2015 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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.

DATED: FEB 5 - 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:12/10/15
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McGILL, SUSAN
Employee/Petitioner

Case# **08WC047783**

16IWCC0107

LUTHER OAKS
Employer/Respondent

On 4/22/2015, 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 0.09% 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:

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
4242 N KNOXVILLE AVE
PEORIA, IL 61614

2674 BRADY CONNOLLY & MASUDA PC
JULIA McCARTHY
705 E LINCOLN ST SUITE 313
NORMAL, IL 61761

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

16IWCC0107

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Susan McGill
Employee/Petitioner

v.

Luther Oaks
Employer/Respondent

Case # 08 WC 47783

Consolidated cases: _____

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 **Bloomington, Illinois**, on **2-27-15**. 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. XX 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. XX Is Petitioner's current condition of ill-being causally related to the injury?
G. XX 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. XX 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. XX What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. XX What is the nature and extent of the injury?
M. Should penalties or fees be imposed upon Respondent?
N. XX Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

16IWCC0107

On **4-13-08**, 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 in part* causally related to the accident.

In the year preceding the injury, Petitioner earned $**7,988.49**; the average weekly wage was $**221.92**.

On the date of accident, Petitioner was **61** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of $**15,799.90** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of $ under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $200.00/week for 3-5/7 weeks, commencing April 14, 2008 through April 15, 2008 and from May 23, 2008 through June 16, 2008, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, for Petitioner's conditions of ill-being relating to her contusion to the left elbow, right knee injury for which she underwent arthroscopic surgery on May 23, 2008, her cervical strain and a right foot/ankle soft tissue injury. Respondent is responsible for payment only related to those conditions through November 2008. Respondent shall pay for the EMG/NCV and MRI recommended by Dr. Holmes. The Arbitrator notes that if Medicare made conditional payments for any of the above referenced conditions, Respondent shall reimburse Medicare for said payments.

Respondent shall pay Petitioner permanent partial disability benefits of $200/week for 68.94 weeks, because the injuries sustained caused 20% loss of use of the right leg (43 weeks), 5% loss of use of the right foot (8.35 weeks) 3% loss of use of the left arm/elbow (7.59 weeks) and 2% permanent partial disability for her cervical strain (10 weeks), as provided in Sections 8(e) and (d)2 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

4/21/15
Date

APR 22 2015

FINDINGS OF FACT

16IWCC0107

Petitioner testified that on April 13, 2008 she was employed with Respondent, Luther Oaks, as a concierge. on a part-time basis. Her job duties included sitting at a desk, signing in guests, directing guests to residents' rooms. Petitioner also testified that she was concurrently employed by the Internal Revenue Service as a clerk.

Petitioner testified that as she was ending her shift on April 13, 2008, she slipped and fell on water that had been present in the hallway. Petitioner provided that as she fell, her right foot was turned underneath her. She also fell on her right ankle, right knee and left elbow. She was jarred and landed on her butt.

Petitioner sought immediate attention at OSF in the emergency room. X-rays were carried out of the left elbow, right knee, right ankle and cervical spine. No fractures were seen with respect to the left elbow and right knee. Degenerative changes were noted on the knee. X-rays of the right ankle revealed questionable tiny avulsion at the level of the tip of the lateral malleolus. Also noted was a possible old avulsion fracture at the medial malleolus. Regarding the cervical spine, the x-rays showed mild degenerative changes at C3-7 levels with no fractures noted. Petitioner was diagnosed with left elbow contusion, right ankle and knee strain, as well as cervical strain. Petitioner was taken off work and advised to follow up with Occupational Health. (PX 1)

Petitioner was seen by the physicians at OSF St. Joseph Occupational Health on April 17, 2008. Petitioner provided a history consistent with her testimony at arbitration. At this visit, Petitioner complained of pain in her right knee, right ankle, left elbow and neck. Records show she had abrasions her right knee and right ankle as well as a large bruise on her left elbow. Petitioner was diagnosed with cervical strain, right ankle sprain, and contusions of the left elbow and right knee. She was released to return to work performing sit-down work only. (PX 2) Petitioner testified that Respondent accommodated the aforementioned restriction.

Petitioner continued with OSF Occupational Health. On May 6, 2008 she was referred to Dr. Lawrence Li at the Orthopedic Sports and Medicine Center in Normal, Illinois. Petitioner saw Dr. Li on May 7, 2008. His records show Petitioner complained of pain over the lateral aspect of the right foot and ankle. She had no numbness or tingling in the upper extremities. She complained of pain over the medial aspect of the right knee and also neck stiffness and discomfort. Dr. Li's assessed neck pain from cervical sprain; left elbow traumatic olecranon bursitis; right knee pain felt to be due to possible medial meniscus tear; right ankle and foot pain and dysfunction felt to be due to persistent dysfunction after sprain. Dr. Li recommended a cortisone injection into Petitioner's left elbow and ordered an MRI of the right knee. (PX 4)

Petitioner next followed up with Dr. Li on May 12, 2008. Dr. Li reviewed the MRI indicating same revealed a tear of the posterior horn of the medial meniscus as well as osteochondral injuries of the medial femoral condyle, patella, and lateral femoral condyle. Dr. Li recommended arthroscopic surgery for the right knee. (PX 4)

Petitioner next presented to Dr. Li on May 20, 2008. Dr Li wrote that Petitioner presented "...for evaluation of right shoulder pain and also right elbow pain that was a work injury that occurred 4/13/08. She has been evaluated here previously from this. However, the pain in the shoulder has been worsening..." Records show Petitioner also complained of right wrist and hand pain, especially at the base of the right thumb. Dr. Li noted Petitioner provided that she had right shoulder pain with above the chest level work and pushing and

pulling. Dr. Li felt her right shoulder pain could be due to a possible rotator cuff tear and recommended a MRI. (PX 4)

Petitioner underwent the surgery recommended by Dr. Li. On May 23, 2008, Dr. Li performed right knee arthroscopy partial medial and lateral meniscectomy and abrasion chondroplasty of the medial femoral condyle, patella and femoral trochies. (PX 4) In addition to performing the surgery noted above, Dr. Li also authored a noted dated May 23, 2008. Dr. Li stated, "When this patient fell, she sustained an injury to her right hand/arm/shoulder. She is complaining of thumb pain around the CMC joint. To treat this injury of acute severe CMC sprain, I suggest a cortisone shot..." (PX 4)

Petitioner continued to treat with Dr. Li post-operatively from her knee surgery. On June 3, 2008, Dr. Li prescribed physical therapy on both the knee and her ankle. He released her to sit down work effective June 16, 2008. Records show Dr. Li ordered MRI's of her right shoulder, cervical spine, and right ankle. These were carried out on June 18, 2008. On June 30, 2008, Dr. Li went over the findings of the MRI's with Petitioner. The doctor provided that her ankle MRI showed a partial tear of the posterior tibialis tendon; the MRI of the right shoulder showed a full thickness tear of the supraspinatus tendon, as well as a partial tear of the biceps tendon; the cervical MRI was found to be normal from a neurological standpoint. At this visit, Dr. Li recorded that her ankle was the most symptomatic. He however indicated that she did have definite pain in the shoulder and had weakness in both supraspinatus and external rotation. She also had positive Neer and Hawkins impingement test. Because of Petitioner's ankle complaint Dr. Li recommended a right ankle arthroscopy, and repair for the torn posterior tibialis tendon. (PX 4)

Petitioner testified she did not have surgery on her right ankle as her right shoulder pain was getting worse. On July 16, 2008, Dr. Li recorded that as a result of being off her Ibuprophen in preparation for ankle surgery, Petitioner noticed intolerable right shoulder pain. As a result, it was decided to proceed with treatment of her shoulder. Dr. Li recommended an arthroscopic right shoulder surgery to repair the rotator cuff tear and bicep tendon tear. Said surgery was carried out on August 1, 2008. (PX 4)

Following the right shoulder surgery, Petitioner continued to treat with Dr. Li. On September 10, 2008, Petitioner began complaining of numbness and tingling in her left hand. Dr. Li wrote, "Since her right shoulder surgery she has been using her left hand much more significantly and has developed numbness and tingling throughout her entire hand..." Dr. Li noted that her right shoulder was progressing in therapy; her right knee was improving; and her right ankle continued with pain, with no significant change. Dr. Li's impression was "Due to lack of function for right arm and overuse of the left arm she has developed carpal tunnel syndrome". Dr. Li recommended an EMG/NCV. (PX 4)

On September 11, 2008, Petitioner presented to Dr. Edward W. Pegg for the recommended EMG/NCV. Dr. Pegg recorded a history of an accident resulting in the fall. Petitioner provided that she hurt both the right knee and right shoulder. She also provided that she had fallen on her outstretched left hand. Petitioner indicated that she had severe pain in the right knee and lesser pain in the right shoulder. Dr. Pegg wrote that she was not aware at the time of the discomfort in the left wrist which was covered up by the pains in both the right knee and shoulder. Once the surgical procedures and been completed she became more aware of discomfort and numbness in the left hand. She did not report any discomfort to her right hand. Dr. Pegg conducted the diagnostic study indicating same demonstrated severe median nerve entrapment on the left and very mild median nerve entrapment on the right. Dr. Pegg felt that based on the history provided, Petitioner most likely sustained a carpal tunnel injury with the fall but was unaware of the symptoms because of the severity of the knee and shoulder pain. (PX 6)

Physical therapy records submitted show Petitioner's right shoulder was progressing in therapy. Records through September 30, 2008 show continual improvement with her range of motions. Her left shoulder range of

motions were within limits. The entry from September 30th also show she reported a recent falling in a friends garage in which she landed on her left knee. Petitioner indicated she was feeling better but was "just all jarred up." (PX 5)

16IWCC0107

Petitioner returned to Dr. Li on October 22, 2008. The doctor noted that her right shoulder had been progressing nicely. At this visit, Dr. Li wrote that Petitioner still had pain in her left shoulder and that same "still bothers her significantly." Dr. Li recommended a left shoulder MRI. Dr. Li also went over the EMG/NCV findings and recommended a left carpal tunnel release. (PX 4)

On October 22, 2008, Petitioner underwent a left shoulder MRI. Physical therapy records from October 22nd show Petitioner continued improvement with the right shoulder. Also documented that day was a slight decrease with active range of motion and strength in the left shoulder. (PX 4, PX 5)

Dr Li discussed the left shoulder MRI finding with Petitioner on October 24, 2008. Dr. Li felt the studies revealed an undersurface tear of the subscapularis, as well as significant tendinopathy and partial tearing of the supraspinatus and infraspinatus tendon. Also noted was some glenohumeral arthropathy and a medially perched biceps tendon. At that time, Dr. Li recommended a course of physical therapy. (PX 4) In addition to the continuing right shoulder therapy session, Petitioner commenced therapy sessions on the left shoulder on October 28, 2008. (PX 5)

Petitioner returned to Dr. Li on December 3, 2008. At that time, Dr. Li indicated that Petitioner's right knee, ankle and right shoulder were improving. He noted that the left shoulder was significantly worse with therapy. The left elbow was still painful at the olecranon process. The left and right hand continued with numbness and tingling. Dr. Li felt Petitioner should attain full recovery for both the ankle and elbow. He felt the right knee was close to maximum medical improvement. However, he recommended Petitioner proceed with left shoulder arthroscopy with rotator cuff repair and biceps tenodesis as well a left carpal tunnel release. He felt Petitioner's left shoulder and carpal tunnel were aggravated by the fall in April 2008. (PX 4)

Petitioner continued treating with Dr. Li and attending physical therapy sessions in 2009. At Respondent's request, Petitioner underwent a Section12 examination with Dr. George Holmes at Midwest Orthopedics at Rush on July 1, 2009. After obtaining a history, performing an examination and reviewing diagnostic studies, Dr. Holmes opined status post twisting injury that appeared to be a soft tissue injury to the right ankle. Dr. Holmes provided that he could not provide a specific injury that Petitioner sustained as a result of the accident. As a result, he recommended Petitioner undergo an EMG/NCV and a second MRI scan of her left ankle. If the findings on said tests were negative, Dr. Holmes would not recommend any additional treatment. (RX 3)

Consistent with Dr. Holmes recommendation, Dr. Li ordered the additional testing on Petitioner's left ankle. On September 9, 2009, Dr. Li indicated the MRI taken revealed a chronic injury to the deltoid ligament as well as the spring ligament. The EMG/NCV was normal. Dr. Li explained that although the chronic injuries are causing Petitioner's discomfort, there is no additional treatment that would be beneficial for the ankle. Petitioner was at maximum medical improvement for her right ankle. (PX 4)

At Respondent's request, Petitioner underwent a Section 12 examination with respect to her left and right shoulder with Dr. David Raab on November 23, 2009. In addition to performing an examination and obtaining –x-rays, Dr. Raab also reviewed OSF emergency room records, Dr. Li's records and the right and left shoulder MRI's. Dr. Rabb opined that the conditions which Petitioner was suffering in both her right and left shoulder were unrelated to the injury of April 13, 2008. Dr. Raab further opined that neither the surgery which had already been performed, nor the surgery which was being recommended would be related to the accident of April 13, 2008. Dr. Rabb wrote, "...the necessity for surgery on her right shoulder is not causally related to her

work related injury of April 13, 2008. I do believe these findings in her right shoulder at the time of surgery were pre-existing. There is no mention in the emergency room report nor on the orthopeadic surgeon's initial evaluation of her was there a mention of any problems with the right and left shoulder. It is my opinion that the surgery that was performed was secondary to pre-existing problems in her right shoulder and is not causally related to the work related injury of April 13, 2008." The doctor further stated, "...[a]" The doctor further stated, "...[a]ny treatment of her left shoulder is for pre-existing problems in the left shoulder including early degenerative arthritis and rotator cuff tendinopathy..." (RX 2, dep #2)

16IWCC0107

Petitioner returned to Dr. Li on October 11, 2010. Petitioner reported that ten days prior she experienced severe right knee pain while walking down stairs. She indicated that she had been doing fairly well until that occurrence. Petitioner also provided that she continued with carpal tunnel and left shoulder symptoms which were not progressing. Dr. Li administered a cortisone injection to the knee and decided to proceed with the left carpal tunnel release which was carried out on October 29, 2010. Subsequent thereto, on November 23, 2010, Dr. Li also performed a left shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, debridement of degenerative labral tear and debridement of arthritis in the glenohumeral joint. The post operative diagnosis was left shoulder rotator cuff tear, degenerative anterior and superior labral tear, Grade II and Grade III changes on the humeral head and glenoid and impingement syndrome. (PX 4)

Post operatively, Petitioner underwent physical therapy through June 2011. On June 27, 2011, Dr. Li recorded that she had completed occupational and physical therapy. He recommended a home exercise program indicating he anticipated gradual improvement and released her from his care. (PX 4) Petitioner returned to the doctor on October 26, 2011 stating she woke up with right knee pain. Petitioner denied any new injuries. Dr. Li assessed underlying osteoarthritis with acute aggravation and administered a cortisteroid injection and again released her from care. (PX 4)

Petitioner testified that she next sought a second opinion with regard to her right hand and right knee. Records show that her family physician, Dr. John Poag, referred her to the physicians at McLean County Orthopedics. On April 10, 2012, Petitioner was seen by Dr. Mark Hanson with complaints of right knee pain. Petitioner provided that she had been experiencing knee pain and burning since March 24, 2012 when she moved "sideways." Dr. Hanson assessed severe right knee osteoarthritis and administered an injection of Synvisc. The doctor felt that a total knee replacement was the only treatment that would ultimately make her feel good. (PX 7)

Petitioner returned to McLean County Orthopedics where she saw Dr. Jerome Oakey on August 16, 2012. Petitioner complaints were right hand pain and numbness. Based upon his physical examination, as well as the review of the 2008 EMG, Dr. Oakey recommended a right carpal tunnel release. (PX 7)

Petitioner returned to Dr. Oakey on August 27, 2012. The doctor noted Petitioner had pain in both the middle finger and thumb. Also noted was that Petitioner felt that her symptoms were related to a fall (presumably the April 2008 fall) and multiple other falls independently jamming several fingers. The doctor opined that the most likely scenario for her problem was degenerative given the diffused pattern. On September 4, 2012, Dr. Oakey performed a right open carpal tunnel release and right middle finger trigger release. After a brief course of physical therapy, Petitioner was released from Dr. Oakey's care on October 15, 2012. (PX 7)

Petitioner continued to treat with Dr. Hanson for her right knee complaints. On May 13, 2013, Dr. Hanson performed a right total knee athroplasty. The doctor also performed a manipulation under anesthesia on June 11, 2013. (PX 7) Petitioner testified that Dr. Hanson released her to sedentary work duty on August 7, 2013.

At the request of Respondent, a records review was performed by Dr. Lawrence Lieber on March 7, 2014. In his report dated same, Dr. Lieber provided that he reviewed the medical records of OSF Hospital & Occupational Health Clinic; the records of Dr. Li; the records of Dr. Hanson at Mclean County Orthopedics. Dr. Lieber opined that Petitioner's current right knee condition showed no direct relationship to the April 13, 2008 event. The doctor indicated that upon review of the diagnostic studies as well as the operative report findings of Dr. Li, there appeared to be no evidence of any isolated injury to the right knee area in association with April 2008 accident that would have caused any increase acceleration or any permanent aggravation of the underlying degenerative arthritis to cause the need for the subsequent total knee replacement surgery. The doctor, relying on the records of Dr. Li, opined that Petitioner reached maximum medical improvement for her work related right knee condition in October/November of 2008. (RX 1, dep #2) **16IWCC0107**

Petitioner testified at arbitration that she continues to experience problems with her right knee. Specifically, she complained of weakness, pain with activity, and an inability to kneel or do any climbing. With regards to her right ankle, Petitioner testified that she continues to have weakness in said ankle. With regards to her right and left hand, Petitioner testified to a continuing weakness with grip strength but otherwise felt she was doing okay. With regards to her left shoulder, she testified to continued weakness and difficulty with activities above shoulder level. Regarding the right shoulder, she testified that it was better than her left shoulder but continues to be weak. Finally, with regards to the left elbow, she complained of pain with any lifting activities, as well as an inability to rest said elbow on hard surfaces. Petitioner denied any injuries involving the multiple body parts prior to April 13, 2008 and/or subsequent to that date.

On cross examination, Petitioner testified that after two days off from the emergency room, she did return to her work in her job as a concierge at Luther Oaks on April 16, 2008. She continued to work up until her right knee surgery of May 23, 2008. Petitioner was then off until June 16, 2008 at which time she again returned to work as a concierge. Petitioner also testified that she had a vacation planned at the end of June 2008. She testified that her last day of work was June 25, 2008. Following her vacation she never returned to work for Respondent.

Dr. Li testified via deposition in this matter on February 3, 2010. Dr. Li testified that he first saw Petitioner on May 7, 2008. Petitioner reported that she sustained an injury at work on April 13, 2008 wherein she injured her right foot/ankle, right knee, left elbow and cervical spine. At that time, an examination revealed some tenderness over her cervical spine; she had some tenderness over the elbow and her knee showed positive medial McMurray's test which was suggestive of a torn meniscus. Ultimately, Dr. Li's assessed neck pain from cervical sprain, left elbow traumatic olecranon bursitis, right knee pain felt to be due to possible medial meniscus tear, right ankle and foot pain and dysfunction due to persistent dysfunction after sprain. Dr. Li testified that after ordering an MRI of the right knee and reviewing same he recommended arthroscopic knee surgery. (PX 8)

Dr. Li testified that Petitioner presented to him on May 20, 2008 and wanted to have her right shoulder evaluated. The doctor provided that Petitioner had previously told him about her elbow pain, but she complained of worsening pain in the right shoulder. He felt Petitioner possibly had a rotator cuff tear, elbow contusion and injury to her first metacarpal joint in the wrist. A MRI of the right shoulder was ordered and demonstrated a full thickness rotator cuff tear. Dr. Li testified that he felt Petitioner's right shoulder condition was related to the fall Petitioner described to him as occurring on April 13, 2008. Dr. Li stated, "Well, I think there's a couple of things. First, she had pains in a lot of different areas, and certainly the shoulder was not the most dominant finding at first, and I think that it became more noticeable to her later." The doctor added that his causation opinion would not change in spite of the fact that Petitioner didn't make any right shoulder complaints until May 20, 2008, approximately five (5) weeks after the accident. (PX 8, pp.8-9)

Dr. Li performed a right knee arthroscopy on May 22, 2008, which he testified was related to the fall. Dr. Li also recommended that Petitioner undergo MRI's of her right shoulder, cervical spine, and right ankle. Dr. Li felt the ankle MRI showed a partial tear of the posterior tibialis tendon; the right shoulder MRI showed a full thickness tear of the supraspinatus tendon, as well as a partial tear of the biceps tendon; and the cervical MRI was normal from a neurological standpoint. Based on these test results, Dr. Li recommended and scheduled right ankle arthroscopy, and repair for the torn posterior tibialis tendon. However, prior to the scheduled surgery, Petitioner saw Dr. Li on July 16, 2008 complaining that her right shoulder had become much more painful. As such, it was decided she would undergo an arthroscopic shoulder surgery to repair the rotator cuff tear and bicep tendon tear. Petitioner underwent this surgery on August 1, 2008. Dr. Li stated that both conditions, i.e., the rotator cuff tear and bicep tendon tear, were caused by the April 2000 fall. (PX 8, pp.11-12)

Dr. Li testified that while treating post-operatively from her shoulder surgery, Petitioner began to complain of numbness and tingling in her left hand. Dr. Li stated that he concluded that "due to lack of her right arm and overuse of the left arm, she developed carpal tunnel syndrome..." (PX 8, p.14) An EMG/NCV obtained demonstrated severe median nerve entrapment on the left and mild median nerve entrapment on the right. Dr. Li testified that he felt that Petitioner's carpal tunnel syndrome in her left and right hand were related to the fall of April of 2008. Dr. Li stated, "I think it would have been aggravated from the - - again, from the overuse afterwards. There may be some relationship to the fall. She may have had pre-existing carpal tunnel syndrome, but I think the symptoms were aggravated." (PX 8, p.15) Dr. Li went on to state that he definitely felt the right hand carpal tunnel could be related to the fall and that the left hand carpal tunnel was due to increase use of the left hand because of her post-operative right shoulder condition. (PX 8, pp.15-16)

Dr. Li testified that additionally, Petitioner began to complain left shoulder pain. A left shoulder MRI was ordered which indicated partial tearing of the supraspinatus and infraspinatus tendons. Dr. Li recommended Petitioner undergo a course of physical therapy for her left shoulder. Dr. Li testified that he believed her shoulder and her carpal tunnel were aggravated by the fall that she suffered at work in April of 2008. The doctor stated, "It would be related to the increased use on the left upper extremity after treatment of her - - after her other surgeries." (PX 8, p.17) Dr. Li testified that he recommended that Petitioner undergo surgery to repair the rotator cuff as well as undergo bilateral carpal tunnel releases. (PX 8, p.19)

With respect to the left ankle, Dr. Li testified that he obtained another EMG/NCV and MRI of the ankle which didn't demonstrate any tear in the posterior tibialis tendon. As a result, he saw no benefit of surgery and instead felt same should be managed nonoperatively. The doctor provided that although he didn't officially release her from his care, he felt the ankle was at maximum medical improvement. (PX 8, p.21) Dr. Li further stated that she was at maximum medical improvement for the right knee sometime in the Fall of 2008. He also provided that Petitioner was at maximum medical improvement for the right shoulder in December of 2008. (PX 8, p.25)

On cross examination, Dr. Li testified that Petitioner told him she injured her right upper extremity at the time of the accident on April 13, 2008. During the deposition, the doctor reviewed the emergency room records and agreed that the ER report does not indicate an injury to the right upper extremity. (PX 8, pp. 34-36)

Dr. Raab testified via deposition in this matter on May 3, 2010. Dr. Rabb performed a Section 12 examination with respect to Petitioner's bilateral shoulders at the request of Respondent. Dr. Rabb testified that he reviewed the emergency room records dated April 13, 2008. He provided that the records did not show of a report of an injury to the right or left shoulder. He noted that he specifically asked Petitioner if she injured her shoulders on the date of injury and she replied that she was not aware of injuring her shoulders. He indicated that she specifically stated that her shoulders began to bother her after her right knee surgery. He noted that Dr. Li's records show a first complaint of shoulder problems occurred on May 20, 2008 which actually preceded Petitioner's statement that she began noticing shoulder problems after the right knee surgery. (RX 2, pp.10-11)

Dr. Rabb testified that he reviewed the right shoulder MRI taken on June 18, 2008. He opined that the MRI did not show evidence of an acute injury. He stated the findings were pre-existing and predated the work-related date of injury. Dr. Rabb also stated that he reviewed Petitioner's left shoulder MRI dated October 22, 2008. The doctor provided that the findings were wear and tear and degenerative. He indicated same were not causally related to the accident. (RX 2, pp.14-17)

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Dr. Rabb stated that it was his opinion that the treatment and surgery on the right shoulder were not causally related to the accident of April 2008. His also opined the fall didn't aggravate the shoulder. His opinion is based on his review of all the records as well as his physical examination and information obtained from Petitioner. The doctor further stated that Petitioner's left shoulder complaints were not secondary to the fall. (RX 2, pp.19-23) Dr. Rabb also testified that the reason for his opinion on the lack of causation for causal connection on the shoulder is multifactorial including the Petitioner's history, lack of documentation and the findings on the MRI. (RX 2, p.29)

Dr. Hanson testified via deposition in the matter on September 11, 2013. Dr. Hanson testified regarding his treatment of Petitioner from August 10, 2012 through August 17, 2013. Petitioner was first seen by Dr. Mark Hanson on April 10, 2012 for right knee pain. Dr. Hanson diagnosed severe right knee osteoarthritis and administered a Synvisc injection. (PX p, pp.6-8) Dr. Hanson testified that ultimately he performed a right knee replacement procedure on May 13, 2013. Dr. Hanson was asked whether he had an opinion as to whether or not the fall which occurred on April 13, 2008 caused or aggravated Petitioner's severe osteoarthritis in her right knee. Dr. Hanson responded that he believed it did not cause it, but did aggravate it. Dr. Hanson provided, "Yes. It could aggravate it to a point where it sped up the eventual need for replacement where maybe she would have had it 4 years later. Maybe if she didn't reinjure it, it could have been later than that." (PX 9, pp.20-21)

On cross examination, Dr. Hanson testified that when Petitioner was first seen she filled out a patient questionnaire indicating the onset of her symptoms was March 24, 2012 and that her knee never stopped burning or hurting since that time. He provided that nowhere within his records did Petitioner relate her complaints to a work injury of April 2008; nor was there a history of a work related injury of April 2008 in his records. Dr. Hanson testified that throughout his records his diagnosis was osteoarthritis. Nowhere in his records did he relate her conditions for which he carried out knee replacement surgery to an injury of April 2008. (PX 9, pp.25-26) Dr. Hanson also testified that he would not be able to testify with a degree of certainty as to when Petitioner would have needed knee replacement surgery with or without the incident of April 2008. (PX 9, p.34)

Dr. Lieber also testified via deposition in this matter. Dr. Lieber performed a records review at the request of Respondent. Dr. Lieber testified that based on the mechanism of injury, the MRI findings of May 2008 as well as the records of Dr. Li, including his opinion of MMI as of October and November 2008 as well as the operative findings from the May 23, 2008 surgery, as well as the four year absence of treatment from 2008 until 2012 and Dr. Hanson's findings at the time of surgery, the knee replacement was carried out to address the osteoarthritis and Petitioner's subjective complaints. The doctor added that there is no evidence that the work injury in 2008 accelerated or aggravated the knee for the May 2013 knee replacement. (RX 1, pp.14-15)

In Support of the Arbitrator's decision regarding (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner's sustained a fall on April 13, 2008 falling onto her right foot/ankle, right knee and left elbow.

Petitioner initially received emergent medical care. Nowhere in the initial records are there any complaints with regard to Petitioner's shoulders, hands or wrists. Petitioner was diagnosed with left elbow contusion, right ankle and knee strain, as well as cervical strain.

Petitioner next treated at OSF St. Joseph Occupational Health on April 17, 2008. At this visit, Petitioner complained of pain in her right knee, right ankle, left elbow and neck. Petitioner was diagnosed with cervical strain, right ankle sprain, and contusions of the left elbow and right knee.

On May 7, 2008, Petitioner began treating with Dr. Lawrence Li at the Orthopedic Sports and Medicine Center. His records show Petitioner complained of pain over the lateral aspect of the right foot and ankle. She had no numbness or tingling in the upper extremities. She complained of pain over the medial aspect of the right knee and also neck stiffness and discomfort. Dr. Li's assessed neck pain from cervical sprain; left elbow traumatic olecranon bursitis; right knee pain felt to be due to possible medial meniscus tear; right ankle and foot pain and dysfunction felt to be due to persistent dysfunction after sprain. Dr. Li ordered an MRI of the right knee which revealed a tear of the posterior horn of the medial meniscus as well as osteochondral injuries of the medial femoral condyle, patella, and lateral femoral condyle. Dr. Li recommended arthroscopic surgery for the right knee.

Prior to the recommended surgery, Petitioner next presented to Dr. Li on May 20, 2008. Dr Li wrote that Petitioner presented "...for evaluation of right shoulder pain and also right elbow pain that was a work injury that occurred 4/13/08. She has been evaluated here previously from this. However, the pain in the shoulder has been worsening..." Petitioner also complained of right wrist and hand pain, especially at the base of the right thumb. Dr. Li felt her right shoulder pain could be due to a possible rotator cuff tear and recommended a MRI.

Petitioner underwent the surgery recommended by Dr. Li on May 23, 2008. Post surgery, Petitioner underwent a MRI of the right shoulder on June 18, 2008. The doctor provided the MRI showed a full thickness tear of the supraspinatus tendon, as well as a partial tear of the biceps tendon. Dr. Li recommended an arthroscopic right shoulder surgery to repair the rotator cuff tear and bicep tendon tear. Said surgery was carried out on August 1, 2008.

On September 10, 2008, Petitioner began complaining of numbness and tingling in her left hand. Dr. Li wrote, "Since her right shoulder surgery she has been using her left hand much more significantly and has developed numbness and tingling throughout her entire hand..." Dr. Li's impression was "Due to lack of function for right arm and overuse of the left arm she has developed carpal tunnel syndrome". Dr. Li ultimately recommended surgery to the left shoulder which was carried out in November 2010.

While Petitioner began treating for her right shoulder in June 2008, it was the testimony of Dr. Li, that she had advised him she injured her right shoulder in the initial fall. Upon reviewing the ER records during his deposition Dr. Li admitted the ER records reflected no injury to the right shoulder. Further, upon review of the records there is no indication of injury to the left shoulder or either hand or wrist.

The evaluation by Dr. Raab including his review of all the medical records and his opinion finding Petitioner's right and left shoulder conditions not related to the April 13, 2008 fall, is supported by the medical records and Petitioner's initial history of her fall. Further, Dr. Raab testified that based on the findings during the surgery of both shoulders, he does not find the shoulder surgeries related to the April 13, 2008 injury.

Petitioner had a full thickness tear of the right shoulder rotator cuff and there is nothing in the ER records or Petitioner's history of injury/fall to indicate any such injury to her right shoulder. Further, the operative report from the left shoulder surgery which was not carried out until November 23, 2010, over two years after the accident, reflects a post operative diagnoses of a left shoulder rotator cuff tear, degenerative

anterior and superior labral tear, Grade II and Grade III changes of the humeral head and glenoid and impingement syndrome.

Dr. Raab specifically noted that the basis for his opinion that Petitioner's shoulder injuries were not related and were multi-factorial including the findings during surgery.

With regard to Petitioner's bilateral carpal tunnel syndrome there is no indication in the initial records that Petitioner in any way injured her hand/wrist during her fall on April 13, 2008. In October 2010 over two years after the accident, Dr. Li diagnosed chronic bilateral carpal tunnel syndrome. Surgery for the left hand was then carried out October 29, 2010. While Petitioner advised she experienced numbness in her left hand in September 2008 following her right shoulder surgery as she was using her left hand more again, Petitioner provided an inaccurate history to Dr. Li that she has injured her right upper extremity in the fall of April 2008.

As Dr. Li's records and opinions are based on an inaccurate representation from Petitioner, his opinion on causation is outweighed by Dr. Raab finding no causal connection regarding both shoulders. Further, as Dr. Li's opinion regarding the left hand numbness onset was following the right shoulder surgery and the right shoulder was not related to the work injury of April 13, 2008, it follows that the left hand is not related to the injury of April 13, 2008.

With regard to Petitioner's right carpal tunnel release which was not carried out until September 4, 2012 along with right middle trigger finger release at the same time, Dr. Oakey's office note of August 27, 2012 reflects that Petitioner had concerns regarding her carpal tunnel release and trigger finger surgery. The doctor noted she felt it stemmed from a fall and she had had multiple falls and had independently jammed several fingers. At no time does Dr. Oakey relate the condition to the fall of April 13, 2008. Further, the medical records do not reflect any injury to Petitioner's right hand/wrist or any of Petitioner's fingers in April 2008. Additionally, Dr. Oakey goes on to comment that most likely the scenario is degenerative given the diffuse pattern of her complaints.

The Arbitrator finds Petitioner's right carpal tunnel syndrome and right middle trigger finger release are not related to the fall of April 13, 2008. The Arbitrator relies on Dr. Oakey's records as well as the medical records and history from April 13, 2008.

With regard to Petitioner's right knee replacement surgery carried out in May 2013, five years after the accident, the Arbitrator notes Dr. Hanson performed that surgery and while he testified during his deposition that the fall on April 13, 2008 may have aggravated or accelerated her underlying degenerative condition and the need for the knee replacement surgery, Dr. Hanson also testified that he could not testify with any degree of certainty as to the relationship between the surgery and the fall of April 2008. Further, the doctor admits that his records reflect Petitioner provides a history of onset of March 2012. Petitioner makes no mention of an April 2008 incident throughout his course of treatment. Further, his records do not provide any opinion regarding causation to the April 13, 2008 injury. He admits the surgery was carried out for degenerative condition and osteoarthritis. Furthermore, Dr. Lieber supports the opinion that the total knee replacement surgery was carried out for the osteoarthritis and degenerative condition and not related to the fall of April 13, 2008.

Based on Petitioner's history of injury of her fall and the medical records taken as a whole, the Arbitrator finds that as a result of the April 13, 2008 injury Petitioner sustained a contusion of her left elbow. Petitioner testimony and the medical records show that any treatment to her left elbow was minimal.

The Arbitrator finds Petitioner sustained injury to her right knee resulting in right knee arthroscopic surgery carried out May 23, 2008. Petitioner was released to return to sedentary duty which was her normal work capacity June 16, 2008. Further, Petitioner was placed at MMI by her treating orthopedic surgeon, Dr. Li,

as of the fall of 2008 per his deposition testimony. It is noted that the arthroscopic procedure on May 23, 2008 involved partial medial and lateral menisectomy and abrasion chondroplasty of the medial femoral condyle, patella and femoral trochlea.

With regard to Petitioner's right foot/ankle, it was the opinion of Dr. Holmes that Petitioner sustained a soft tissue injury of the right foot/ankle from which no residuals were anticipated. No surgery was recommended. The Arbitrator notes that following Dr. Holmes' opinion, Dr. Li no longer recommended surgery for the right foot/ankle.

The Arbitrator notes that approximately six weeks after the accident Petitioner's version of the fall begins to change and subsequently changes and varies the mechanism of the fall and body parts involved to include various new complaints and multiple body parts. The initial ER records do not support the numerous injuries/conditions for which Petitioner treats over the course of approximately six years. The initial ER records support the initial injury to Petitioner's right knee, right foot/ankle, the left elbow contusion and a cervical strain. It is not until approximately six weeks later on May 20, 2008 that Petitioner claims injury to her right upper extremity, right shoulder, wrist and elbow. She then submits a history of landing on her right arm.

As Petitioner's treatment continues and her complaints spread, on September 11, 2008 Dr. Pegg indicates he had a history that Petitioner then recalled at the time of the accident she had fallen on her outstretched left hand. At that time he noted that she is right hand dominant but was complaining of no discomfort in the right hand.

Thus, the injuries related to Petitioner's fall of April 13, 2008 as supported by the medical evidence of a contusion to the left elbow, right knee injury for which she underwent arthroscopic surgery on May 23, 2008, right foot/ankle soft tissue injury and a cervical strain.

In Support of the Arbitrator's decision regarding (G) What were the Petitioner's earnings, the Arbitrator finds as follows:

The parties agree Petitioner's AWW from her earnings with Respondent, Luther Oaks, was $95.11. Further, the parties agree that in the year preceding the accident Petitioner was a temporary worker for the IRS. It is agreed that Petitioner's total earnings from the IRS was $6,594.36.

Petitioner testified that her work with the IRS was short term/temporary. She was aware that it was for a limited time period. Petitioner did not make any claim for any potential for further earnings from the IRS.

As Petitioner's total earnings from the IRS over the 52 week period prior to the date of accident was $6,594.36, Petitioner's AWW from the IRS was $126.81:

> When the employee is working concurrently with two or more employers, and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employersshall be considered as if earned from the employer liable for the compensation. 820 ILCS 305/10.

Per the plain language of the statute involving concurrent employment, Petitioner's earnings from both employers shall be considered as if earned from Respondent employer, liable for the compensation. Petitioner's earnings from Respondent are based on 52 weeks of earnings. As the concurrent employment is to be treated as employment from Responsible employer, the additional earnings should be added to the 52 weeks for calculation of the AWW based on concurrent employment.

Therefore, in the current case as noted, Petitioner's additional earnings from the IRS, $6,594.36, based on as though it was earned from Respondent for whom she worked all 52 weeks, the calculation is $126.81. Combined with her AWW at Respondent of $95.11, Petitioner's AWW, $221.92 pursuant to the language of the Act.

In Support of the Arbitrator's decision regarding (G) What were the Petitioner's earnings, the Arbitrator finds as as follows:

Petitioner was initially off work following the accident from April 14, 2008 through April 15, 2008 for a total of 2/7th weeks of T.T.D. Petitioner testified that she did return to work on April 16, 2008 pursuant to the light duty restrictions. Petitioner was next taken off work effective May 23, 2008 (the date of her arthroscopic knee procedure) and was once again released to return to work by Dr. Li on June 16, 2008. This is an additional T.T.D. period of 3-3/7th weeks. The remaining time Petitioner was off work was due to conditions of ill-being that the Arbitrator has found not to be causally related.

Based on the above, the Arbitrator finds that as a result of accidental injuries sustained on April 13, 2008, Petitioner was temporarily and totally disabled for a period of 3-5/7 weeks. The Arbitrator notes the parties stipulated Respondent paid $15,799.90 in TTD and that Respondent is entitled to credit for said payments.

In Support of the Arbitrator's decision regarding (J) Were the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds as follows:

Having found that Petitioner's conditions of ill-being, i.e., contusion to the left elbow, right knee injury for which she underwent arthroscopic surgery on May 23, 2008, a right foot/ankle soft tissue injury and cervical strain, are related to the accident sustained on April 13, 2008, the Arbitrator finds that Respondent is responsible for payment only related to those conditions through November 2008, the timeframe Dr. Li testified that Petitioner right knee condition had attained MMI. The Arbitrator further finds that Respondent shall pay for the EMG/NCV and MRI recommended by Dr. Holmes. Said payments shall be made consistent with the fee schedule. The Arbitrator notes that if Medicare made conditional payments for any of the above referenced conditions, Respondent shall reimburse Medicare for said payments.

In Support of the Arbitrator's decision regarding (L) What is a nature and extent of the injury, the Arbitrator finds as follows:

Petitioner suffered injury to her right knee. She underwent right knee arthroscopy involving a partial medial and lateral menisectomy and abrasion of the chondroplasty. She was released to sedentary duty which was her regular occupation.

Based on the injury to Petitioner's right knee, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 20% of the right leg.

With regard to Petitioner's twisting injury of the right foot/ankle, Dr. Holmes, an orthopedic surgeon specializing in the care of treatment of the foot and ankle, found Petitioner sustained a soft tissue injury with no residuals. The Arbitrator finds Petitioner sustained permanent partial disability of 5% of the right foot.

With regard to Petitioner's left elbow contusion, Petitioner testified and the medical records show had minimal treatment. The Arbitrator finds Petitioner sustained permanent partial disability of 3% of the left arm.

With regard to Petitioner's cervical condition, all the records show she sustained and was treated for a cervical strain. The Arbitrator finds Petitioner sustained permanent partial disability of 2% man as a whole under Section 8(d)2 of the Act.

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY SHAUGHNESSY,

Petitioner,

vs. NO: 08 WC 49366

CITY OF CHICAGO,

16IWCC0099

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and permanency, 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.

The Commission modifies the Arbitrator's causation determination with regard to Petitioner's slip and fall in his physician's parking lot on December 16, 2008. As a result, the Arbitrator's determinations regarding medical expenses and permanency are also necessarily modified as a result.

The question in this case is whether the Petitioner proved that the work injury (a right foot fracture) caused the subsequent injury (head trauma). The Petitioner, following a December 16, 2008 visit to the physician treating the foot, Dr. Strugala, slipped and fell in the parking lot. The Commission believes that the evidence supports a finding that at least part of the cause of the December 16, 2008 slip and fall was Petitioner's use of walking CAM boot on ice and snow on the ground in the parking lot.

In *Fermi Nat'l Accelerator Lab v. Industrial Comm., 224 Ill.App.3d 899, 586 N.E.2d 750 (1992)*, the Court cited *International Harvester v. Industrial Comm., 46 Ill.2d 238, 263 N.E.2d*

49 (1970), and made several findings that are applicable to the case at bar. First, the Court determined that the Commission's determination in *Fermi* that a subsequent accident/injury was a natural consequence flowing from the original accident was not against the manifest weight of the evidence. Citing *International Harvester*, the court noted: "where the work injury itself causes a subsequent injury, however, the chain of causation is not broken"; and: "If a non-employment related factor is a contributing cause, with the compensable injury, in an ensuing injury or disability, it does not constitute an 'independent intervening cause' breaking the causal connection where it is not brought about by claimant's intentional or negligent misconduct."

In *Fermi*, the claimant was on crutches after suffering an initial work-related accident, and was using them to traverse a wet area at work. The claimant testified that the crutches slipped, causing him to fall and sustain a new injury. In this case, the Petitioner testified that: a) the parking lot was gravel, covered in ice and snow, b) he was wearing his walking boot on his right foot/leg, c) he thinks it was snowing that day, d) he was carrying a folder of his medical records in his left hand, e) testified that he believed he slipped on ice, but was unsure because it was snow covered, f) he slipped with his right foot first, g) asked if he believed he slipped because of the boot or because of the ground, he stated "both", h) the surface was not smooth, but was up and down with holes or standing water in gravel, and i) he walked carefully because the surface was frozen ice and snow covered. (Tr. 11-17, 24-30, 36-39).

Petitioner needed to prove not just that the ground was slippery, but that the prior injury, i.e. the boot, was at least a part of the reason he fell. While the Arbitrator found the evidence lacking, we believe the evidence supports a determination that the Petitioner's prior right foot injury and use of a walking boot contributed to his slip and fall. The Petitioner testified that it was his right foot that slipped, which is the foot he had injured and which had the boot on, and that both the boot and the ground are what caused him to slip. As noted, he also testified that he was being extra careful while traversing the area due to the ground conditions, but the boot still slipped on the icy conditions. We also note that the December 16, 2008 records of both MercyWorks (Px1) and Little Company of Mary Hospital (Px2) specifically note that the Petitioner was using the CAM boot.

While Respondent attempted to rebut this using weather documentation from that date (Rx5), whether it actually snowed that particular day or not doesn't tell us anything about whether there was preexisting ice and snow on the ground. Additionally, the records do indicate some amount of precipitation, albeit a very small amount. Even that small amount could have resulted in adding to the slippery walking conditions.

The Commission finds that the evidence supports the inference that the Petitioner's use of the walking boot made it more likely that Petitioner could slip and fall in the icy conditions he encountered in the doctor's parking lot. But for the work injury involving the right lower extremity, Petitioner would not have been wearing the walking boot. Therefore, we find that this case falls within the reasoning espoused in *Fermi* and *International Harvester* and their progeny.

Based on our findings, the Petitioner is entitled to the reasonable medical expenses related to both the right foot and head trauma, as submitted in Petitioner's Exhibit 5, pursuant to

the Fee Schedule. Respondent shall pay same, with credit for any of the expenses that were paid prior to hearing, as well as any that were paid pursuant to Section 8(j) of the Act.

With regard to the right foot trauma, the Commission finds that the Petitioner sustained the loss of use of 15% of the right foot. This is based on the nature of the injury, including a second metatarsal fracture, and Petitioner's complaints of ongoing foot discomfort with cold weather and the need to keep the foot warm. Dr. Strugala's last report of January 13, 2009 noted the Petitioner had ongoing stiffness in the foot.

With regard to the head trauma, the Commission finds, based on the medical records in evidence (Px1, Px2 & Px4), that the Petitioner sustained a subdural hematoma, right temporal bone fracture, cochlear concussion and possible ruptured right eardrum. The Petitioner testified, consistent with his medical records, that he also had issues with vertigo, and that he had no similar prior symptoms. Dr. Bendok's diagnoses included sensorineural hearing loss, and Petitioner testified that he feels an ongoing hearing loss and tries to focus on his better left ear in conversation. Based on this evidence, the Commission finds the Petitioner has sustained the loss of 10% of the man as a whole based on the head trauma.

The Commission notes that we affirm the credits to Respondent that were awarded by the Arbitrator. However, we note that a TTD credit was awarded despite no TTD being requested or awarded in the case. Thus, it would be our understanding that the parties agreed on the period Petitioner was entitled to TTD, and that it was paid. Respondent's TTD credit is thus not applicable to be taken against the permanency awarded in the case or any medical expenses, unless there was an overpayment of TTD. If there was an overpayment of TTD based on the agreement of the parties regarding the period of TTD Petitioner was entitled to, the Respondent would only then be entitled to credit for such overpayment against the Petitioner's permanency awards.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is modified as noted, and that the Petitioner's December 16, 2008 slip and fall incident is causally related to the October 31, 2008 accident, for the reasons noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses contained in Petitioner's Exhibit 5, pursuant to Sections 8(a) and 8.2 of the Act, including expenses related to both Petitioner's right foot and head injuries; Respondent is entitled to credit as indicated in the Arbitrator's Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week, the maximum allowable permanency rate, for a period of 25.05 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 15% of the right foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week, the maximum allowable permanency rate, for a period of 50 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the man as a whole.

16IWCC0099

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.

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.

DATED: FEB 4 - 2016
TJT: pvc
O 12/08/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHAUGHNESSY, TIMOTHY
Employee/Petitioner

Case# **08WC049366**

CITY OF CHICAGO
Employer/Respondent

16IWCC0099

On 11/10/2014, 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 0.06% 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:

0222 GOLDBERG WEISMAN & CAIRO LTD
DEBORAH BAKER
ONE E WACKER DR 39TH FL
CHICAGO, IL 60601

0010 CITY OF CHICAGO-LAW DEPT
ELIZABETH MANNION
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

16IWCC0099

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Timothy Shaughnessy
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **08 WC 49366**

Consolidated cases: _____

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 **David Kane**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **October 24, 2014**. 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 16IWCC0099

On **October 31, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury of **October 31, 2008**, Petitioner earned $**77,827.52**; the average weekly wage was $**1,496.68**;

On the dates of accident, Petitioner was **60** years of age, *single* with **0** dependent children.

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

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

Respondent shall be given a credit of $**14,580.93** for TTD, **0** for TPD, $ **0** for maintenance, and $ **0** for other benefits, for a total credit of $**14,580.93.**

Respondent is entitled to a credit of $**22,030.35** under Section 8(j) of the Act.

ORDER

For the injuries sustained to Petitioner's right foot, Respondent shall pay petitioner permanent partial disability benefits of $664.72/week for 16.7 weeks, because the injuries sustained caused the 10% loss of the right foot, as provided in Section 8(e) of the Act.

This Arbitrator finds that dates of service 12/2/08 Code 73630/RT and 12/16/08 Code 73630/RT for Midland Orthopedic Associates are related to the Petitioner's right foot injury, and Petitioner shall pay these dates of service directly to the provider, pursuant to the fee schedule, with a credit to Respondent for any payments already made.

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.

David A. Kane
Signature of Arbitrator

November 7, 2014
Date

NOV 10 2014

Timothy Shaughnessy v. City of Chicago

08 WC 49366

16IWCC0099

FINDINGS OF FACT:

The parties stipulate that the City of Chicago (hereinafter referred to as "Respondent") was operating under the Illinois Workers' Compensation Act on October 31, 2008. On said date Timothy Shaughnessy (hereinafter referred to as "Petitioner") sustained accidental injuries that arose out of and in the course of his employment with the Respondent. On this date, he was 60 years old and working as a lineman for the City of Chicago.

Parties proceeded to hearing on October 24, 2014, with disputed issues as to accident, causation of the injuries and nature and extent of the injuries, and medical bills.

Petitioner testified on October 31, 2008, he was working as a lineman, when a pole he was dissembling fell on his right foot. Petitioner reported to Mercy Works that day, at which time he had an X-ray done, showing a non-displaced fracture of the 2nd metatarsal on the top of his right foot. (Px 1). Petitioner was given a CAM Walker (walker boot), and placed on limited duty. (Px 1).

Petitioner followed up care with Dr. Strugala at Midland Orthopedics, and continued to treat at Mercy Works as well. Petitioner was discharged full duty for his right foot on February 10, 2009, approximately three months following the incident.

Petitioner also testified to an injury that occurred while Petitioner was in the parking lot leaving his December 16, 2008 appointment with Dr. Strugala at Midland Orthopedics. Dr. Strugala's records from December 16, 2008, state the doctor wanted Petitioner to begin weaning out of the walker boot. (Px 3).

Petitioner testified that the parking lot was adjacent to the doctor's office, and it was open to the public and patrons of other surrounding businesses. Petitioner did not report the incident to the doctor's office. Petitioner testified there was snow and ice on the ground, and he was not sure what he slipped on. He testified he slipped with his right foot, on which he was wearing the walker boot. Petitioner had no loss of consciousness. (Px 2)(Px 4).

Petitioner did not call an ambulance; rather he drove his next appointment that day at Mercy Works. The medical records indicate that Petitioner then reported to Little Company of Mary, complaining of bleeding from his right ear and dizziness earlier that day after the fall. (Px 2).

Per the request of Petitioner's sister, a nurse at Northwestern Memorial Hospital, Petitioner was transferred to Northwestern Memorial Hospital that same day, December 16, 2008. (Px 4). At CT scan taken at that time showed a non-displaced right temporal bone fracture. (Px 4). Petitioner was found to have hearing loss in his right ear at that time. (Px 4). Petitioner was discharged from Northwestern Memorial Hospital on December 21, 2008, with the diagnoses of "left frontal acute subdural hematoma, contusion, and right temporal bone fracture and sensorineural hearing loss". (Px 4). While Petitioner was admitted in Northwestern

Memorial, he was also treated and instructed in diabetes self-management on Dec. 18 and 19. (Px 4).

Petitioner testified he followed up three additional times with the neurologist on February 2, 2009, February 26, 2009, and March 2, 2009. Medical records for these treatment dates were not admitted into evidence; however, Petitioner testified he has had no additional treatments for his head or right ear since March 2009. Petitioner has had no additional treatment for his right foot since February 2009. Petitioner testified he has no pending doctor's appointments, and is not on any prescription medication for his claimed injuries.

Petitioner testified he retired from the City of Chicago on February 17, 2009, because he had the maximum amount of time which allowed him to retire.

Petitioner only testified to remaining permanency in his right ear and right foot. On the date of trial, Petitioner testified his right foot was "in good shape," and the only time he notices discomfort is in cold weather. Otherwise, he testified he can do "just about everything." Petitioner did not present evidence of measurable hearing loss, but he testified that he hears better out of his left ear than his right and tries to use his right ear for talking on the phone.

CONCLUSIONS OF LAW:

Regarding (C), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

This Arbitrator finds that an accident did occur on Oct. 31, 2008, wherein Petitioner's right foot was injured by a falling pole. This Arbitrator does not find that a separate accident occurred on December 16, 2008, on the date of petitioner's slip and fall. Rather, the issue is one of causation as to whether Petitioner's slip and fall in the public parking lot after leaving his orthopedic doctor's office was related to the work incident.

Regarding (F) Is Petitioner's current condition of ill-being causally related to the injury?

There is no di8spute that the right foot condition is causally related to the accident of October 31, 2008. The causation dispute concerns the injuries to Petitioner's head due to the fall in the parking lot, as set forth above. Petitioner presented no evidence that the fall in the parking lot c=was caused by the prescribed boot he was wearing on the right foot. There is no evidence that Petitioner would not have fallen regardless of the wearing of this boot. As such, Petitioner has failed to meet his burden of proof on this issue.

For these reasons, this Arbitrator finds that the injuries sustained from the slip and fall on Dec. 16, 2008 are not causally related to the underlying work incident.

Regarding (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?

Petitioner claims outstanding bills in the amount of $1,196.79 for Midland Orthopedic (Arb. Exh. 1)(Px 5).

The following dates of service appear outstanding:

10/31/08 – Code 28470

10/31/08 – Code 99202/25

12/2/08 – Code 73630/RT

12/16/08 – Code 73630/RT

Respondent submitted corresponding proofs of payments to these claimed balances made to Midland Orthopedic for dates of service:

10/31/08 – Code 28470 (Rx 2, p.1)

10/31/08 – Code 99202/25 (Rx 2, p. 1)

This Arbitrator finds that dates of service 12/2/08 Code 73630/RT and 12/16/08 Code 73630/RT are related to the Petitioner's foot injury, and Petitioner shall pay these dates of service directly to the provider, pursuant to the fee schedule, with a credit to Respondent for any payments already made.

Regarding (L) What is the nature and extent of the injury?

As a result of Petitioner's work accident of October 31, 2008, Petitioner sustained an injury to his right foot, when a poll he was dissembling fell on it. As a result of the accident, Petitioner sustained a non-displaced fracture of the 2nd metatarsal on the top of his right foot. Petitioner treated with Mercy Works and Midland Orthopedics, and utilized a walker boot while on limited duty. Petitioner's foot was treated conservatively, and he

was released at full duty approximately three months following the incident, in February 2009.

On the date of trial, Petitioner testified his right foot was "in good shape," and the only time he notices discomfort is in cold weather. Otherwise, he testified he can do "just about everything."

For the injuries sustained to Petitioner's right foot, Respondent shall pay petitioner permanent partial disability benefits of $664.72/week for 16.7 weeks, because the injuries sustained caused the 10% loss of the right foot, as provided in Section 8(e) of the Act.

Petitioner failed to meet his burden that his injuries sustained by the slip and fall on Dec. 16, 2008 were causally related to the work incident of Oct. 31, 2008.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Khaled Karim,
Petitioner,

vs.

NO: 08WC 50887

H & M International,
Respondent,

16IWCC0064

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical, causal connection, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 9, 2014, is hereby affirmed and adopted.

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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,100.00. 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.

DATED: JAN 27 2016
o012016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

A08 F 8300803 4

Mark as Written

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KARIM, KHALED
Employee/Petitioner

Case# 08WC050887

H&M INTERNATIONAL
Employer/Respondent

16IWCC0064

On 12/9/2014, 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 0.09% 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:

4218 KATZ FRIEDMAN ET AL
DAVID M BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1872 SPIEGEL & CAHILL PC
CHRISTINA H BAWCUM
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Khaled Karim
Employee/Petitioner
v.
H&M International
Employer/Respondent

Case # **08** WC **50887**

16IWCC0064

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **September 22, 2014 and September 30, 2014.** 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 **fee petition by prior attorney**

16 IWCC 0064

FINDINGS

On **February 19, 2007**, 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 hernia and right shoulder current condition of ill-being *are* causally related to the accident.

Petitioner's low back current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**45,703.84**; the average weekly wage was $**878.92**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of $**2,916.69** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2,916.69**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**585.95**/week for **7** weeks, commencing **February 26, 2007** through **April 15, 2007**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**2,916.69** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary hernia and right shoulder medical services only, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**527.35**//week for **30**/ weeks, because the injuries sustained caused the **6**/% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Petitioner's attorneys' fees shall be divided pursuant to agreement, as detailed in this decision.

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

December 9, 2014
Date

DEC 9 - 2014

FACTS

Petitioner worked as a truck mechanic for Respondent. On February 19, 2007, Petitioner was carrying an air compressor with two co-workers. He testified that the air compressor weighed between 400 and 500 pounds. Petitioner testified that as a result of this activity he began feeling pain in his back and abdomen. Petitioner testified that he continued to work for about one hour until the end of the day. Petitioner testified that he performed light duty work for about a week, when, while using a hammer at work he again felt pain in his abdomen and back.

On February 26, 2007, Petitioner presented to Concentra. He complained about shoulder pain and advised the doctor that it was injured on February 19, 2007. He stated that he was using a big hammer overhead to straighten a trailer piece and he felt pain in the right shoulder. That same day he felt pain at the left groin area. The pain began gradually. The assessment was shoulder strain and inguinal hernia. He was to undergo therapy three times per week for 1 to 2 weeks. He was given work restrictions of no lifting over ten pounds, no pushing/pulling over 20 pounds of force, and no reaching above shoulders. (RX 1, 26-28)

Petitioner returned to Concentra on March 1, 2007. He complained about his shoulder which was injured on February 19, 2007. The assessment was inguinal hernia and shoulder strain. He was to do a home exercise program and modified work duties were recommended. (RX 1, 29-30)

Petitioner returned to Concentra on March 8, 2007 for a re-check of his right shoulder and inguinal hernia. It was noted that he was to see a surgeon for his hernia. Petitioner informed the doctor that his shoulder was better. The assessment was (1) right shoulder strain (2) history of a left inguinal hernia. He was to return to the clinic in one week for re-check of his right shoulder. The same restrictions of no repetitive lifting over ten pounds and no pushing or pulling over 20 pounds were imposed. (RX 1, 31)

Petitioner returned to Concentra on March 15, 2007 and complained of shoulder pain. He reported that he was using a hammer to straighten out a trailer piece. The assessment was (1) shoulder strain improved and (2) left inguinal hernia. Petitioner was given restrictions of no lifting over ten pounds, no pushing/puling over 20 pounds of force. He was released from medical care, because he preferred to follow-up with a private physician. (RX 1, 33-34)

On March 13, 2007, Petitioner presented to Dr. Siavelis. He reported that he lifted something heavy at work called a compressor, and then felt left inguinal pain and started noticing that he had a bulge in the left inguinal area. (RX 2, 19, 24) On March 16, 2007, Dr. Siavelis performed a laparoscopic preperitoneal bilateral hernia repair with mesh and umbilical hernia repair. (RX 2, 22-23) Dr. Siavelis released Petitioner to return to work full duty as of April 16, 2007. (RX 6)

Petitioner testified that he was terminated by Respondent on October 18, 2007. That day, Petitioner returned to Dr. Siavelis. Petitioner reported to Dr. Siavelis that he was doing well, but then felt a sharp pain with lifting in the left periumbilical region that radiated down towards the groin. A detailed physical examination showed that the repairs were entirely intact. There was no evidence of herniation. Dr. Siavelis felt that Petitioner may have a small muscle strain. (RX 2, 17)

On September 26, 2008, Petitioner underwent a MRI of right shoulder pursuant to the recommendation of Dr. Karim, Petitioner's nephew. The impression was degenerative changes at the AC joint with soft tissue

hypertrophy and inferior spurring producing extrinsic impingement on the supraspinatus muscle; Mild tendinosis involving the distal supraspinatus tendon; There was no evidence of labral tear; Question biceps tendinosis at the level of the biceps anchor; There was normal appearance of the biceps tendon within the bicipital groove. (RX 2, 33-34)

On September 26, 2008, Petitioner underwent an MRI of the lumbar spine pursuant to the recommendation of Dr. Karim. The impression was transitional vertebral and 6 lumbar vertebral bodies. There were hypertrophic and degenerative change at the spine and decreased signal intensity of the intervertebral disc at the level of L4-L5 and L5-L6. There was mild stenosis at the level of L4-L5 and moderate spinal stenosis at the level of L5-L6. There was a moderate sized herniated and extruded disc at the level of L5-L6 on the left combined with small spinal canal. (RX 2, 36)

On November 20, 2008, Petitioner presented to Dr. Zillmer at M&M Orthopedics. He was referred by a family member for evaluation of his left shoulder. Petitioner informed the doctor that his left shoulder was painful occasionally but primarily he was suffering from weakness in the left arm. He stated that he was injured on the job back in February of 2007, when he had to lift, along with some others, a 400 pound compressor. Petitioner reported that this led to pain in his shoulder and also to development of a hernia which eventually required operative intervention. Some time later he then had to use a sledgehammer to straighten out something that was bent. He had to make multiple overhead blows with that hammer over several hours. By the time he was done with that particular day he had significant discomfort. Dr. Zillmer performed physical examinations on both the left and right shoulders. Dr. Zillmer review the MRI scan and read it as showing degenerative changes at the AC joint with some extrinsic impingement on the supraspinatus muscle, tendinosis of the distal supraspinatus tendon with no evidence of full thickness cuff tear of labral pathology or biceps tendon pathology. The doctor felt that Petitioner likely had a rotator cuff strain combined with some subacromial bursitis secondary to overuse. Dr. Zillmer recommended supervised physical therapy and that Petitioner return in one month. (RX 3, 3-5)

On January 8, 2009, Petitioner presented to Dr. Mather for evaluation of low back pain. He informed the doctor that he sustained an injury in January of 2007, when he lifted a compressor weighing approximately 500 pounds. He noted an onset of low back pain beginning June 2007. He complained of low back pain when getting up on the morning especially after doing some shoveling of snow or lifting. He had noted an increase in his pain in the morning starting in April or May of 2008, with no additional injury reported. He informed the doctor that he also experienced an onset of bilateral feet numbness, tingling and cold sensation since that time. Dr. Mather reviewed the MRI films from September 26, 2008, and found that they revealed a large extruded disc migrated caudally, left L5-L6 at the transitional level with mild degenerative disc disease noted at L5-L6. The impression was degenerative disc disease of the lumbar spine and history of herniated disc. He was instructed to do home exercises, and continue conservative care. (RX 3, 2-3)

Petitioner returned to Dr. Mather on April 26, 2010. Petitioner complained of back pain that radiated to both buttocks and both feet. A new MRI was ordered. (RX 2, 13)

Petitioner underwent a second MRI of the lumbar spine on June 18, 2010. The impression was spondylotic changes in the lumbar spine at L4-S1 and L4-L5 to a lesser degree. Findings at the L5-S1 improved from the prior examination and the findings at L4-L5 were overall stable. (RX 4)

On July 15, 2010, Petitioner reported to Dr. Mather that he continued to have complaints of lower back pain with radiation of symptoms down either leg. (RX 2, 11) The doctor reviewed the MRI and found that it

revealed a large left L4-L5 disc herniation. Dr. Mather noted that L5-S1 a transitional segment, so some radiologists may call this an L5-S1 disc herniation. Dr. Mather found that it was a relatively large disc herniation occupying the left half of the spinal canal. The impression was herniated disc. Dr. Mather felt that Petitioner needed surgery and recommended augmenting the discectomy with fusion. He opined that Petitioner was unable to work.

CAUSATION

Petitioner testified that when he presented to Concentra, he complained of back pain. However, the Concentra medical records do not show that Petitioner complained of back pain. When Petitioner presented to Dr. Siavellis for hernia and shoulder injuries, he did not complain of back pain. Petitioner's testimony that he complained of back pain is contradicted by the medical records.

Petitioner's accident was on February 17, 2007. However, it was not until September 26, 2008 that he underwent a lumbar spine MRI, which was pursuant to the recommendation of his nephew, Dr. Karim.

The medical records do corroborate hernia and right shoulder complaints.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being regarding his hernia and right shoulder, are causally related to the accident.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being regarding his low back is not causally related to the accident.

MEDICAL

Based upon the Arbitrator's findings regarding causation, the Arbitrator finds that Respondent shall pay medical bills for hernia treatment and for right shoulder treatment only.

The Arbitrator further finds that Respondent is not responsible for medical bills regarding the low back.

TEMPORARY TOTAL DISABILITY

Petitioner was given work restrictions on February 26, 2007, which were continued until Dr. Siavelis released him to return to work full duty on April 16, 2007.

Therefore, the Arbitrator finds that Petitioner is entitled to temporary total disability for that period.

NATURE AND EXTENT

Petitioner sustained a right shoulder strain for which he underwent conservative care. The Arbitrator awards 1% loss of the person as a whole for that injury.

Petitioner sustained hernia injuries for which he underwent surgical repair. The Arbitrator awards an additional 5% loss of use of a person as a whole for that injury.

ATTORNEYS' FEES

Petitioner's prior attorney, Isabella Wells, and Petitioner's current attorney, David Barish, have entered into an agreement regarding the division of attorney's fees. They have agreed that an award that is up to Respondent's existing offer shall result in 1/3 of the attorneys' fees to Petitioner's current attorney and 2/3 of the attorneys' fees to Petitioner's prior attorney. They have further agreed that an award that is above Respondent's existing offer shall result in 2/3 of the attorneys' fees to Petitioner's current attorney and 1/3 of the attorneys' fees to Petitioner's prior attorney.

The amount of the offer has not been disclosed. Respondent's attorney has voiced no objection.

The Arbitrator finds that the attorneys' agreement is reasonable and orders that the fees be divided, as agreed.

08WC51604

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

Alfred Joiner

Petitioner,

vs. No. 08 WC 51604

Ceco Concrete Construction,

Respondent. **16IWCC0091**

DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to multiple filings:

1) The Petitioner's Petition for Review, as was filed on July 27, 2015;
2) The Motion to Vacate the Settlement Contract as was approved on July 24, 2015, by Petitioner's former counsel, Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C., and;
3) The Petition for Penalties and Fees filed on October 22, 2015, by Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C.

FACTS AND PROCEDURAL HISTORY

The Commission believes that a recitation of the procedural history is necessary to understand the issues in this matter.

Petitioner filed an Application for Adjustment of Claim on November 21, 2008. Petitioner claimed that he suffered a work-related injury to his low back on September 15, 2008. At the time, Petitioner was represented by Neal Wishnick of Sostrin & Sostrin, P.C.

On June 24, 2010, Petitioner discharged Sostrin & Sostrin, P.C., and retained Andrew Leonard of the Leonard Law Group. On July 1, 2010, Sostrin & Sostrin, P.C., filed a Petition for Attorney's Fees and Costs. On August 24, 2010, Arbitrator Joseph Prieto continued the hearing on the fee petition until disposition of the case.

On September 9, 2014, Petitioner filed a Stipulation to Substitute Attorneys, indicating that Petitioner would be represented by Francine Fishel of Brill & Fishel, P.C., and discharging the Leonard Law Group from further representing Petitioner. Subsequent to its discharge, Leonard Law Group filed a Petition for Fees, which was deferred to the disposition of the case.

On June 29, 2015, Brill & Fishel, P.C., received a settlement offer from Respondent of $290,000.00, which it conveyed to Petitioner.

08WC51604

On July 9, 2015, Petitioner terminated the services of Brill & Fishel, P.C. That same day, Brill & Fishel, P.C., filed a Petition for Fees.

Running concomitantly was Petitioner's Common Law action pending in the Circuit Court of Cook County under Case Nos. 10 L 10589 and 13 L 4355, as described in the documents listed below. Said matters included multiple defendants, including Ceco, the workers' compensation Respondent.

On July 21, 2015, Petitioner, represented by Mr. Thomas Plouff of Costello, McMahon, Burke & Murphy, Ltd., who was present at the negotiations, entered into a Global Settlement Agreement and Release which consisted of three pages. Said Global Settlement Agreement and Release (hereinafter "Global Agreement") was thereafter attached to and made part of the Settlement Contract Lump Sum Petition and Order (hereinafter "Settlement Contract"), with Respondent, represented by Michael E. Rusin of Rusin & Maciorowski, Ltd. Said Global Settlement indicated that Petitioner was receiving a combined settlement of $750,000.00, with $430,000.00 being paid by Alko, et al and $320,000.00 being paid by Ceco.

The aforementioned Settlement Contract attached a copy of the Global Agreement and made it a part thereof. This Settlement Contract was submitted to an Arbitrator for approval.

On the Settlement Contract form, Respondent's counsel scratched out the sentence: "I attest that any fee petitions on file with the IWCC have been resolved." The Global Agreement states in pertinent part:

> "This global settlement also resolves Joiner's pending Workers Compensation claim for one dollar ($1.00). Joiner has filed an Illinois workers compensation claim against Ceco Concrete Construction that is pending before the Illinois Workers Compensation Commission as case number 08 WC 51604. Joiner agrees to settle the third party case *of Joiner v. Alko Construction and Development, Inc., et. al.,* Circuit Court of Cook County Law Division (Case No. 10 L 10589) for the above total sum and agrees to execute a lump sum settlement contract in the form attached hereto as Exhibit A (a copy of the Settlement Contract)....Joiner acknowledges that he must resolve all attorney fee petitions and issues. No additional sums will be paid by Releasees for attorney fees which are solely Joiner's responsibility.
>
> In addition, as set forth in the settlement contract, CECO does hereby agree to waive its worker's compensation lien against Joiner it its entirety. In consideration of the waiver of the workers compensation lien and the payment made by CECO to Joiner as described above...Joiner agrees to hold harmless and indemnify the Releasees from all claims, damages, costs, expenses, attorney's fees, demands, liens, actions, subrogation or suit brought by Joiner or anyone on Joiner's behalf or subrogating to Jointer's interest as a result of the aforementioned occurrence. Joiner also agrees to pay his own attorney's fees in this matter....Joiner further agrees and

affirmatively states that he has read all of the terms and provisions of this Global Settlement Agreement and Release and affirmatively states that he is being represented by legal counsel in this matter and understands all of the terms used and their significance and that this Global Settlement Agreement and Release has been signed voluntarily."

As a result of the execution of these documents, the parties submitted Settlement Contracts to an Arbitrator for approval.

Also on July 21, 2015, Mr. Thomas Plouff sent a letter to Francine Fishel regarding the Settlement Contract and Global Agreement, as well as Ms. Fishel's attorney's fee. In the letter, Mr. Plouff stated that it was in Petitioner's "best interests to settle the workers compensation case for $1.00, with a lien waiver" but failed to explain his opinion. Plouff then indicated that: "...[U]nder the terms of your fee agreement with [Petitioner] you would be entitled to 20% of $1.00." Mr. Plouff notified Ms. Fishel by written correspondence that: "Mr. Rusin will appear this Friday at 9:00 a.m. before Arbitrator Kane to obtain approval of a lump sum settlement contract for $1.00, with a hearing at a later date on filed fee petitions. Mr. Rusin we understand will provide to you formal notice for the July 24, hearing." Said correspondence was attached to and made a part of the Amended Petition for Fees that was filed by Brill & Fishel on July 24, 2015.

By the same correspondence, Plouff explained that he felt Fishel's fee for her services is $.20 and noted that he offered her $10,000.00 for her fees as a "professional courtesy." Mr. Plouff explained that his "offer to pay you and your firm $10,000.00, which will come out of our attorney fee on the third party case, which legally you have no interest in, expires as of 5:00 p.m. on July 23, 2015. This amount is in full satisfaction of any attorney fees you claim because of working for [Petitioner]....Should you not accept this offer, [Petitioner] will argue that your attorney fee is $.20."

On July 24, 2015, Arbitrator David Kane held a hearing on the Settlement Contract submitted by Rusin & Maciorowski, Ltd., and the fee petitions filed by Petitioner's former attorneys, as all were present. Arbitrator Kane noted at hearing that Petitioner's workers' compensation case "was settled on the third-party basis, and there was apparently a lack of agreement or lack of understanding with regard to the fees due under Workers' Comp with a third-party attorney." (July 24, 2015-T.3) The Arbitrator further noted that he spoke to Petitioner, off the record, and asked him if he agreed with the settlement contract, the attorney's fees, and the division of attorney's fees, to which Petitioner testified that he agreed. (July 24, 2015-T.4-5)

Petitioner testified that prior to discharging Brill & Fishel, P.C., Francine Fishel had conveyed to him an offer of settlement on the workers' compensation case of $290,000.00 and that Ms. Fishel indicated that they would continue to negotiate the amount. (July 24, 2015-T.6) Petitioner testified that Ms. Fishel was later informed that Petitioner had retained counsel, Thomas Plouff, on the common law case stemming from the work accident. (July 24, 2015-T.6) Petitioner explained that Mr. Plouff was going to contact Ms. Fishel regarding Petitioner's case. (July 24, 2015-T.6-7) Petitioner later became aware that Mr. Plouff failed to contact Ms. Fishel prior to mediation on the common law claim. (July 24, 2015-T.7)

Petitioner testified that during mediation, Mr. Plouff called Ms. Fishel, with Petitioner's knowledge and understanding, and advised Ms. Fishel that there was an offer on the table for $350,000.00, with $175,000.00 coming from the third-party defendant and the other $175,000.00 from Respondent with a waiver of the Workers' Compensation Lien. (July 24, 2015-T.7-8) Petitioner testified that Ms. Fishel then called him and explained that she was representing him on the Workers' Compensation claim and advised Petitioner not to sign anything regarding the Workers' Compensation claim without calling her first. (July 24, 2014-T.8) Petitioner agreed to call Ms. Fishel, but never did again. (July 24, 2015-T.8)

Plouff ultimately settled all claims for $750,000.00, $320,000.00 from Respondent for the Workers' Compensation claim, together with a waiver of the Workers' Compensation Lien. (July 24, 2015-T.8-9) Petitioner signed the Global Agreement on July 7, 2015, on Plouff's advice. (July 24, 2015-T.9) The Petitioner fired Brill & Fishel as his Workers Compensation attorney on July 9, 2015, by letter.

Petitioner testified that he read the Global Agreement and the Settlement Contract presented to the Arbitrator and that he understood that the agreement did not include future medical benefits and that his Medicare benefits may be affected by the settlement. (July 24, 2015-T.10-11) Petitioner testified that he was aware that he was responsible for attorney's fees regarding his Workers' Compensation case per the fee agreement he signed with each of his Workers' Compensation attorneys. (July 24, 2015-T.11-12) Petitioner testified that he was aware that had he settled his Workers' Compensation claim separate from the common law claim he would have paid a total of $64,000.00 in Workers' Compensation attorney's fees to Sostrin & Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C. (July 24, 2105-T.12)

Respondent's counsel, Michael Rusin from Rusin & Maciorowski, Ltd., stated on the record that part of the overall settlement agreement includes a $320,000.00 contribution from the Workers' Compensation Insurer. (July 24, 2015-T.4) The Arbitrator noted that the $320,000.00 was the "basis for which the fee would have to be determined." (July 24, 2015-T.4)

After an off the record discussion regarding a Proposed Order, regarding the payment and distribution of fees in the workers' compensation matter, Petitioner agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel upon receipt of the settlement proceeds as set forth in the order. (July 24, 2015-T.16) Arbitrator Kane then agreed to approve the Settlement Contract and the Order indicating that Petitioner was to pay his prior Workers' Compensation attorneys $21,333.33 each within 30 days of receipt of the settlement proceeds. (July 24, 2015-T.16-17)

The Settlement Contract was approved by Arbitrator David Kane on July 24, 2015, at the conclusion of the hearing. The Arbitrator's Order indicating that Petitioner was to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel $21,333.33 each within 30 days of receipt of the settlement proceeds, though executed by the Arbitrator that day, was officially filed with the Commission on July 27, 2015.

On August 12, 2015, Petitioner retained Mark Whiteside as his fourth workers' compensation counsel. Mr. Whiteside filed his Appearance of Representative on August 13, 2015 at the Commission, this despite the entry of the approved settlement.

On August 13, 2015, Petitioner filed a Petition for Review of the Arbitrator's July 27, 2015 Order.

On August 19, 2015, Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel, P.C., filed a Motion to Vacate the Settlement Contract approved by Arbitrator Kane on July 24, 2015.

On October 22, 2015, a Petition for Penalties and Fees was filed by Brill & Fishel, P.C.

On October 30, 2015, Commissioner Michael Brennan conducted a hearing, with counsel present, and continued the matter to allow the parties time to file briefs on the Petition for Review and responses to the Petition for Penalties and Fees and Motion to Vacate the Settlement Contract.

FINDINGS OF THE COMMISSION

It is well established that while a case brought before the Commission is, in essence, an appeal, the Commission has original jurisdiction in all cases which come before it. *Caterpillar Tractor Co. v. Industrial Commission*, 215 Ill.App.3d 229, 237 (1991). Furthermore, "since the Commission has original jurisdiction…the Commission can, unlike the appellate court, consider a new theory of recovery in a case brought on review." *Caterpillar*, 215 Ill.App.3d at 238. The Commission must decide a case on the evidence presented and on the merits of the case before it and must not be restricted to the information provided on a form. But, it must also make certain that a party's substantive rights not be prejudiced by the Commission's relaxation of its requirements. *Caterpillar*, 201 Ill.App.3d at 239-240.

In *Alvarado v. Industrial Commission*, 215 Ill.2d 547, 554 (2005), the Illinois Supreme Court explained that the Act authorizes the Commission to award attorney's fees and to resolve fee disputes. The Court further noted that Section 16(a) of the Act reads, in pertinent part:

> "'Any and all disputes regarding attorneys' fees, whether such disputes relate to which one or more attorneys represents the claimant or claimants or is entitled to the attorneys' fees, or a division of attorneys' fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorneys' fees or contracts for attorneys' fees, shall be heard and determined by the Commission after reasonable notice to all interested parties and attorneys.' *820 ILCS 301/16a(J)* (West 2002)."

Furthermore:

> "With regard to attorney fees, the Act does authorize the Commission to award attorney fees and to resolve fee disputes. For example, *section 16* of the Act states that 'the Commission shall have the power to determine the reasonableness and fix the amount of any fee of compensation charged by any person, including attorneys ***, **for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this Act.**' *820 ILCS 305/16* (West 2002)." (emphasis added) *Alvarado v. Industrial Commission*, 216 Ill.2d at 554.

Determining and awarding attorney's fees is one of the many powers given to the Commission under the Act. So too is the right of the Commission to interpret settlement contracts put before it.

> "Contract interpretation is a question of law subject to *de novo* review. *Cincinnati Insurance Co. v. Gateway Construction Co.*, 372 Ill. App. 3d 148, 151, 865 N.E.2d 395, 310 Ill. Dec. 71 (2007). The principal goal in construing a contract is to ascertain and give effect to the intent of the parties at the time they executed the document. *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 310, 767 N.E.2d 945, 263 Ill. Dec. 219 (2002). In determining the parties' intent, the contract must be construed as a whole, viewing each provision in the light of the other provisions. *Thompson v. Gordon*, 241 Ill. 2d 428, 441, 948 N.E.2d 39, 349 Ill. Dec. 936 (2011). Where the language of a contract is plain, it provides the best evidence of the parties' intent and will be enforced as written. *Carey v. Richards Building Supply Co.*, 367 Ill. App. 3d 724, 727, 856 N.E.2d 24, 305 Ill. Dec. 492 (2006). Nevertheless, we are mindful that a court may properly disregard even unambiguous language when it is clear that the parties meant something different than what was said. *United Airlines, Inc. v. City of Chicago*, 116 Ill. 2d 311, 318-19, 507 N.E.2d 858, 107 Ill. Dec. 705 (1987)." *Loyola University of Chicago v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 130984WC, ¶23.

In reviewing the Arbitrator's Order and the Settlement Contract, the Commission notes that while the total amount of settlement is listed as $1.00 on one page of the Lump Sum Settlement and Order, the Terms of the Settlement are listed on the Lump Sum Settlement and Order as totaling $750,000.00, $430,000.00 of which was paid by Alko et. al. and $320,000.00 of which was paid by Ceco, Respondent in the workers' compensation claim. The Commission further notes that the Global Agreement which is attached and made a part of the Settlement Contract states that:

> "[A]s set forth in the settlement contract, CECO does hereby agree to waive its worker's compensation lien against Joiner in its

> entirety. In consideration of the waiver of the workers compensation lien and the payment made by CECO to Joiner as described above...Joiner agrees to hold harmless and indemnify the Releasees from all claims, damages, costs, expenses, attorney's fees, demands, liens, actions, subrogation or suit brought by Joiner or anyone on Joiner's behalf or subrogating to Jointer's interest as **a result of the aforementioned occurrence. Joiner also agrees to pay his own attorney's fees in this matter**....Joiner further agrees and affirmatively states that he has read all of the terms and provisions of this Global Settlement Agreement and Release and affirmatively states that he is being represented by legal counsel in this matter and understands all of the terms used and their significance and that this Global Settlement Agreement and Release has been signed voluntarily." (emphasis added)

The Commission further notes that the Lump Sum Settlement and Order clearly distinguishes the payment for the civil case ($430,000.00) and the payment for the workers' compensation case ($320,000.00). Finally, the Commission notes that the $320,000.00 paid by Ceco was paid by its workers' compensation insurer for the settlement of Petitioner's workers' compensation claim, which was verified both at the July 24, 2015 hearing and at oral argument by Respondent's counsel, Rusin & Maciorowski, Ltd. (July 24, 2015, T.3-4) The Terms of Settlement and the Global Agreement, both of which are within the "four corners" of the Lump Sum Settlement and Order, and the actions of Ceco and its workers' compensation carrier indicate that the workers' compensation claim was settled for $320,000.00 and not $1.00.

Aside from the "four corners" of the Settlement Contract, the Commission notes that fee petitions were filed by Petitioner's prior attorneys in 2010 and 2014 and on July 9, 2015, prior to the approval of the Settlement Contract. A hearing on the fee petitions was held on July 24, 2015. Petitioner had ample notice of the pending fee petitions well within the 10 day notice requirement of Rule 7080.10(a)(2), despite Petitioner's claim to the contrary. Furthermore, Petitioner was present at said hearing, so clearly the notice requirement was met.

In his Response to the Motion to Vacate the Settlement Contract, Petitioner explains that a fundamental principle of contract law is that there is no contract, and as such no settlement, without both an offer and acceptance. The Commission agrees with this and questions Petitioner's attempts to renege on the contract he entered into on July 24, 2015 before Arbitrator Kane when he agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel upon receipt of the settlement proceeds as set forth in Arbitrator Kane's order. (July 24, 2015-T.16)

At the hearing, Petitioner agreed that he was responsible for attorney's fees regarding his workers' compensation case, that he had signed three separate fee agreements with his three prior attorneys in the workers' compensation claim and that he agreed with the Settlement Contract, the attorney's fees, and the division of attorney's fees. (July 24, 2015-T.4-5,10-12) But now that the settlement monies have been paid, Petitioner has decided to question the order that was entered based on his declarations at hearing and under oath. Furthermore, the Commission notes that Petitioner signed the Settlement Contract, including the Global Agreement indicating

that Petitioner was responsible for and agreed to pay all of his attorney's fees, and declared to Arbitrator Kane that he would pay the attorneys' fees while represented by Mr. Plouff, again contrary to Petitioner's claim that he was *pro se* at the hearing.

Rather than attend the hearing, Plouff decided to send Ms. Fishel a letter about the Settlement Contract and upcoming hearing. Plouff also left Mr. Rusin to "formally" notify Ms. Fishel of the hearing. Plouff's decision not to attend the hearing and Petitioner's decision to go forward at hearing without Mr. Plouff is not an acceptable defense against having to pay the agreed to attorneys' fees. Petitioner's now asserted "pro se" status is much like the child convicted of murdering his parents and begging for the status of an orphan. The Commission notes that Petitioner has repeatedly throughout his case moved forward without and against his workers' compensation counsels' advice.

At hearing, the Arbitrator made it very clear that he was approving the Settlement Contract based on Petitioner's agreement to pay the attorneys' fees. (July 24, 2015, T.15-16) As previously noted, Petitioner agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel upon receipt of the settlement proceeds as set forth in the order. (July 24, 2015-T.16) At no point during the hearing did Petitioner indicate that he did not then understand or that he was confused. The Commission finds it wholly disingenuous for him to claim that he did not understand what he was agreeing to now. Furthermore, under the doctrine of estoppel, Petitioner is now barred from claiming that he is not required to pay the attorneys' fees per the Order since it contradicts his prior testimony indicating that he had to and would pay the fees; testimony that was relied upon by the Arbitrator.

Regarding the amount of Petitioner's settlement, the Commission finds that the Settlement Contract was for $750,000.00, $320,000.00 of which was for the settlement of Petitioner's workers' compensation claim. As previously noted, the $320,000.00 was paid by Ceco's workers' compensation insurer for the settlement of Petitioner's workers' compensation claim. It is clear that Petitioner's workers' compensation claim was settled for $320,000.00 and not $1.00.

It is within the province of the Commission to "resolve conflicts in the evidence and to draw reasonable conclusions and inferences from the evidence." *Glover v. Industrial Commission*, 140 Ill.App.3d 361, 366 (1985). Furthermore, when there is a variance between pleadings and proof, wide latitude is allowed the Commission. *McLean Trucking Co. v. Industrial Commission*, 96 Ill.2d 213, 218-219 (1983). Amending a pleading to conform to the evidence already in the record is within the province of the Commission. *Reliance Elevator Co. v. Industrial Commission*, 171 Ill.App.3d 18, 22 (1988).

The evidence establishes that Petitioner's workers' compensation claim was settled for $320,000.00. The evidence further establishes that Petitioner agreed to pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel $21,333.33 each within 30 days of receipt of the settlement proceeds. However, the Settlement Contract was inartfully drafted to show two settlement amounts. The Commission notes that the most detailed portions of the Settlement Contract clearly distinguish the common law claim and the workers' compensation claim and that the Settlement Contract clearly delineates that the workers' compensation claim was settled for $320,000.00. Therefore, pursuant to *Glover*, *McLean* and *Reliance*, the Commission hereby

amends the Settlement Contract Lump Sum Petition and Order approved by Arbitrator Kane on July 24, 2015 to reflect that the workers' compensation claim was settled for $320,000.00 and that Petitioner shall pay Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel $21,333.33 each, for a total of $64,000.00 in attorney's fees.

It is important to note that Sostrin & Sostrin, P.C., Leonard Law Group, and Brill & Fishel all filed appearances at the Commission. Attorney Thomas Plouff has never filed an appearance at the Commission nor is there any fee agreement between Petitioner and Mr. Plouff on file at the Commission. As such, Mr. Plouff has no legal claim to attorney's fees regarding the $320,000.00 workers' compensation settlement entered into by Petitioner and Ceco.

By his theory now pending before the Commission, Petitioner would retain the benefit of the settlement, to the extent that he would receive $320,000.00, together with certain lien waivers, in settlement of his workers' compensation claim, but then argue that his former attorneys are not entitled to equally rely upon said document. At best his argument is disingenuous and at worst it perpetrates a fraud upon the Commission.

Joiner's appearance before the arbitrator was for one purpose: the approval of the Settlement Contract, so that he could reap the benefit of the Global Agreement and receive his share of the combined $750,000.00. As part of that appearance, Joiner was required to confront his three former attorneys and deal with their fee petitions. When he appeared, Joiner took the easy way out, and agreed that he owed the attorneys twenty per cent (20%) of the $320,000.00 that was paid in settlement of his workers compensation claim. Equally, Plouff took the easy way out, as he never appeared and never executed a fee agreement as required by the Illinois Workers' Compensation Act.

In an apparent case of "Buyer's Remorse," Joiner now wishes to repudiate all that occurred on July 24, 2015, and all that was required as impetus for the arbitrator's approval of the Settlement Contract. If the Commission were to ratify Joiner's actions, it would result in a miscarriage of justice and allow Petitioner's greed to absolve him of his legal responsibilities.

Cleverly, the Petitioner has now filed a Petition for Review and attempted to limit the inquiry of the Commission to that of the Fee Order of the arbitrator. The record is patently clear that the Settlement Contract and the separate fee Order of Arbitrator Kane are so inextricably intertwined that they are in fact one in the same document. Neither the settlement contract nor the fee Order would have been entered and approved by the arbitrator without the other.

Therefore, the Commission affirms the Arbitrator's Order, entered on July 27, 2015, and denies the Motion to Vacate the Settlement Contract approved by Arbitrator Kane on July, 2015.

As a final item, the Commission must consider the Petition for Penalties that has been filed by Joiner's past counsel. Section 19(k) of the Act reads, in pertinent part:

> "In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but

> are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 302/19(k) (2013).

Webster's Dictionary defines honesty as: *a:* fairness and straightforwardness of conduct *b* : adherence to the facts : sincerity. It defines integrity as: *a:* the quality of being honest and fair.

Mr. Joiner was neither honest nor acting with integrity on the day that he appeared before the arbitrator on July 24, 2015, if it was his intent to merely gain the approval of the Settlement Contract and later repudiate his obligation to pay the fees at a later date. The Commission cannot say unequivocally that this was Joiner's intent. Rather, the Commission must speculate as to his intentions.

Since the Commission is left to speculate as to Joiner's conduct, it will not find that he has acted in a vexatious manner, as to his failure to pay the agreed upon fees. For this reason, the Commission denies the Petition for Penalties filed by Joiner's former counsel.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Order, dated July 27, 2015, is hereby affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that the Motion to Vacate the Settlement Contract is denied.

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.

Dated: FEB 3 - 2016
O-01/12/15
MJB:ell
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alfred Joiner,	)	
	)	
Petitioner,	)	
vs.	)	NO. **08WC 51604**
	)	
Ceco Concrete Construction,	)	**16IWCC0091**
	)	
Respondent.	)	

ORDER

This cause coming to be heard on multiple Petitions for attorney fees regarding the above matter. All parties have been given notice of this hearing. The Arbitrator after considering the arguments of all the parties present orders:

1. That Petitioner has retained the following law firms for representation in the above matter:
   a. Sostrin & Sostrin, P.C.
   b. Leonard Law Group
   c. Brill & Fishel, P.C.

2. That Respondent tendered $320,000.00 on the settlement at mediation to resolve their liability in this matter.

3. That the above law firms are entitled to attorney fees in the amount of 20% of the amount tendered or $64,000.00 for their efforts in this matter.

4. That all of the law firms listed in paragraph 1 have done all things necessary to move this case forward and were responsible due to their efforts for a settlement offer of $320,000.00 offered by Respondent, Ceco at the mediation hearing of this matter.

5. That the distribution of said fees is to be as follows:
   a. $21,333.33 to Sostrin & Sostrin, P.C.
   b. $21,333.33 to Leonard Law Group
   c. $21,333.33 to Brill & Fishel, P.C.

6. That ~~Respondent~~ Alfred Joiner + the firm of Costello, McMahon, Burke + Murphy is ordered to forward these amounts to the Petitioner's firms as set forth in paragraph 5 within 30 days from receipt of settlement proceeds.

16IWCC0091

7. That Respondent should forward the balance of the $320,000.00 settlement to Petitioner.

David C. Kane
Signature of arbitrator or commissioner

July 24, 2015
Date

JUL 27 2015

STATE OF ILLINOIS	)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILLIAMSON	)	☒ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK WITHERSPOON,

Petitioner,

16IWCC0007

vs.

NO: 07 WC 46762

WHITE COUNTY COAL,

Respondent.

DECISION AND OPINION ON REMAND

This matter returns to the Commission pursuant to an Order of the Workers' Compensation Commission Division of the Appellate Court for the Fifth District of Illinois. The court found the July 3, 2012, Decision and Opinion of the Commission failed to adequately articulate the basis of its decision, a decision in which the Commission reversed the Decision of the Arbitrator to award benefits under the Act, and remanded the matter to the Commission with instructions clearly articulate the basis for its decision or to make factual findings to support its decision. In accordance with the Order, the Commission does so.

Petitioner filed a claim under the Occupational Diseases Act (the Act) and, in said claim, alleged inhalation of coal mine particulates over a twenty-three year career as an underground coal miner resulted in his affliction of experiencing shortness of breath and exercise intolerance. The Commission recognizes, under the Act, that Petitioner is presumed to have both been exposed to the occupational diseases associated with coal mining on the basis of his having been employed as a coal miner and also that his pneumoconiosis arose out of his employment on the basis of his being a coal minter for twenty-three years. The Commission also recognizes that the presumption of Petitioner's pneumoconiosis as being attributable to his employment as a coal miner is rebuttable and acknowledges Respondent's rebuttal of that presumption.

Respondent had Petitioner undergo a Section 12 examination with Dr. Jeffery Selby, a pulmonologist and a B reader, and Dr. Selby found Petitioner showed no evidence of pneumoconiosis or any other respiratory disease attributable his employment as a coal miner. Dr.

Selby had Petitioner undergo an x-ray of his chest and found the x-ray was negative for pneumoconiosis. The Commission, however, places little weight on Dr. Selby's interpretation of the x-ray given his own assessment that it was of grade II quality. The Commission, instead, is more confident in the interpretation of Petitioner's chest x-ray by Dr. Henry Smith, Petitioner's examining physician. Dr. Smith, a B reader, graded that particular x-ray as being of grade I quality and noted it showed evidence of early, mild pneumoconiosis. Dr. Glennon Paul, a board certified pulmonologist, reviewed the same x-ray as Dr. Smith did and identified small nodules in Petitioner's lower lobes that he found to be consistent with coal workers' pneumoconiosis. The Commission places greater weight on the x-ray reviewed by Dr. Smith and Dr. Paul and considers it to be an accurate depiction of Petitioner's lungs. The Commission, accordingly, finds Petitioner contracted coal workers' pneumoconiosis as result of his working as a coal miner.

Petitioner, in addition to being diagnosed with coal workers' pneumoconiosis after he left mining, was also found to have been repeatedly diagnosed with respiratory ailments during the latter half of his mining career as well as after he ceased working as a miner.

Petitioner's primary care physician at that time was Dr. David Stricklin. Dr. Stricklin's treatment records reference Petitioner's respiratory problems on multiple occasions, both during and after Petitioner's mining career. Petitioner was thrice diagnosed with an upper respiratory infection. Those diagnoses were made on March 8, 2001, again on May 12, 2004, and again on November 30, 2006. He was diagnosed with acute bronchitis on February 18, 2005. On February 7, 2006, he was diagnosed as having possibly an upper respiratory infection. The four acute diagnoses and one equivocal acute diagnosis represent documented positive findings concerning Petitioner's respiratory system.

Having found in Petitioner's favor with respect to exposure to an occupational disease, the Commission addresses the effect of that exposure upon Petitioner's physical condition.

Petitioner testified to experiencing respiratory problems both while and after working in Respondent's coal mine. He testified that, about the time he turned 40 years old, approximately in 1992, he noticed he didn't have the "wind" he once had. He also testified that his respiratory problems were severe enough to require him to take breaks and to complain to his supervisors about the work environment. He testified further that, after even leaving the mine, to his activities of daily living being negatively affected by his respiratory problems, namely of being able to walk only a couple of blocks at a regular pace, of being able to climb only three or four flights of stairs before noticing a change to his breathing, of having to hire help to perform work around is house and of having to use a riding mower to mow his lawn. The Commission finds no reason to challenge the veracity of Petitioner testimony.

The Commission, after weighing Petitioner's medical record against his testimony, finds the medical records complement his testimony. Accordingly, the Commission finds Petitioner's current condition of ill-being, namely his compromised respiratory system, is the direct result of his being exposed to the coal mining debris and gas over the course of his mining career.

16IWCC0007

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner was found to have contracted coal workers' pneumoconiosis that had arose out of and in the course of his employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner proved a causal connection between his current condition of ill-being and his employment.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $414.80 per week for a period of twenty-five (25) weeks, as provided in §8(b)2 of the Act, for the reason that the injuries sustained caused the 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,500.00. 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

DATED: JAN 5 - 2016
KWL/mav
O: 09/01/15
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

08WC39702

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Metropolis

Petitioner,

vs. No. 08 WC 39702

Village of Richton Park

Respondent.

ORDER

This matter comes before the Commission pursuant to Petitioner's Petition for Penalties and Attorney's Fees pursuant to Sections 19(k) and 16 and Respondent's Motion to Dismiss Petitioner's Petition for Penalties, Attorney's Fees and Interest. Hearing on the petition and motion was held on February 18, 2014 before Commissioner Michael Brennan.

FACTS AND PROCEEDURAL HISTORY

The parties entered into a Settlement Contract Lump Sum Petition and Order (hereinafter "Settlement Contract") that was approved on July 23, 2009.

In June of 2010, Jennifer Davey, Respondent's insurance adjuster with IRMA, the Intergovernmental Risk Management Agency, received a call regarding outstanding medical expenses incurred by Petitioner at Keystone Orthopedics. (T.71) By her testimony, Ms. Davey personally handled Petitioner's file. She stated that she never received bills regarding the outstanding medical charges. (T.72) Ms. Davey testified that on June 12, 2009, when Respondent's counsel signed the Settlement Contract, she checked her file regarding Petitioner's claim to determine if all bills that she and/or IRMA had received had been paid. (T.70) Ms. Davey found that all bills then received had been paid pursuant to the fee schedule. (T.70) She then issued the settlement check on or about August 4, 2009, and then closed the file. (T.71)

After receiving a telephone call in June of 2010, Ms. Davey issued a denial letter to Keystone Orthopedics regarding a request for payment of the outstanding amount. (T.72-73) Ms. Davey explained at hearing that bills come to her several ways: directly vial email, fax, or mail, or from CorVel, a third party company that IRMA employ's to "review our medical bills and make sure they are pursuant to the fee schedule." (T.77-78)

Grace Owen, the patient care advocate for Keystone Physical Therapy, testified that she is familiar with Keystone Orthopedics' billing process, bill format, and the process of how bills

are sent out for payment. (T.24) At hearing, Ms. Owen reviewed PX4a, an open item ledger of what was billed by Keystone Orthopedics for Petitioner's treatment, and explained that the left hand column under Date of Service shows when Petitioner was treated and the right hand column indicates when the services were billed. (T.26-27) Ms. Owen further explained that the date of June 1, 2012 was when the charges were "re billed" because they had not been paid. (T.27-28) Ms. Owen also explained that the services rendered on September 5, 2008 had originally been billed to IRMA on September 10, 2008 because, as indicated by ledger, that was listed on the right column. (T.28) Ms. Owen provided the same testimony regarding other outstanding charges listed on the ledger and then reviewed the final page of the ledger and explained that the unpaid amounts, after they had been rebilled to IRMA but remained unpaid, were transferred for payment to Petitioner. (T.T. 28-30,33-34)

The final page of the ledger shows that the outstanding amount, totaling $5,739.00, has been transferred to Petitioner for payment. (PX4a)

FINDINGS OF THE COMMISSION

It is clear from the review of the billing ledger (PX4a) that the unpaid balance is for services incurred in 2008 prior to the settlement of Petitioner's claim. Further review of the ledger clearly indicates that the outstanding services were billed almost a full year prior to the settlement. (PX4a) There is nothing in the record to indicate that Respondent was not aware that Petitioner underwent treatment with Keystone Orthopedics. In fact, the Commission notes that Respondent paid multiple bills issued by Keystone Orthopedics for Petitioner's treatment.

In its Motion to Dismiss, Respondent points to the front of the settlement contract which states that "[a]ll medical bills which are known, submitted and causally related have been paid." Respondent also points to the section added on the back of the document which states: "This settlement includes liability for TTD, TPD, PPD, and all medical, surgical, and hospital expenses, past or future, for all of which petitioner expressly assumes responsibility." However, Respondent fails to acknowledge that it did not mark the section "Medical Expenses" on the front of the settlement contract which asks if the employer has or has not paid all medical bills. That same section asks that unpaid bills be listed in the space below, where none were listed.

The Commission notes that in *Hagene v. Derek Polling Constr.*, 388 Ill. App. 3d 380, 383 (2009), the court first began its analysis of the liability of employer for outstanding medical expenses in the context of a settlement contract by "examining the fact that the settlement arose in the context of a workers' compensation claim." The court in *Hagene* then explained that:

> "[t]he purpose and policy embedded in the Workers' Compensation Act is to promote the general welfare of the citizens of the state. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181, 384 N.E.2d 353, 357, 23 Ill. Dec. 559 (1978). The Workers' Compensation Act affords protection to workers by providing prompt and equitable compensation for workplace injuries. *Kelsay*, 74 Ill. 2d at 180-81, 384 N.E.2d at 356. It is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill. 2d 590, 596,119 N.E.2d 224, 228

(1954). The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Martin v. Kralis Poultry Co.*, 12 Ill. App. 3d 453, 460, 297 N.E.2d 610, 615 (1973).

It is important here to emphasize that the employer's obligation to pay all the medical bills related to the petitioner's work injury flows not from the settlement contract, but from the Workers' Compensation Act. See 820 ILCS 305/8(a) (West 2002) (requiring an employer to pay for all the necessary medical care and first aid causally related to an on-the-job injury). The employer is, of course, only required to pay for care that is reasonably required to treat injuries that are actually caused by the work-related accident. *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 717, 609 N.E.2d 775, 781, 182 Ill. Dec. 241 (1993) (citing *Quality Wood Products Corp. v. Industrial Comm'n*, 97 Ill. 2d 417, 423, 454 N.E.2d 668, 671, 73 Ill. Dec. 571 (1983)). If there is a dispute over whether any of the petitioner's injuries are, in fact, causally connected to his or her on-the-job accident, the parties may choose to resolve this dispute as a part of a settlement. If the parties agree that only some of the medical bills are causally related, there may well be disputed unpaid medical bills for which the employer is, by agreement, not obligated to pay. However, unlike the indicated dispute over the length of total temporary disability here, the settlement agreement does not indicate a dispute regarding whether any of the bills were causally related. Instead, in the medical-expenses section it indicates that the employer has paid all the medical bills....the respondent argues that, because the settlement contract is unambiguous, the actual facts surrounding the execution of the settlement are immaterial because we are foreclosed from any extraneous consideration under contract law. Essentially, the respondent wants us to decide this case in a vacuum, looking only to the four corners of the document.

....Nonetheless, the respondent argues that by entering into the settlement contract, the petitioner waived his right under the Workers' Compensation Act to obligate the respondent to pay for unpaid related medical bills. Unquestionably, employees can and do contract away their right to have past and future related medical expenses paid for by their employers. However, a waiver of important statutory rights must be explicit. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 237-38, 874 N.E.2d 43, 61, 314 Ill. Dec. 133 (2007) (finding that general release language was insufficient to waive an employer's statutory right to a workers' compensation lien in a related suit against a third party on the basis that statutory rights must be explicitly waived). The supreme court in *Gallagher*

went on to cite a number of other cases requiring an explicit waiver, stating: 'We note it is not uncommon to require the explicit waiver of certain rights. In various other contexts, where an important statutory right is at issue, an explicit manifestation of intent is required before the right in question can be deemed waived.' *Gallagher*, 226 Ill. 2d at 239, 874 N.E.2d at 62.

The respondent points to the 'Terms of Settlement' section in support of its argument that the payment of the petitioner's past medical bills was specifically waived. Were we to read these terms in isolation, we would be inclined to agree with this interpretation. However, we are instructed to give effect to *all* the relevant contractual language to resolve the question of the parties' intent. *Gallagher*, 226 Ill. 2d at 241, 874 N.E.2d at 63. This includes the contract recitals in which the respondent indicated that it had paid all the medical bills, when in truth and in fact it had not. '[W]hile recitals are not [an] operational part of [a] contract between the parties, they reflect the intent of the parties and influence the way the parties constructed the contract.' *First Bank & Trust Co. of Illinois*, 338 Ill. App. 3d at 48, 787 N.E.2d at 311 (citing *Yeomans v. Brown*, 239 Ill. App. 117, 124 (1925), and 5 M. Kniffin, Corbin on Contracts §24.7, at 37 (rev. ed. 1998)). The contract recitals create a context through which the operational portion of the contract can be better understood, because they indicate the relevant circumstances to its execution. *First Bank & Trust Co. of Illinois*, 338 Ill. App. 3d at 48, 787 N.E.2d at 311.

When we consider the entire contract in the context of all the surrounding circumstances, we conclude that the parties did not intend to discharge the respondent's statutory obligation to pay the petitioner's past related medical bills. What is clear from the surrounding circumstances is that the settlement was premised on the understanding that the respondent had in fact paid all the outstanding medical bills to the date of the settlement as indicated in the contract recital. To find otherwise would result in a windfall to the respondent, because it would be absolved from paying bills as required by statute without paying the petitioner any real consideration (the settlement amount almost equals the unpaid medical bills) as well as a loss to the petitioner (after the payment of the medical bills in question and attorney fees). This is a result the parties never could have intended. We will not interpret the settlement contract in such a way to defeat a claim not then in the minds of the parties. *Gladinus v. Laughlin*, 51 Ill. App. 3d 694, 696, 366 N.E.2d 430, 432, 9 Ill. Dec. 173 (1977). To do so would not only lead to an absurd and unjust result but also seriously undermine the remedial purpose of the Workers' Compensation

> Act." *Hagene v. Derek Polling Constr.*, 388 Ill. App. 3d at 383-385.

The Commission finds *Hagene* instructive. While *Hagene* differs from the case at bar in that the medical expenses section was not marked to indicate that all medical bills were paid or not paid, it is similar in that it appears to indicate that the bills were paid since no unpaid bills were listed. The Commission finds the failure to list any unpaid medical bills clearly indicates that there were, as far as the parties were aware, none.

As previously explained, the unpaid balance is for medical services provided to Petitioner for treatment of his work injury and were incurred before the parties entered into a settlement of Petitioner's claim. And as also previously noted, the bills for the unpaid medical treatment were issued to IRMA before the parties settled Petitioner's claim. While the Commission finds whether those bills got to IRMA questionable, it finds that the records clearly indicate that they were issued out for payment. Adding to the confusion is the fact that, as explained by Ms. Davey, the bills could be sent to IRMA a number of ways. According to Ms. Davey, the bills could be sent to her via email, fax or mail, as well as through CorVel, a third party company employed by IRMA. As no testimony was presented explaining which method was used by Keystone Orthopedics to send bills to IRMA, there is no way to investigate how it was that the bills did not make it to Ms. Davey.

The Commission also notes that Respondent points out that the Settlement Contract states that "[a]ll rights under §§4, 8, 16, and 19 of the Act are expressly waived by the parties." The Commission finds that such waiver goes against the intent of the Illinois Workers' Compensation Act and is against public policy.

The Commission finds that just as in *Hagene*, the circumstances of this case show that the settlement was premised on the understanding that Respondent had paid all outstanding medical bills. Absolving Respondent from payment of the outstanding balance would result in a windfall to Respondent, a loss to Petitioner, and a result the parties did not intend. Therefore, the Commission interprets the Settlement Contract as including Respondent's liability for the unpaid balance so as not to defeat the claim and to avoid an absurd and unjust result that would undermine the remedial purpose of the Illinois Workers' Compensation Act.

Regarding Petitioner's claim for penalties and fees, the Commission finds that Ms. Davey's testimony establish a clear intent by Respondent to pay all medical bills incurred by Petitioner for treatment of his work injury. The Commission notes that the ledger shows that the great majority of the medical expenses incurred by Petitioner at Keystone Orthopedics were paid, which also establishes Respondent's intent to pay Petitioner's medical expenses. Therefore, the Commission finds that Petitioner failed to show any vexatious or unreasonable behavior by Respondent in this matter. As such, the Commission finds that Petitioner failed to prove entitlement to penalties, attorney's fees and interest and denies Petitioner's claim for penalties, attorney's fees and interest.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay the outstanding amount of $5,739.00 in medical expenses.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion for Penalties and Attorney's Fees pursuant to Sections 19(k) and 16 is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Petitioner's Petition for Penalties, Attorney's Fees and Interest is denied.

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.

DEC 16 2015

Dated:
disc-10/13/15
MJB:ell
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☒ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROMAN GRZYBOWSKI,

Petitioner,

vs. NO: 10 WC 2495

CHICAGO BUILDING PRODUCTS, INC.,
WINDRUSH CONSTRUCTION LLC.,
WESTWARD DEVELOPMENT CO. LLC.,
ZDISLAW BRILKA, and the
ILLINOIS INJURED WORKERS' BENEFIT FUND,

16IWCC0009

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of whether the Arbitrator erred in granting the Injured Workers' Benefit Fund's (IWBF) Motion to Dismiss, and being advised of the facts and applicable law, reverses the Order of the Arbitrator dated January 28, 2015 for the reasons stated below. The Commission further remands this case to the Arbitrator for further proceedings on all issues.

The Commission hereby denies Petitioner's "Notice of Additional Evidence to be introduced Pursuant to 7040.10(c)."

Pursuant to the Rules Governing Practice before the Illinois Workers' Compensation Commission (Rules), Section 7040.10(c), Notice of Additional Evidence:

> Parties desiring to introduce additional evidence shall, not less than five (5) days before the date of hearing on review, give the

16IWCC0009

> opposite party a notice apprising him of the fact that additional evidence will be submitted and the nature thereof, at which time a copy of such notice shall also be filed with the Industrial Commission.

However, Section 19(e) of the Illinois Workers' Compensation Act states, "In all cases in which the hearing before the arbitrator is held after December 18, 1989, no additional evidence shall be introduced by the parties before the Commission on review of the decision of the Arbitrator." 820 ILCS 305/19(e).

The Act expressly prohibits the Commission from hearing additional evidence upon review of the Arbitrator's decision. Therefore, the Commission denies Petitioner's "Notice of Additional Evidence to be introduced Pursuant to 7040.10(c)."

The Commission reverses the Arbitrator's January 28, 2015 Order dismissing the IWBF, and remands the matter back to the Arbitrator as to Chicago Building Products, Inc., Westward Development Co. LLC., Zdislaw Brilka and the IWBF for a hearing on all issues.

The Commission recognizes that while the Act and the Rules do not specifically describe a Motion to Dismiss, Section 19 of the Act empowers the Arbitrator to make inquires and investigations deemed necessary, examine and inspect the records, etc. related to the questions in dispute and to hear such proper evidence, and make findings as to the disputed questions of law and fact. In this matter, however, a transcript of proceeding was not made at the time of the hearing on IBWFs Motion to Dismiss. Therefore, a hearing before Commissioner Michael J. Brennan was held on June 10, 2015 and an agreed statement of facts was made by the parties. The parties subsequently filed their Statement of Exceptions and oral arguments were held.

The Commission finds that the IWBF was timely added as a respondent. Based upon the procedural history of this case, no dispositive issues have been resolved as this matter was previously reversed and remanded by the Commission (12 IWCC 0773) on September 10, 2012 and is currently pending before the Arbitrator. Thus, the IWBF is not prejudiced by remaining in this matter and has not been deprived of its due process rights.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's January 28, 2015 Order granting the IWBFs Motion to Dismiss is hereby reversed and the case is remanded back to the Arbitrator for a hearing on all issues.

16IWCC0009

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.

DATED: JAN 6 - 2016

MJB/tdm
O: 12-8-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

GRZYBOWSKI, ROMAN
Employee/Petitioner

Case# 10WC002495

16IWCC0009

CHICAGO BUILDING PRODUCTS INC,WINDRUSH CONSTRUCTION LLC,WESTWARD DEVELOPMENT CO LLC AND ZDISLAW BRILKA
Employer/Respondent

On 8/9/2011, 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 0.06% 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:

2234 CHEPOV & SCOTT LLC
MASHA A CHEPOV
5400 CUMBERLAND AVE SUITE 150
CHICAGO, IL 60656

0507 RUSIN MACIOROWSKI & FRIEDMAN
MICHELLE POWELL
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

CHICAGO BUILDING PRODUCTS INC
2111 W BELLE PLAINE
CHICAGO, IL 60618

WESTWARD DEVELOPMENT CO
FDISLAW BRILKA
212 W WACKER DR
CHICAGO, IL 60610

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Roman Grzybowski
Employee/Petitioner

Case # 10 WC 02495

v.

Consolidated cases: _____

Chicago Building Products, Inc., Windrush Construction, LLC, Westward Development Co., LLC and Zdislaw Brilka
Employer/Respondent

16IWCC0009

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 **Chicago, Illinois**, on **03/18/2011, 03/22/2011, 04/13/2011**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statutory Employer; P. Choice of Treaters under §8(a)**

FINDINGS

16IWCC0009

On the date of accident, **1/05/2010**, 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 $**2,974.65**; the average weekly wage was $**675.00**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $450.00/week, commencing January 6, 2010 through March 18, 2011, for a period of 62-2/7 weeks, as provided in Section 8(b) of the Act.

Respondent shall authorize prospective medical care prescribed by Dr. Domb and Dr. Lorenz as well as any additional evaluations, tests, physical therapy and/or procedures necessitated by said treatment.

Respondent shall pay reasonable and necessary medical services of $47,865.16, as provided in Section 8(a) of the Act. The medical bills are to be paid pursuant to the medical fee schedule contained in the Illinois Workers Compensation Act. This may cause the total amount awarded to decrease to comply with the provisions of said schedule.

Respondent shall pay additional compensation in the amount of $37,946.87, as provided under Section 19(k) of the Act.

Respondent shall pay additional compensation in the amount of $10,000.00, as provided under Section 19(l) of the Act.

Respondent shall pay attorneys fees in the amount of $22,768.11, as provided under Section 16 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

8/8/2011
Date

16IWCC0009

FINDINGS OF FACT:

Petitioner, Roman Grzybowski, testified that he is 51 years old and began working as a carpenter when he immigrated to the United States with his family in August 2002. Petitioner testified he began a working relationship with Respondents, Westward Development and Chicago Building Products approximately six year prior to his alleged date of injury. He testified that to his knowledge, Jim West was the owner of both Westward Development and Chicago Building Products. Petitioner stated he was introduced to Jim West through a friend named John, who worked for Mr. West doing masonry work. Petitioner testified that during the time he worked with and for Jim West he performed carpentry duties that included remodeling existing structures and new construction projects. Petitioner stated that at the beginning of his relationship with Mr. West, he was paid cash by his boss, Zdislaw (Ziggy) Brilka. Petitioner testified that during that time Ziggy would manage the jobsites and acted as the on-site foreman for projects directed by Jim West and his various companies. Petitioner stated that this relationship changed in 2007 when Ziggy left for Poland and he began working directly for Jim West. Petitioner stated during this time his work was supervised by Jim West, Sr., the father of Jim West Jr., who acted as the on-site foreman. Petitioner further stated that he was required to punch in and out with color coated punch keys provided by Jim West (which he showed at the arbitration hearing). He was then paid on an hourly basis according to the times he was punched in, was paid by check made to his name and issued a 1099. After working for another construction company for approximately one year, Petitioner returned to work for Jim West and his companies Chicago Building Products and Westward Development November 2009.

Petitioner testified that in November 2009, Jim West had a conversation with him and Ziggy and asked them to work on a construction project that consisted of remodeling work in a multiunit apartment building located in Chicago, Illinois. Petitioner testified that Mr. West agreed to pay him $15.00/hour and that the work day was from 7:30 a.m.-5:00 p.m. Petitioner testified that the work consisted of replacing and fixing ceiling beams in each of the apartments and that Jim West Sr. acted as the on-site foreman directing all work. Petitioner stated that every morning Jim West Sr. would have a meeting with all the workers and direct what needed to be done that day. Jim West Sr. was the only person on the job-site daily who had keys to get into the building, onto each floor and into each unit. Petitioner stated that he was once again given punch keys which he stated all the workers on the site used to punch in and out on a daily basis at a box placed by the back fence of the property. Petitioner stated all tools, other than those on his tool belt, and materials were purchased and provided by Respondents Chicago Building Products and Westward Development. Petitioner testified that although Jim West Sr. directed the day-to-day activities on behalf of Respondents, Jim West Jr. and Chris Nurre, would come to the jobsite regularly to check progress of the work.

Petitioner testified that on January 5, 2010, he was in the process of leveling the ceiling beams in one of the apartments. He was directed to cut out the old beams from the ceiling and put in new ones. The ceiling was approximately 14 feet high and Petitioner utilized a ladder. Petitioner testified that the wood beams were 4 feet wide and 18 feet long and weighed between 150 and 200 pounds. Petitioner indicated that since the beams were so large and heavy that this was a two-person job, which he executed together with Ziggy. At approximately 2:00 p.m. while on a ladder, Petitioner was using a crowbar to try and straighten one of the wood beam when a piece of wood came loose, caused him to lose his balance and fall off the ladder. Petitioner testified as he fell, his body twisted and he did the splits in the air. He then landed on the right side of his body, hitting his head through the drywall. Petitioner testified he felt immediate pain in his head, neck, pelvis, groin area and left hip, as well as his right arm including the shoulder, elbow wrist and hand. Petitioner indicated he was assisted by Ziggy who called Jim Sr., who at the time of the accident was just outside the apartment in the hallway. Petitioner stated that Jim Sr. instructed Ziggy to take him home.

Petitioner testified that he first sought medical treatment at Resurrection Medical Ctr January 5, 2010, a few hours after the accident. Hospital records reveal that Petitioner was treated for injury to his pelvis, groin, left hip, right wrist, right elbow and head that consisted of an occipital headache. (PX 1) X-rays revealed a possible fracture of the right elbow. The Arbitrator notes there is a discrepancy between the doctor's record and the radiologist's report with respect to the pelvis. The radiologist states there was a fracture of the superior ramus. Petitioner was diagnosed with a head contusion, a right wrist contusion, a possible elbow fracture, and a left hip contusion. (PX 1 at 4, 21-22 and PX 2) At discharge, Mr. Grzybowski was given a splint for his elbow, crutches for the injury to his hip, prescriptions for Motrin and Vicodin, instructed to stay off work and follow-up with an orthopedic surgeon. (PX 1)

Petitioner and his daughter, Paulina Grzybowski, who accompanied him to the hospital and acted as a translator, testified that they were instructed to obtain a follow-up CT study of the right elbow to determine whether there was a definitive fracture and if a cast was needed. Both testified they attempted to schedule a follow-up appointment with the specialist recommended by the hospital but they would not accept Petitioner without insurance or a cash payment. Petitioner and his daughter testified they made repeated efforts to contact Jim West and Respondents both over the phone and at their places of business in an attempt to get insurance information or ask for assistance with medical bills and treatment. Ms. Grzybowski testified that when she was able to final speak with Mr. West, she explained to him that her father required follow up care with an orthopedic specialist and a CT of his elbow. Ms. Grzybowski provided that Mr. West instructed her to take her father to Cook County Hospital for treatment.

On January 8, 2010, Petitioner proceeded to Cook County Hospital and was admitted through the emergency room to obtain a CT scan of the elbow and orthopedic consult. Medical records from Cook County show that the CT scan of the elbow was still suspicious for a fracture and that Petitioner was instructed to continue wearing his splint and follow up with the Orthopedic Fracture Clinic. (PX 3).

Petitioner testified that he continued to experience pain in his head, neck and shoulder area, entire right arm from the shoulder to wrist and thumb, pelvis, groin area and left hip. Petitioner testified that he spent most of his time resting in bed and that his wife and daughters provided him with help for all daily activities, including getting in and out of bed or chairs. On January 18, 2010, Petitioner sought medical treatment at Central Medical Clinic with Dr. Victor Forys, a polish speaking family practice clinic close to his home. Dr. Forys reviewed the records from Resurrection Medical Center and conducted a full body physical examination. The initial examination revealed an antalgic gait, groin pain, tenderness and inability to flex in the upper left leg region, swelling in the right forearm/wrist/thumb and decreased range of motion, tenderness in the occipital region of the head and decreased range of motion in the neck. Petitioner was diagnosed with a concussion, contusion of the skull, right shoulder strain, cervical spine injury, probable fracture of the right wrist, neuropathy of the thumb with probable fracture or capsulitis, possible PSOAS hematoma, and pelvis fracture. Dr. Forys ordered additional x-rays and instructed Petitioner to remain off work. (PX 4 at 68-70.)

Petitioner next saw Dr. Forys on January 20, 2010 at which time they reviewed the x-rays which showed no fracture. Petitioner was given a script to begin physical therapy. (PX 4 at 64-65) Records show that Petitioner continued with neck and shoulder complaints. As a result, Dr. Forys referred him for MRIs of the cervical spine and right shoulder. The MRIs performed on May 19, 2010, at Edgebrook radiology revealed a partial thickness tear of the supraspinatus tendon with surrounding tendinitis and/or bursitis and a 2-3mm herniation at C3-C4. (PX 5). The records from Central Medical Clinic reveal that Petitioner had over twenty office visits with Dr. Forys and underwent physical therapy from January 21, 2010 through August 10, 2010. Petitioner also received numerous medications to alleviate his symptoms as well as injections in the occipital region to relieve headaches and post-concussion symptoms. (PX 4)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Mercier on July 29, 2010. Petitioner was accompanied by his daughter Paulina who acted as a translator. Dr. Mercier authored a report opining that Petitioner suffered a soft tissue contusion to the right elbow, right wrist and left hip with regard to his work injury. He further opined that with regard to Petitioner's right elbow contusion, he should have returned to work at his regular duties at MMI within three to four weeks following his alleged work accident. He noted that as Petitioner treated at Resurrection Emergency Department on the date of accident but since a neck or right thumb problem was not documented, it is likely that a structural injury to these areas did not occur as a result of the work accident. The doctor further opined that as of January 14, 2010, the soft tissue contusions of the right wrist and left hip had substantially resolved. He further opined that it is highly likely that Petitioner did not sustain a pubic rami fracture as a result of his work accident.

Dr. Mercier concluded that all subsequent medical care for problems other than his right elbow following his doctor visit on January 14, 2010 are not related to his work accident. He noted that he did not believe that physical therapy was medically indicated. He noted that Petitioner sustained a soft tissue right elbow, right wrist and left hip contusion as a result of his work accident and that his clinical course was not consistent with a pelvic fracture. He stated that Petitioner's follow up x-rays of the right wrist and elbow were negative for fracture or dislocation and that from these alleged injuries, Petitioner should have returned to regular job duties within three to four weeks following his work accident at MMI. He noted that any and all subsequent medical care for the neck, right shoulder and right thumb, and all right upper extremity neuropathy, is unrelated to his work accident. He noted that on the date of his examination, except for subjective pain, Petitioner's examination was normal. He stated that Petitioner exhibited "extensive subjective non-anatomical motor and sensory loss in the right upper extremity indicating false reporting to clinical testing." He stated that otherwise Petitioner was neurologically intact. (RX5)

Petitioner testified that during his treatment at Central Medical Clinic he did experience improvement of his symptoms but that other than the injury to his elbow, none of his symptoms completely resolved. Throughout the records are consistent complaints of pain in the head, neck, right shoulder, right arm, right thumb, pelvic/groin regions, left hip and headaches. As of June 1, 2010 Dr. Forys began recommending Petitioner for an orthopedic consult. (PX 4)

On September 13, 2010, Petitioner presented to Dr. Benjamin Domb of Hindsdale Orthopaedics. Dr. Domb's records include a history with a consistent description of a work related injury and a detailed orthopedic examination. The left hip exam demonstrated decreased range of motion with pain in all motions, positive anterior and lateral impingement, positive leg roll, positive FABER sign, decreased abductors strength, tenderness at the psoas/rectus, adductor muscles and the greater trochanteric, and positive Trendelenburg and antalgic gait. After the examination, Dr. Domb assessed a labral tear. The doctor also stated that "[g]iven the temporal nature and the mechanistic nature of this injury, this injury is work-related." Dr. Domb referred Petitioner for a MR arthrogram with cortisone injection and kept him off work. With regards to the right shoulder, after conducting his examination Dr. Domb suspected Petitioner had a pinched nerve in the C6-C7 region and referred him for a consult with Dr. Mark Lorenz. (PX 7 at 1-5)

On September 24, 2010, Petitioner underwent a MRI of the cervical spine. The impression was 1.) small posterior disk protrusions at C3-4 and C5-6. It was noted that these extra dural defects barely indent the ventral thecal sac. No significant central spinal canal or foraminal narrowing associated. 2.) Mild degenerative changes were also noted at C6-7 which appeared to be subtle bilateral posterior uncovertebral osteophytes with no significant foraminal narrowing associated. Facet arthropathy bilaterally was noted at C7-T1. (PX 7 at 9)

Dr. Lorenz saw Petitioner on September 30, 2010. Dr. Lorenz reviewed Petitioner's EMG, which he noted was unremarkable. He noted the MRI of the cervical spine from May 19, 2010 was essentially unremarkable. The CT scan was unremarkable. He stated that the repeat MRI of September 24th demonstrated

a tiny disk herniation without any significant cord or root obstruction. Petitioner was diagnosed with a cervical spine strain with chronic pain syndrome and possible labral tear left hip. Dr. Lorenz stated that Petitioner was not a surgical candidate with regard to his cervical spine and needed pain management. Petitioner was not a surgical candidate concerning the spine and suggested a rehabilitation and pain management program to begin after the injury to the left hip was addressed with Dr. Domb. (PX 7 at 7).

Petitioner also underwent a MR arthrogram of the left hip on September 30, 2010. The results demonstrated mild narrowing of the left hip joint space with mild diffuse chondromalacia indicating mild degenerative change. Linear signal abnormality was seen throughout the entire superior labrum, extending to the anterosuperior and posterosuperior portions of the labrum, indicating a labral tear. (PX 7 at 10-11)

On October 5, 2010, Dr. Domb suggested arthroscopic repair of the labral tear noting that Petitioner had failed to improve with conservative measures including physical therapy and intraarticular injection confirmed the intraarticular source of his pain. Petitioner was instructed to remain off work. (PX 7 at 13-14).

Dr. Mercier authored an addendum report dated January 5, 2011. In his report Dr. Mercier opined that "an acute fracture of the pelvis or an acute fracture or labral injury to the left hip would cause immediate pain and continuing symptoms requiring, at a minimum, the need for medical care and disability for many weeks..." Dr. Mercier noted that following the work accident on January 5, 2010, medical records from January 8, 2010 and January 14, 2010 document complaints of right elbow symptoms only. Dr. Mercier noted that on these dates, a continuing problem in Petitioner's pelvis or left hip was not documented. Dr. Mercier concluded that based on his initial clinical course, Petitioner did not fracture his pelvis or sustain a fracture or labral tear of the left hip as a result of his alleged work accident. Dr. Mercier further concluded that any proposed left hip surgery is therefore unrelated to his alleged injury of January 5, 2010. (RX 7)

On March 11, 2011, Dr. Mercier authored a final report. Dr. Mercier noted that he reviewed Petitioner's January 5, 2010 x-rays of the pelvis and left hip. The doctor noted they reveal an incomplete fracture of the superior pubic rami at the symphsis pubis. Dr. Mercier noted that in the emergency room, Petitioner had full range of motion of the left hip with mild tenderness to palpation over the anterior hip (symphsis pubis area). Dr. Mercier stated this would indicate an acute structural injury to the left hip joint which did not occur as a result of the events on January 5, 2010. Dr. Mercier noted that medical records from January 8, 2010 and January 14, 2010 document complaints of right elbow symptoms only. Dr. Mercier noted a continuing problem in Petitioner's pelvis or left hip was not documented. Dr. Mercier stated that "[w]hile this was inconsistent with an acute fracture of pubic rami, giving the patient the benefit of doubt, I will go along with the diagnosis of a fractured pubis as noted on the x-ray." Dr. Mercier indicated the clinical course at the clinic indicates the fracture was not functionally disabling and that it also indicates that a significant left hip injury did not occur as result of the events in January 2010. Dr. Mercier concluded that any AVN or labral tears were preexisting and not work related. (RX 8)

Petitioner testified that he has not yet undergone the surgery recommended by Dr. Domb due to the Respondent's refusal to pay medical benefits, his lack of medical insurance and inability to personally pay for the procedure. In an attempt to alleviate the pain in his left hip Petitioner obtained an orthopedic consult at Cook County Hospital on January 27, 2011. (PX 3) Petitioner testified he was put on a wait list for the surgery and told to continue his home exercises and limit his daily activities.

Petitioner testified that he continues to have headaches and pain in the occipital region of the head, pain in the neck, pain in the right shoulder and arm, numbness in the right thumb, pain in the left hip and groin region, pronounced limp and pain with walking or other physical activities. He continues to take Vicodin for pain every eight hours and to do daily home exercises as instructed by the therapist at Central Medical Clinic and Dr. Domb for his neck, right shoulder, right arm and hip/pelvis. Petitioner stated that he has not returned to

any type of work and continues to limit his daily activities. Petitioner also stated that his intention is to move forward with the treatment recommendations of his treating physicians, Dr. Domb and Dr. Lorenz, as he wishes to return to his daily activities and back to work.

Respondent submitted surveillance video taken on March 7, 2010. The video shows Petitioner bending from the waist a few times to collect what he testified he believed was cigarette butts with his left hand, and not his injured right arm. The video also shows Petitioner walking with a limp.

Chris Nurre testified on behalf for Respondent. Mr. Nurre testified that he is the managing partner of Windrush Construction. He testified that Windrush has no employees and they "hire other general contractors to perform work." He testified that Westward Development Company submitted a bid to perform work at a project run by Mr. Nurre at 617-619 W. Drummond in Chicago. This bid was submitted on July 27, 2009. (RX 4). Mr. Nurre testified that he accepted the bid of Westward Development Company and he "required liability insurance and a workers' compensation policy of sub Westwood."

Mr. Nurre testified that prior to the commencement of work on the project at 617-619 W. Drummond, Westward Development Company provided him with a Certificate of Liability Insurance naming the insured party as Westward Development Company and naming Windrush Construction, LLC as the Certificate Holder. Mr. Nurre identified the Certificate of Liability Insurance with policy dates from 10/24/09 through 10/24/10 as the Certificate submitted to him by Westward Development Company with regard to the project at 617-619 W. Drummond. (RX 1) Mr. Nurre testified that this Certificate was submitted in approximately October 2009, and prior to commencement of work on the project. (The Arbitrator notes the Certificate of Liability Insurance is dated January 24, 2010.)

Mr. Nurre testified that Windrush was the general contractor and hired Jim West and to his knowledge, Westward Development, as a sub-contractor. Mr. Nurre stated that Jim West then maintained the right to hire additional sub-contractors. Mr. Nurre testified he hired Westward Development and didn't know Jim had a company called Chicago Building Products. Mr. Nurre testified that he did not receive the certificate from the insurance carrier or agent but instead from Mr. West's assistant via email. He stated that he did not call anybody to verify the validity of the policy.

Brad Freburg testified on behalf of Respondent. Brad Freburg is named as producer on the aforementioned Certificate of Liability Insurance. (RX1). Mr. Freburg testified that he utilized his insurance agent identification number as the policy number of the Certificate of Liability Insurance indicating it was typical to insert the agent's identification number until NCCI issues a policy number. Mr. Freburg testified the policy effective dates (10/2009 – 10/2010) were clerical errors. Mr. Freburg testified that the Certificate of Liability Insurance was not generated until January 2010. The policy period covers the period of January 26, 2010 through January 26, 2011. (RX 2) He indicated that Westwood did not contact him requesting a policy prior to October 2009. He also indicated that he could not explain how a policy was presented to Windrush in October 2009. Mr. Freburg acknowledged that the certificate holder would likely and reasonably rely on the Certificate of Liability Insurance as representing that the listed insured had coverage per the terms of the Certificate. Mr. Freburg also stated that he was not contacted by Windrush regarding effective dates of a policy.

In support of the Arbitrator's decisions relating to (A.) Whether Respondents were operating under and subject to the Illinois Workers' Compensation Act, the Arbitrator finds as follows:

Section 3 of the Illinois Worker's Compensation Act provides in part as follows:

> "The provisions of this Act hereinafter following shall apply automatically ... to all employers and all their employees, engaged in any department of the

following enterprises or businesses which are declared to be extra hazardous, namely:

1. The erection, maintaining, removing, remodeling, altering the demolishing of any structure;
2. Construction, excavation or electrical work;

Petitioner testified that his work for Jim West and his companies, Chicago Building Products and Westward Development consisted of remodeling existing structures and the erection of new structures. According to Petitioner as well as Respondent Windrush's representative, Mr. Chris Nurre, the work performed at 617 W. Drummond Place, required the repairing of structural supports in the individual units and consisted of removing existing ceiling beams and replacing them with new ones. Petitioner was provided with power tools owned by either or both Chicago Building Products and Westward Development.

The credible evidence indicates that Windrush Construction is in the construction business and was a general contractor that contracted with subcontractor Westward Development directly and Chicago Building Products indirectly for the remodeling of a structure located at 617 W. Drummond Place, in the City of Chicago. The credible testimony of Petitioner along with Mr. Nurre's indicates that both companies owned by Jim West, Westward Development and Chicago Building Products, were engaged in the construction business and were Windrush Construction's subcontractors.

Based on the foregoing, the Arbitrator finds that Windrush Construction, Westward Development and Chicago Building Products, were operating under and subject to the Workers' Compensation Act.

In support of the Arbitrator's decisions relating to (B.) Whether there was an employee-employer relationship, the Arbitrator concludes as follows:

In determining whether an employee/employer relationship existed between the Petitioner and Respondents, this Arbitrator must examine various factors of the relationship, including the method of payment, deduction for withholding tax, right to discharge, skills required, whether the worker's occupation is related to that of the alleged employer, ownership of tools, materials and equipment, and the right to control the manner in which work is performed. *Sankey Brother, Inc., v. Industrial Commission, 552 N.E.2d 278, 280 (3d Dist. 1988).* The most important of these factors is the right to control work. *Bauer v. Industrial Commission, 51 Ill. 2d 169, 282 N.E.2d 448, 450 (Ill. 1972).*

Petitioner credibly testified he was hired by Jim West Jr. in November 2009 to work on the Drummond remodeling project. He testified that on January 5, 2010 he was working for Chicago Building Products and Westward Development. Although Petitioner was not aware of the specific corporate structure of each company, he credibly testified that he had knowledge that Jim West Jr. owned both companies. Petitioner testified that during the Drummond project and when he worked for Mr. West previously in 2004, his work was supervised by the on-site foreman, Jim West Sr., father of Jim West Jr.

Petitioner testified that he was subject to the hours set by the Wests. They controlled not only what work was done and how it was done, but they also directed when to start and/or stop work. Petitioner showed the Court during his testimony the punch keys given to him by Mr. West Jr. which he used to document his hours by punching in and out. According to the times recorded by the punch keys, Petitioner was paid an hourly rate of $15/hour, by check, made payable directly to him, by Jim West Jr. on behalf of Chicago Building Products. (PX 10). It appears that there were no deductions or withholdings from Petitioner's paycheck. Petitioner testified that Jim West Jr. and Sr. had the right to discharge him at any time. The work that Petitioner performed was not highly skilled and as a general carpenter, his trade is closely related to that of Westward Development and

Chicago Building Products. Additionally, Petitioner stated that other than the tools on his tool belt all tools materials and equipment was purchased by Respondents. Most importantly, Petitioner convincingly testified that Jim West Jr. and Jim West Sr. maintained the right to control the manner in which he, Ziggy and the other workers performed work on the property. Petitioner testified that every morning Jim West Sr., as the on-site foreman, would have a meeting to assign everyone their duties for the day. Furthermore, only Jim West Sr. had a master set of keys that he would use to allow the workers into individual units and onto each individual floor. Mr. Nurre provided similar testimony when he stated that Jim West Jr. would purchase all materials and provide necessary tools and equipment and that Jim West Sr. acted as the on-site foreman directing daily work. Respondent, Windrush Construction, failed to provide any evidence that Petitioner was an independent contractor. Their representative, Mr. Nurre, testified he hired Jim West Jr.'s company as a sub-contractor and that Jim West Sr. acted as the on-site foreman. Also, Petitioner testified that Zdislaw was performing similar work, also had to punch in and out as he did and that both were supervised and directed by Jim Sr. on a daily basis. The only evidence not supporting an employment relationship between Petitioner and Jim West Jr.'s companies Chicago Building Products and Westward Development is the lack of withholding tax. However, this factor alone is not enough in light of the overwhelming evidence of control asserted by Jim West Jr. and Jim West Sr. on behalf of Respondents Chicago Building Products and Westward Development. Both Chicago Building Products and Westward Development maintained the right to control Petitioner's work and both companies benefited from his work, thus making Petitioner a joint employee.

Respondents Building Products and Westward Development did not appear for this hearing in spite of having notice of same both from Petitioner and their former counsel in this matter, Law Offices of Brill and Fishel, PC. Counsel on behalf of Chicago Building Products and Westward Development was granted leave to Withdraw as Attorneys at the hearing of March 2, 2010 due to lack of cooperation. At this hearing, the Arbitrator continued the 19b hearing to March 18, 2010 and advised counsel on behalf of Chicago Building Products and Westward Development to send proper notice of the new hearing date to the former clients via regular and certified mail. The record also reflects that proper notice of the 19b Hearing was also sent to Respondents via mail by Petitioner. (PX 12). Respondent Windrush Construction also issued subpoenas for Jim West Jr. and Jim West Sr. (RX 10 and RX 11). No representative of Chicago Building Products or Westward Development filed a subsequent appearance after March 2, 2010. Chicago Building Products and Westward Development failed to participate in the March 18, 2010 19b hearing. Accordingly, this Arbitrator finds that Chicago Building Products and Westward Development were joint employers of Petitioner on January 5, 2010.

The Arbitrator failed to find any convincing evidence that Petitioner was the employee of sub-contractor Zdislaw Brilka and therefore this Respondent is dismissed.

Based on the evidence presented, the Arbitrator finds that an employee/employer relationship existed between Petitioner and Building Products and Westward Development.

In support of the Arbitrator's decisions relating 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 provided a consistent history of falling off a ladder and injuring his head, neck, right shoulder, right arm, right wrist, pelvis, groin region and left hip while working for Respondents on January 5, 2010. At the time of the accident, Petitioner was attempting to straighten a wood ceiling beam with a crowbar when a piece of the wood came loose, causing him to lose his balance and fall off a ladder. On-site foreman, Jim West Sr., was notified of same moments after the occurrence and provided direction to take Petitioner home. Petitioner sought treatment on the same day of the accident in the emergency room at Resurrection Hospital for his multiple traumatic injuries. Petitioner provided consistent history of the work accident to all health care providers.

Accordingly, the Arbitrator finds that Petitioner sustained multiple injuries arising out of and in the course of his employment.

In support of the Arbitrator's decisions relating to (E.) Whether timely notice of the accident was given to Respondent, the Arbitrator concludes as follows:

Petitioner testified that within minutes of his fall, Jim West Sr., the on-site foreman came into the apartment. A co-worker then explained to Mr. West how Petitioner fell and Mr. West instructed Petitioner to go home. Additionally, both Petitioner and his daughter Paulina testified that they placed numerous phone calls to Jim West Jr. in the days following the accident to discuss follow-up treatment for Petitioner's injuries.

Respondents offered no witnesses or evidence to rebut Petitioner's testimony that proper notice of the accident was given.

Accordingly, the Arbitrator finds that timely notice of the accident was given to Respondents Chicago Building Product and Westward Development.

In support of the Arbitrator's decisions relating to (F.) Whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

Petitioner testified that on January 5, 2010, he fell from a ladder landing on his right side and injuring his head, neck, right shoulder, right arm, right elbow, right wrist, right thumb, pelvis, groin region and left hip. Petitioner testified that prior to the accident he was in good health and able to perform his daily activities and laborious work requirements without any difficulties or pain. Other than a dislocated right shoulder following a work accident six years prior, Petitioner never suffered any personal injuries or pain in his head, neck, right hand/wrist, right thumb, right elbow, pelvis, groin or hips. With regards to the prior right shoulder injury, Petitioner testified he sought only emergency room treatment and after missing two days from work was able to return full duty with no residual pain.

Throughout the medical records submitted by Petitioner there is consistent history of a work accident and consistent complaints of pain and disability. Dr. Forys' records dated January 18, 2010 and September 2, 2010 clearly state that Petitioner's multiple traumas and continued pain complaints were causally related to the January 5, 2010 accident. Although Petitioner's diagnosis of a labral tear in the left hip was not made until orthopedic specialist, Dr. Domb, examined him in September 2010, this was not due to the Petitioner's lack of symptoms or lack of treatment. Petitioner credibly testified as supported by the medical records, that Dr. Forys wanted him to see a specialist for his hip as well has his headaches, neck and shoulder pain as early as June 2010. However, without approval from Respondent and no medical insurance or personal funds to pay for such treatment, Petitioner continued to manage his symptoms conservatively under the care of Dr. Forys.

In addition to the above, Dr. Domb credibly relates Petitioner's current conditions of ill-being to the work-injury based on the mechanism of injury as well as the temporal casual connection. (PX 7). The Arbitrator finds the opinions of Dr. Forys, Dr. Domb and Dr. Lorenz regarding the causation of Mr. Grzybowski's multiple traumas to the January 5, 2010, accident to be credible.

Respondent's IME reports authored by Dr. Mercier are unpersuasive and not credible. There are numerous inconsistencies in the initial report as well as the addendums. First, without reviewing the x-rays Dr. Mercier opined that Petitioner did not suffer a fractured pelvis merely because his treatment did not follow the proper clinical course. Dr. Mercier failed to state specifically how Petitioner's treatment was not within the proper clinical course. Dr. Mercier also incorrectly states that Mr. Grzybowski was seen at Cook County

Hospital on January 14, 2010, this is inconsistent with Petitioner's testimony and medical records from Cook County Hospital. (PX 3). Dr. Mercier completely discounted the regular mention of pain in the pelvis, groin areas and left hip documented in Dr. Forys' records. Moreover, after reviewing the initial x-ray films from Resurrection taken on January 5, 2010 and taking a closer look at the medical records generated at Resurrection, Dr. Mercier changes his diagnosis with regards to the pelvis fracture. This Arbitrator further finds that Dr. Mercier failed to provide any credible evidence to support his opinion that Petitioner had a degenerative hip condition and that his labral tear and the fracture of the pelvis were preexisting. (RX 8). Dr. Mercier's reading of mild-moderate degenerative changes in the pelvis and hip x-rays is inconsistent with the more credible reading of the radiologist and Dr. Domb. Additionally, Dr. Mercier states in his addendum that he relies on a CT in his diagnosis of degenerative changes; however, the record is completely void of any CT of the left hip. Dr. Mercier opined that Petitioner's injuries of the right elbow and wrist were casually related to his accidental injury of January 5, 2010. However, Dr. Mercier goes on to state, without any credible evidence to support his opinion, that Petitioner's neck and head injuries were not casually related to the accident. Dr. Mercier's opinion completely disregards not only Petitioner's subjective complaints and objective findings on exam as well as the positive MRI results that showed a herniation at C3-C4 and the EMG/NCV which was positive for cervical radiculopathy.

Based on all the above, the Arbitrator finds that Petitioner's condition of ill-being as it relates to injuries of his head, neck, right shoulder, right arm, right elbow, right wrist, right thumb, pelvis, groin region and left hip are all casually related to the work accident of January 5, 2010.

In support of the Arbitrator's decisions relating to (G.) What were Petitioner's earnings, the Arbitrator finds as follows:

Petitioner's Exhibit No. 10 contains copies of seven checks made directly to Petitioner by JimWest Jr. on behalf of Chicago Building Products. Petitioner testified that these checks represented all the payments he received from Jim West Jr. beginning from the time he was hired as an employee and started work on the Drummond property to the week of his injury. According to the paychecks and Petitioner's testimony, he was paid $15/hour. Petitioner testified that he worked Monday through Friday from 7:30 a.m. to 5:00 p.m. with 30 minutes for lunch, which was unpaid. Petitioner credibly testified that as a full-time employee, if work was available, he would work the full nine hours a day.

The Arbitrator finds Petitioner's testimony regarding wage rate and hours to be credible and pursuant to *Sylvester v. Industrial Commission, 197 Ill.2d 225, (2001),* accordingly finds that Petitioner's average weekly wage is $675.00.

In support of the Arbitrator's decisions relating to (J.) Whether the medical services provided to Petitioner were reasonable and necessary, the Arbitrator concludes as follows:

Petitioner's Exhibits No. 1 through 8 contain medical expenses incurred as a result of the January 5, 2010 accident. These charges were itemized and submitted as Petitioner's Exhibit No. 9, showing a total of $47,865.16 in unpaid bills. Having determined that Petitioner's current condition of ill-being is casually related, the Arbitrator finds all treatment provided was necessary for the treatment of Petitioner's injuries and that the bills incurred are reasonable for the services rendered. The Arbitrator awards Petitioner medical bills in the amount of $47,865.16 , subject to the limitation of the Fee Schedule of the Act.

In support of the Arbitrator's decisions relating to (K) whether Petitioner is entitled to prospective medical care, the Arbitrator finds as follows:

Dr. Domb has recommended Petitioner undergo arthroscopic repair of the left labral tear identified in the MR arthrogram. Additionally, Dr. Lorenz has recommended that Petitioner undergo rehabilitation and pain management for injury to his cervical spine. Petitioner testified that he wishes to undergo this treatment to alleviate his pain and return to work and his daily routines.

The Arbitrator having found the Petitioner's condition of ill-being is casually related to his accidental injuries of January 5, 2010 and having discounted the opinions of Dr. Mercier, hereby orders Respondent to authorize treatment recommended by Dr. Domb and Dr. Lorenz as well as any additional evaluations, tests, physical therapy and/or procedures necessitated by said treatment. Respondent is further ordered to pay medical expenses for the treatment outlined above consistent with the Fee Schedule of the Act.

In support of the Arbitrator's decisions relating to (L) What amount of compensation is due for temporary total disability, the Arbitrator concludes as follows:

Petitioner claims he was temporarily totally disabled from January 6, 2010 through the date of the arbitration hearing on March 18, 2011. Petitioner testified his pain limits his daily activities including walking and lifting and that because of this he has not been able to engage in any physical or strenuous activities since the date of accident. Due to the pain and physical inability to walk normally or lift anything heavy, Petitioner after searching for work, was unable to find employment with his physical limitations. Petitioner testified that he has not returned to any type of employment since the date of accident nor has any treater released him back to work in any capacity. Moreover, the surveillance footage submitted as Respondent's Exhibit No. 3 failed to show Petitioner engaging in any physical activity that would suggest he was able to return to work.

As mentioned earlier, the Arbitrator is not persuaded by the opinions of Dr. Mercier. In his initial IME report dated July 29, 2010, Dr. Mercier opined that Petitioner did not suffer a fracture of the pelvis merely because he believed the treatment rendered did not follow the proper clinical course for the injury. Dr. Mercier stated that Petitioner would have been able to return to work full duty after three to four weeks following the accident. Nowhere in his report does Dr. Mercier state what the physical requirements of Petitioner's job are and therefore any opinions regarding Petitioner being able to return to full-duty is not credible. The physical examination conducted by Dr. Mercier which according to his report failed to show reliable objective findings is not credible when compared to the numerous thorough and lengthy physical examinations conducted by Dr. Forys, Dr. Domb and Dr. Lorenz. Additionally, it is of note that in his last IME report dated March 11, 2010, Dr. Mercier concedes, after reviewing the x-ray films taken on January 5, 2010 at Resurrection Medical Center, that Petitioner had a fractured pelvis.

Based on all the above, the Arbitrator finds the Petitioner was temporarily totally disabled from January 6, 2010 through March 18, 2011, a period of 62-2/7 weeks.

In support of the Arbitrator's decisions relating to (M.) whether penalties and fees should be imposed upon Respondent, the Arbitrator finds as follows:

Illinois courts have stated that the burden of proof is not on the claimant to prove the employer's delay in payment of compensation was unreasonable and vexatious. *County of Cook v. Industrial Commission, 160 Ill. App. 3d 825 (1987)*. Rather, where a delay has occurred in payment of compensation benefits, the employer bears the burden of justifying the delay. *Board of Education v. Industrial Commission, 93 Ill.2d 1 (1982)*. Respondent has not met that burden in the instant case.

Respondent has refused to pay any medical benefits and temporary total disability for over fourteen months in spite of consistent and reliable documentation provided by Petitioner's various treaters. Petitioner has provided consistent history of a work accident to each provider and has maintained consistent pain

complaints throughout the medical records and in his testimony at the arbitration hearing. The Arbitrator already found that the opinions of Dr. Mercier are not credible given the substantial medical evidence and unrebutted testimony of Petitioner. Additionally, Respondent claims it relied on an erroneous and invalid certificate of Workers' Compensation Insurance for Westward Development. The Arbitrator did not find the testimony of Mr. Nurre to be credible as he admitted to never checking to verify the validity of the certificate that on its face was not valid. As the statutory employer, Respondent, Windrush Construction, failed to even provide medical and temporary total disability benefits for the injuries their IME concluded were casually related.

Respondent failed to show adequate justification for its refusal to pay benefits in this matter and further failed to notify Petitioner in writing of any reason for denial of benefits. Respondent demonstrated an unreasonable and vexatious delay in payment of medical bills and temporary total disability benefits.

Respondent is ordered to pay Section 19(k) penalties in the amount of $37,946.87 (representing 50% of the unpaid medical and 62 and 2/7ths weeks of TTD), $10,000.00 in Section 19(l) penalties and $22,768.11 in Section 16 attorney fees (20% of the unpaid medical totaling $9,573.03, 20% of the unpaid TTD benefits totaling $5,605.71 and 20% of the 19(k) penalties totaling $7,589.37).

In support of the Arbitrator's decisions relating to (O.) Whether Respondent, Windrush Construction, is a statutory employer under the Act, the Arbitrator concludes as follows:

On January 5, 2010, Petitioner was employed by Respondents Chicago Building Products and Westward Development, both companies owned and operated by Jim West Jr. On said date, Petitioner was working on a jobsite located to 617 W. Drummond in Chicago, Illinois. Both Petitioner and Mr. Nurre testified that the work being performed at the jobsite was construction work and consisted of remodeling and removing of structures. Respondent, Windrush Construction, admitted during arbitration by the testimony of its managing partner, Mr. Chris Nurre, that Windrush was the general contractor and hired Jim West and to his knowledge, Westward Development, as a sub-contractor. Mr. Nurre specifically stated that Jim West then maintained the right to hire additional sub-contractors. Although Mr. Nurre testified that he believed he hired Westward Development and not Chicago Building Products as his subcontractor, he failed to provide any signed contract between the parties. Even giving Mr. Nurre the benefit of the doubt that he did in fact hire Westward Development as subcontractor, it can then be inferred that Jim West as owner of Westward Development subsequently hired Chicago Building Products as sub-contractor.

Petitioner amended his Application for Adjustment of Claims to name Windrush Construction based on the theory of statutory employer pursuant to *820 ILCS 305/1(a)3*. The credible testimony of insurance agent Brad Freburg established that he never issued a valid Worker's Compensation policy that would have provided coverage on January 5, 2010 for Westward Development, Chicago Building Products or any company owned by Jim West. Mr. Freburg acknowledged that he did create a document showing effective dates of coverage from October 24, 2009 through October 24, 2010. However, he testified that the certificate did not contain a valid policy number, valid named insurance carrier and that the certificate was issued in error. Additionally, Respondent's Exhibit No. 1, a copy of the insurance certificate Respondent claims Mr. West tendered to them sometime in October 2009, clearly shows the date issued as January 24, 2010. Mr. Nurre's testimony that he was issued a copy of the certificate of insurance in October 2009 is not consistent with the certificate nor is it credible as he was unable to provide any evidence other than his own statement which was contrary to that of the issuing agent who provided more reliable testimony. Mr. Nurre's reliance on the certificate of insurance which on its face was not valid is not sufficient to excuse Respondent from liability as a statutory employer. Mr. Nurre testified that he received the certificate not from the insurance carrier or agent but instead from Mr. West's assistant and he verified that he never investigated the validity of the policy. Petitioner's Exhibit No. 11,

a subpoena answered by NCCI verifies that Respondents Chicago Building Products, Westward Development and Zdislaw Brilka did not maintain valid Workers' Compensation coverage on January 5, 2010.

Based on the foregoing, the Arbitrator finds that Petitioner has met all the requirements of Section 1(a)3 for the existence of a statutory employer as to Respondent Windrush Construction. Respondent is liable for payments of benefits to the Petitioner in this matter.

In support of the Arbitrator's decisions relating to (P.) Whether Petitioner exceeded choice of treaters under §8(a), the Arbitrator concludes as follows:

Petitioner initially sought emergency medical treatment at Resurrection Medical Center. Pursuant to the recommendations of the emergency room physician as well as the request of Jim West Jr. his employer, Petitioner went to Cook County Hospital to seek an orthopedic consult and CT scan of his right elbow to determine whether a cast was necessary. Said treatment Petitioner received at Cook County is not considered an exercise of his choice of treaters. Petitioner did not utilize his first choice of treaters until he sought treatment with Dr. Forys at Central Medical Clinic. From there, all subsequent treatment was within the chain of referral. Dr. Forys subsequently referred Petitioner for x-rays and MRIs at Edgebrook Radiology, EMG testing at Professional Neurological Services and Hinsdale Orthopedics. Dr. Forys referred Petitioner for orthopedic consults for injuries to his neck, shoulder and hip on multiple occasions. Although Dr. Forys provided Petitioner with scripts for his various injuries, after seeing Dr. Domb on September 13, 2010, for evaluation of the hip and shoulder pain, Petitioner was also referred to Dr. Lorenz to address his cervical complaints.

Based on the foregoing and the record, the Arbitrator finds that Petitioner did not exceed his choice of treaters under §8(a).

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES DAVID HUITE,

Petitioner,

vs. NO: 10 WC 46272

PINCKNEYVILLE CORRECTIONAL CENTER,

Respondent.

16IWCC0004

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses and prospective medical care, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner has been a Correctional Officer for Respondent since 1999. In July 2010 he was promoted to Correctional Sergeant. In February 2012 he transferred to Correctional Maintenance. In January 2015 he took a voluntary reduction to Correctional Supply.

2. Over 80 percent of Petitioner's time as a Correctional Officer was spent in the wings and galleries. 70-75 percent of that time at Pinckneyville he spent in R5 or little segregation.

3. As a Wing Officer he performed wing checks every 30 minutes. He had to pull on every door to make sure it was locked. He performed between 1 and 6 cell

shakedowns per shift. He used Folger keys to open chuckholes. Some chuckholes work well, while others don't. He cuffs inmates, and some resist, which causes Petitioner to get "banged up." The steel doors can swell and jam. Petitioner never had to bar wrap while employed by Respondent, however. He worked the 7am to 3pm shift, unless he worked overtime to 11pm.

4. Petitioner stated that 2010 was one of the facilities worst years regarding lockdowns. Lockdowns greatly intensify Petitioner's duties, as all inmates must be cuffed and everything is done through chuckholes. In general population 3 or 4 chuckholes would cause difficulty. This number doubled or tripled in segregation.

5. During his employment Petitioner began noticing numbness, elbow pain and cramping. After undergoing compression neuropathy tests he filed an incident report with Respondent and listed repetitive locking and unlocking of doors, chuckholes, restraints, and locks as the cause of his symptoms. Petitioner's Counsel sent him to see Dr. Brown, who recommended mild medication and hard splints for sleeping. Petitioner's symptoms persisted.

6. Currently Petitioner is a Supply Supervisor for Respondent. His duties are akin to a grocery store cashier. He acknowledged that there is not a lot of force involved with the Supply Supervisor position.

7. Petitioner began noticing his symptoms around 2008. He had an idea that they were work-related after he had been diagnosed with carpal tunnel by Dr. Alam and some coworkers began complaining of the same symptoms.

8. Jason Thompson is a Shift Supervisor at Jacksonville Correctional Center. He worked for Respondent from 1998 to 2011 as a Lieutenant.

9. Mr. Thompson estimated that a Correctional Officer would do only 100 key turns per shift in the housing unit, 200 turns in segregation, and that there are 70-75 cell doors to check in Respondent's housing unit. However, he stated that it does not take much force to open cell doors. He stated that only 1-2 percent of chuckholes are difficult to open.

10. Testimony from a Dr. Brown indicated that forceful gripping and/or pinching, repetitive motion, prolonged wrist flexion, forceful turning of the wrist and exposure to vibration are common for causing carpal tunnel. Based on this, Dr. Brown opined that Petitioner's occupational stressors were outside of the course of daily living, and that over an extended period of time they could aggravate both carpal and cubital tunnel syndromes. Dr. Brown looked at force, frequency and duration and found that the opening and closing of cell doors and food slots, cuffing and uncuffing inmates and writing tickets would eventually lead to a manifestation of symptoms for compression neuropathy.

11. Dr. Brown stated that Petitioner's age was his only comorbid risk factor for the

development of his conditions. His motorcycle riding may have been a factor, but it was greatly outweighed by his work activity.

12. Although he had no information regarding Petitioner's job duties, Dr. Williams did not believe Petitioner's condition was work-related. He opined that Petitioner's job did not involve significant exposure to repetitive, forceful sustained gripping or pinching, or excessive exposure to vibration. Dr. Williams did acknowledge that the duties of a Correctional Maintenance Officer could cause or contribute to the development of compression neuropathy.

13. Despite Dr. Alam's assessment of moderately severe bilateral compression neuropathy at both carpal and cubital tunnel, Dr. William's found Dr. Alam's studies to be normal. However he also stated on cross examination that Petitioner does suffer from carpal and cubital tunnel and is a surgical candidate due to conservative treatment failing. He also acknowledged that Petitioner had no comorbid risk factors. Dr. Williams indicated that he used NIOSH standards to formulate his causal connection opinion.

14. Robert Schuchert was Respondent's Locksmith. He was previously a Correctional Officer from 1998 to 2004. He testified that while employed as a Locksmith for Respondent he developed bilateral compression neuropathies. He stated that it progressed to the point where he was unable to carry a tool box full of locks with his left hand. He stated that Respondent locks have worsened over the years. When he first began working there, inmates had keys to their own locks, so there was a lot of wear and tear. This caused a change in policy. Nevertheless, he described the current condition of the locks as fair to poor. The locks and chuckholes are very difficult to open. The locks themselves as well as the food stuck in them made them difficult to operate. He estimated that he switched out 2-5 locks per week. Occasionally 4 or 5 locks would go out in a day.

15. On December 1, 2010 Dr. Brown examined Petitioner and reviewed his nerve conduction studies and agreed with the bilateral diagnoses. It is noted that Petitioner had no systemic contributory factors for compression neuropathy. Splints and anti-inflammatory meds recommended. He opined that Petitioner's work duties were in part an aggravating factor in his need for further treatment.

The Commission reverses the Arbitrator's finding of accident. The Commission finds the opinions of Dr. Williams persuasive. He has toured Respondent's facility and noted that it takes mild, low force to open doors.

Dr. Brown noted that performing the duties of a housing unit officer for over a decade could aggravate carpal tunnel syndrome. Respondent, however, pointed out that Petitioner worked in its housing and segregation unit for 4-5 years of his total time spent employed by Respondent. Thus, Petitioner's time spent in housing and segregation (which required more frequent hand manipulation) was not significant enough to cause his bilateral compression neuropathy. With Petitioner failing to meet his burden of proof

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that he sustained a work-related repetitive trauma injury, the Commission reverses the Arbitrator's ruling and finds no accident or causal connection.

With a finding of no accident and causal connection, the awards for medical expenses and prospective medical care are also hereby reversed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner failed to prove he sustained an accident arising out of and in the course of his employment with Respondent on October 1, 2010.

IT IS FURTHER ORDERED BY THE COMMISSION that no medical expenses or prospective medical care be awarded to Petitioner.

DATED: JAN 4 - 2016
O: 11/5/15
DLG/wde
45

Mario Basurto

Stephen Mathis

DISSENT

I respectfully dissent from the majority decision and would affirm the Arbitrator's well reasoned decision in its entirety.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

HUITE, CHARLES
Employee/Petitioner

Case# **10WC046272**

STATE OFILLINOIS/PINCKNEYVILLE CORR CTR
Employer/Respondent

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On 5/27/2015, 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 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 · STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

MAY 27 2015

RONALD A. HASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0004

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Charles Huite
Employee/Petitioner

v.

State of Illinois/Pinckneyville Corr. Ctr.
Employer/Respondent

Case # 10 WC 46272

Consolidated cases: _____

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **March 18, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **October 1, 2010**, 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 **$56,793.00**; the average weekly wage was **$1,092.17**.

On the date of accident, Petitioner was **55** years of age, *married* with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

Respondent is entitled to a credit of $ **any benefits paid through group** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in § 8(a) of the Act.

Respondent shall be given credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit. as provided in § 8(j) of the Act.

Respondent shall authorize and pay for the treatment recommended by Dr. Brown and/or Dr. Paletta.

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

5/18/15
Date

ICArbDec19(b)

MAY 27 2015

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

16IWCC0004

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES HUITE
Employee/Petitioner

v. Case # 10 WC 46272

STATE OF ILLINOIS/PINCKNEYVILLE CORR. CTR.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time his injuries manifested, Petitioner was a 55-year-old Correctional Sergeant at Pinckneyville Correctional Center. (AX1; T.10). Petitioner began his career with Respondent as a Correctional Officer at Menard Psychiatric in 1991, and stayed there until it was converted into the maximum security segregation unit in 1997. (T.7, 8, 63). Petitioner the spent two and a half years as a Correctional Officer at Centralia Correctional Center until he transferred to Pinckneyville Correctional Center in November of 1999. (T.7, 8).

Petitioner testified that he did a lot of bar rapping, cuffing and uncuffing of inmates, turning of Folger Adams keys and opening of heavy steel sliding doors at Menard Correctional Center. (T.9). Respondent's Correctional Officer Job Site Analysis by CorVel provides a narrative description ofthe job duties of a Correctional Officer at Menard. It classifies the strength demand of the job asfrequent lifting and/or carrying up to 25 pounds. Correctional officers are required to frequentlypull open doors from 2 ½ hours to 5 ½ hours per day, up to 66% of the time, or up to 200 timesper day. This includes pulling open chuckhole doors as needed during lockdowns for dining, andcuffing and snuffing residents. Wrist turning is required 34-66% of the time, 2 ½ hours to 5 ½hours per day, or 33 to 300 times per day. (PX24). Petitioner also submitted a post description, which fully corroborates his testimony as to his job duties at Menard Correctional Center. (PX26).

Petitioner submitted Respondent's DVD, which depicts the duties of a Correctional Officer at Menard CorrectionalCenter. The Arbitrator watched the DVD and notes that it depicts various job tasks, assignments,areas, equipment and mechanisms. It also features some demonstrations by a variety ofCorrectional Officers. Depictions included the armory, shakedown officer, bar rapping, doublegate door, double gate walkway, opening cell doors, turning gallery cranks, receiving controlhouse, control room, receiving door, shower door segregation, shower door, segregation unit,segregation door, chuckholes, double gate, and tower. Each area requires opening and closingmultiple doors and using multiple keys, mostly Folger Adams keys. These tasks were brieflyshown. Bar rapping was simulated in the DVD and the officer explained that, depending uponthe shift, all open bars will be rapped for security purposes. Officers are to listen to the sound toensure that

the bar is sold and that the inmates have not tampered with the cell doors. The officer held the bar with his right hand and struck the bars approximately 60 times to demonstrate bar rapping on 1 cell (5 to 6 bars vertically in 12 separate sections, each bar struck I time). Bar rapping is conducted on the 7-3 and 3-11 shifts. Officers perform bar rapping at the beginning of each shift on the gallery where they are assigned. There are 55 cells per gallery. While some galleries have half solid doors and half open bars, Correctional Officers will also be assigned more than one gallery shift per day. The Correctional Officers demonstrating these areas and job duties on the DVD used both hands to complete tasks. On one occasion, when the videographer requested a Correctional Officer to demonstrate the unlocking maneuver in slow motion, the officer tried to do so and the lock stuck. He had to turn it multiple times to get it to work and explained that the locks were difficult to turn in slow motion. The DVD was stopped when a Correctional Officer struggled to open a cell door and yanked on it repeatedly with both hands. There appeared to be a mechanical problem. (PX27).

Additionally, Petitioner entered the opinion of the Respondent's expert, Dr. Sudekum, who opined that the job duties performed by Menard Correctional Officers caused and/or contributed to the development of compression neuropathy. (PX25).

At Centralia Correctional Center, Petitioner was a pod officer in charge of running the electric doors. (T.9). From March of 2004 through May of 2008, Petitioner worked as a vocational school officer. (T.50). From May of 2008 through January of 2009, Petitioner was a tower four sally port officer. (T.54). From January of 2009 through July of 2010, Petitioner worked as a tower officer and R5 escort officer. (T.53). Petitioner was promoted to Correctional Sergeant in July of 2010. (T.10). Petitioner testified that he continued to perform the same duties along with his fellow officers despite his promotion. (T.60). Petitioner next made a lateral move to Correctional Maintenance in February of 2012; and in January of 2015, Petitioner became a Supply Supervisor. (T.10).

Petitioner testified that during the time he served at Pinckneyville, he spent 2 to 5 years as a gallery unit officer, and 2 to 2.5 years out of that 5 years as a segregation officer. (T.10, 11, 75). Petitioner also spent time working as a maintenance mechanic between 2001 and 2003, which required him to use tools such as wrenches, screwdrivers, impact guns and jacks to repair and maintain vehicles. (T.12, 13).

As a gallery officer, Petitioner performed wing checks every 30 minutes, performed shakedowns, serviced inmates through chuckholes, and used Folger Adams keys. (T.16). Petitioner testified that at times, the chuckholes stick due to spilled food and intentional abuse from inmates using urine and feces. (T.16, 17, 24, 25). He testified that bleach is used to clean the chuckholes, which results in further rust and deterioration. (T.24, 25). This made it difficult to perform certain job duties such as cuffing and uncuffing inmates and the delivery of mail, laundry and food, all of which were done through the chuckholes. (T.17, 18). Petitioner testified that inmates occasionally resist during the cuffing process, which results in his arms, hands and shoulders being "banged up." (T.18). The doors in segregation are made of heavy steel and have a rubber squeegee lining on the bottom to prevent inmates "fishing lines" (passing items across the floor) or flooding the wing. (T.19). Petitioner also testified that these doors swell in the summer time, making them even more difficult to open. (T.19). Petitioner testified that he worked the 7:00 a.m. to 3:00 p.m. day shift for his regular shift and worked overtime on the 3:00 p.m. to 11:00 p.m. shift. (T.20, 21).

Petitioner testified that in 2010, the facility frequently went on lockdown. (T.21). He testified that 2010 was "one of [the] worst years for lockdowns. (T.21). Petitioner stated that the duties of a

Correctional Officer magnify greatly during lockdown:

> Every inmate on a level one lockdown is cuffed and escorted so all your general pop inmates are treated as seg inmates so everybody's cuffed, everything's done through the food slots or chuckholes. It's just a lot of extra – lot of extra work. (T.22).

Petitioner estimated that 3 or 4 chuckholes on each general population wing were problematic, and double or triple that estimate were problematic in segregation. (T.23). Petitioner testified that if he was "horse enough" he could open the difficult chuckholes; if not, the locksmith was called. (T.23). He testified that Respondent's videos did not depict any of these difficulties, and he described the footage shown as a "very vague and slow day." (T.24). Petitioner submitted a more thorough description of his job duties into evidence as Petitioner's Exhibits 7 and 8.

Petitioner testified that he has opened thousands of door and chuckholes, and has turned tens of thousands of keys over his career with Respondent. (T.25). Petitioner testified that his job duties as a Correctional Officer were harder on his hands than his duties as a Maintenance Mechanic due to the sheer upper extremity repetition involved in being a Correctional Officer. (T.26). Petitioner's current assignment as a Supply Supervisor requires him to repeatedly use his hands and arms to check out inmate purchases in commissary similar to a cashier at a grocery store. (T.33). He testified that there is no part of this job that does not require the use of his hands and arms. (T.33). Petitioner testified that he does not suffer from gout, hypothyroidism, diabetes or rheumatoid arthritis. (T.28). Petitioner shoots guns once a year with his sons and to qualify for his employment with Respondent. (T.28, 29). Petitioner formerly rode a motorcycle for two-and-a-half to three years, but quit when the symptoms in his hands began to worsen and his wife could no longer ride due to scoliosis. (T.29, 30, 69). The Arbitrator notes that Petitioner's symptoms were present at or before the time he purchased his motorcycle in 2008. (T.70). Petitioner has no previous workers' compensation claims for his hands or elbows. (T.31).

Respondent called Jason Thompson, who formerly worked at Respondent's facility as a Correctional Lieutenant, and he testified that Petitioner was a very good worker. (T.80). He testified that aside from some mathematical computation errors, he had absolutely no problems with Petitioner's testimony. (T.80). Petitioner testified that his estimate that he spent 80% of his 15 years as a *housing* unit officer (not to be confused with a gallery officer) included his time as a school officer, because he was not assigned to the walk, pod or armory during that time; he was always where the inmates were. (T.88).

Petitioner also offered the deposition testimony of Jason Thompson. At the time he gave his deposition testimony, Mr. Thompson was a Correctional Lieutenant at Pinckneyville Correctional Center. (PX19). On cross-examination by counsel from the State during his deposition, the following exchange took place with regard to the condition of the chuckhole locks:

Q: Do you use keys as a lieutenant?
A: Yes.

Q: Do you have any difficulties with keys?
A: Sometimes.

Q: How often?
A: Chuckholes stick all of the time, and the reason they stick is because food and stuff gets – you're passing trays through it, so food would drip down in the lock and gum it up. On top of that, every now and then, you get an inmate try to sabotage a unit. It doesn't happen very often that way, but a lot of the chuckholes are sticky. And when I say "sticky," I just mean what they're supposed to do is you just should be able to turn it like that. (Indicating.) [Sic]. When they're brand-new, they're really easy to use. Ours are more difficult. (PX19, p.32-33).

With regard to the doors, his deposition testimony revealed that sometimes the pins in the door become loose and caused problems. (PX19, p.33). When asked to describe the cell doors, the following exchange took place:

Q: Comparing it to like your front door at home –
A: Uh-huh.

Q: -- the key -- is it more smooth than that, or less smooth, as long as your house key or house door is in functioning -- it's --
A: I would say in general it's comparable to a front door, except for the fact that it -- there's more constant tension on some of ours, whereas with a house key it's only when the lock engages and disengages. But yes. Similar.

Q: Are the cell doors -- are they heavy?
A: They're heavy, but they're on fairly stout hinges. I mean, the doors themselves are very heavy.

Q: Are they easy to open?
A: Comparatively speaking, like with a house door -- they're harder than your average house, like your civilian residence. They're -- you have to be -- get more momentum to open them, because they're heavy.

Q: Would they be comparable to like a hospital door?
A: Well, luckily, I haven't spent much time in a hospital, so I –

Q: Or is there a door that -- outside of a prison -- that you can say it would be comparable to?
MR. RICH: Look, Ms. Hagan, what you're doing is you're asking this witness for opinions. Unless you want to lay some foundation as an expert, then I need to start objecting. That's my objection.

Q: (By Ms. Hagan) You can answer.
A: Is it comparable to the outside door on the prison?

Q: Any outside door.
A: Let me try and think of one it would be comparable to. I can't really -- they're heavy doors. They're a lot harder than most doors you're ever going to come across in the civilian world. *Id.* at 33-35.

Lieutenant Thompson testified in his deposition that keying cells and chuckholes, opening and closing doors, cuffing and un-cuffing inmates, turning difficult keys, opening difficul*t doors, pulling on bars, checking cell doors, weapons training, working mandated double shifts, performing extra duties on lock down, opening and closing chuckholes, lifting property boxes, carrying trays upstairs, restraining inmates, guiding inmates through lines, and performing various amounts of paperwork were the duties of a Correctional Officer. He further agreed that there was hardly a single part of the job that did not involve using one's arms, hands, or elbows. *Id.* at 38. In addition, he acknowledged that these activities involved force and stress. *Id.* at 40.

Respondent submitted a "Demands of the Job" form within its Workers' Compensation Documentation Log, which is a form that is designed to quantify Petitioner's arm and hand usage in the performance of his job duties. (RX1). The form never does any lifting, from 1 pound to 100 pounds, "without intermittent rest." *Id.* The form indicates that Petitioner uses his hands for gross manipulation such as grasping, twisting and handling for up to 2 hours per day, and uses his hands for fine manipulation such as typing and good finger dexterity for up to 2 hours per day. *Id.* The form makes no indication whatsoever as to how much weight is lifted with or without carrying or with intermittent rest. *Id.*

The CorVel Job Site Analyses indicate that 70% of the key turning is done by Wing Officers. (RX3). Both of Respondent's Job Site Analyses categorizes the strength demands Petitioner's job as "Medium" which is defined as "lifting 50 pounds maximum with frequent lifting and/or carrying up to 25 pounds. *Id.* "Frequent" is defined as 2.5 to 5.5 hours per day, 34% to 66% of a day, or 33 to 200 repetitions per day. *Id.* Correctional Officers also engage in "frequent" wrist turning and "frequent" finger manipulation. *Id.* The wrist turning was associated with the opening of doors and chuckholes up to 150 times per shift in the housing unit. *Id.* More keys would be turned during lockdown. *Id.*

Respondent's analyses and videos were created by Melanie Welch. (PX12). Ms. Welch is an employee of CorVel, which is a national corporation providing services to employers, third party administrators, insurance companies, and government agencies. (PX12, p.44). When asked if she had ever done a Job Site Analysis for an injured worker, the following interchange took place:

Q: As far as performing a job site analysis for an injured worker, have you ever done that?
A: Yes.

Q: Ma'am, I took your deposition on—in the case of Darin Hathaway versus IYC, State of Illinois on June 9, 2011, and I specifically asked you on line 14 through 18 on page 23, "As far as performing job site analysis for an injured worker, have you ever done that?" Your answer under oath at that point, ma'am, was, line 16 through 17, "For the employer. The injured worker did not call us, no." Do you remember that answer, ma'am? Have you done one since June 9, 2011?
A: Since June 9, 2011. Oh, you mean requested by an injured worker.

Q: No, ma'am. My question was pretty clear, and I caught you in a lie right out of the box. Now, my question now is very simple. Have you performed a job site analysis for an injured worker since June 9?
A: Not requested by an injured worker, but when I do, like, an ergonomic assessment, I consider that to be for the injured worker, for their behalf.

Q: Well, was this done on behalf of the employees at Pinckneyville Correctional Center or was it requested by the State of Illinois?
A: It's requested by the State of Illinois.

Q: I see.
A: For the injured worker.

Q: I don't think it's very funny, ma'am.
A: Okay.

Q: I note for the record you're laughing, but I consider that a sign of disrespect for all parties involved. *Id.* at 44-45.

Ms. Welch received her training in Job Site Analysis from ErgoRehab Incorporated. *Id.* at 45-46. This certification was obtained by mail and through the Internet, and was paid for by Corvel. *Id.* at 47-48.

Ms. Welch could not remember the last time she did any work on behalf of an injured worker, did not know the age of Pinckneyville Correctional Center, did not know that during the 5 to 7 years prior to the video being shot that the facility was short staffed, and admitted that the video was edited. *Id.* at 50-51.

Ms. Welch also believed that it was a requirement that 20% of the entire staff rotate every 90 days, despite the consistent testimony from other witnesses that some Correctional Officers stay in their positions for years. *Id.* at 55. She did not take into account overtime and she mistakenly believed that the segregation unit was contained in the video that she filmed. *Id.* at 56-58. The video did not show any of the locks that would not open, did not show how hard the locks were to open, did not show any bending or breaking of keys, did not show any new keys which were hard to put into the locks, and did not show the heaviness or the weight of the wing doors. *Id.* at 58-59.

Ms. Welch testified that she had neither seen nor lifted a property box, and was completely unaware that they contained TVs, radios, books, paperwork, computers, clothing. *Id.* at 63-64. She further acknowledged that the video showed nothing about Correctional Officers having to carry crates filled with cartons of milk or juice weighing hundreds of pounds up flights of steps to feed inmates. *Id.* at 66. When asked whether it would be important in consider whether a Correctional Officer had to carry a milk carton and/or food tray and simultaneously open and close difficult chuckholes that often stick, Ms. Welch answered, "I don't know, I didn't try it." *Id.* at 67. She also believed that restraining a combative inmate at a Respondent's Pinckneyville Correctional Center would fall in the "medium" category of job requirements. *Id.* at 64.

She further acknowledged that there was nothing in the Job Site Analysis or video about keying and un-keying doors for moving of inmates through the housing units in passes run on any given day; nothing about the transfer box, writs, medical furloughs, medical and furlough bags. *Id.* at 68-69. Nothing was contained in the video about keying out passes for clothing, barber shop, and commissary (where Petitioner works as a Supply Supervisor), or weapons and tactical training. (RX4; RX5).

She did not videotape or observe any cell shake downs and, in fact, believed that shake downs

were performed on Correctional Officers themselves when they entered the prison. *Id.* at 76. She did not video tape the Correctional Officers having to push buttons and operate toggles to open doors, which required the officers to hold down the button with their thumb and toggle the switch with their little and pinky fingers at the same time. *Id.* at 77-78. She had no idea that this happened almost 250 times in an hour and thousands of times in a day. *Id.* at 78. After going through all this information, Ms. Welch testified that whether Correctional Officers are constantly and repetitively using their arms and hands in a forceful manner depended on their post. *Id.* at 88-89.

Petitioner introduced the deposition testimony of Mr. Schuchert, who was employed at Respondent's Correctional Center as the facility's locksmith. (PX13, p.4). He also operates an outside business called Schuchert's Lockshop in Chester, Illinois. *Id.* at 4. He began working for the State of Illinois in 1981 at Menard Psychiatric Center, and transferred to Pinckneyville Correctional Center on August 16, 1998. *Id.* at 5-6. He served as a Correctional Officer, like Petitioner, from 1998 until January 2004. Since 2004, he has been a locksmith at Pinckneyville. *Id.* at 6. Schuchert viewed the videos from Menard Correctional Center and Pinckneyville Correctional Center. *Id.* at 7. He also reviewed the Job Site Analysis. *Id.* at 7-8. He testified that while employed as a locksmith at Pinckneyville, he developed bilateral compression neuropathies and filed a Workers' Compensation Claim that was accepted by Respondent. *Id.* at 8. He was voluntarily paid for his time off and received a settlement. *Id.* at 8, 33-34. He attributed his injuries to his repetitive work at Menard and Pinckneyville Correctional Centers. *Id.* at 9-10. He testified that his problems began while working in the segregation at Menard and progressed while performing his job duties at Pinckneyville. *Id.* at 9-10. He testified that, "It got to the point where if I had a tool box full of locks I couldn't carry them with my left hand, especially from one cell house to the next. I had to keep switching hands because it hurt so bad." *Id.* at 9-10. When asked to describe the difference between the locks in the segregation unit and the general population, he stated:

> The seg unit—the difference between the locks in the seg unit and general pop over there is they have a mogul key—a bigger electronic lock in their unit over there than general pop. General pop has a Medeco lock, which is a smaller key, which is compared to your house key. The mogul keys that are over in the seg unit—they're a bigger key. I would say probably about that big on the head. The length of the key is probably about that long. (Indicating.) *Id.* at 10.

He acknowledged that all Correctional/Wing Officers had to key open chuckholes, cell doors, cabinets, and medical cabinets; and diary each item that had to be keyed out, logged out, keyed back in, and logged back in. *Id.* at 11-12. The same requirements existed in medical. *Id.* at 12. When asked to describe the locks at Pinckneyville, he stated:

> They have gotten worse, naturally, through the years. When we first arrived, the inmates had their own keys to their locks, so there was a lot of wear and tear. I was trying to remember last night how long it's been since we got rid of the—we pulled the inmate keys out over there. *Id.* at 12.

He testified that approximately 7 to 8 years ago, the inmates had their own keys. *Id.* at 13. However, the keys were taken away due to the atrocious wear and tear on the locks from constant inmate traffic. *Id.* at 13. He described the current condition of the locks as fair to poor. *Id.* at 13-14. When asked to describe the locks where Petitioner has worked the last 5 years, he stated:

> . . . We had a lot of wear on the locks then, and it's been—the chuckhole locks have got a lot of wear, especially in the seg, because they get keyed all the time. You're feeding them three meals a day, plus you're transporting them in and out, if you're—if they're going to – they're going to the yard; they're going to passes, and right now, you're—in warm weather, pass ice, mail, anything else—you got to open that chuckhole. *Id.* at 13.

He acknowledged that Respondent's witness, Lieutenant Thompson, was correct when in stating that the locks and the chuckholes were very difficult to open. *Id.* at 16-17. The difficulty stemmed not only from the locks, but from the food spilled in them. *Id.* at 18. He estimated that he switched out between 2 to 5 locks per week, or at times, 4 or 5 locks will go out in a day. *Id.* at 22.

In 2008 during the course and scope of his employment, Petitioner began developing elbow pain and hand pain accompanied by numbness and cramping. (T.32). Petitioner saw his family physician, Dr. Craig Furry; and Dr. Furry referred Petitioner for nerve conduction studies with Dr. Fakhre Alam, which provided electrophysiological evidence of moderately severe bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome without evidence of cervical radiculopathy on October 1, 2010. (PX4; RX11). Petitioner testified that this was the first time he became plainly aware that he suffered from a work-related condition. (T.40). He testified:

> Q: Okay. When did you know that your numbness and tingling in your hands that you noticed beginning in 2008 was related to your work activities?
>
> A: When Dr. Alam diagnosed it as that and my coworkers were having the same issues.
>
> Q: Okay.
>
> A: Up to that point, sir, I thought it was my age and my weight, was just poor circulation, just getting old. (T.40).

Although Petitioner suspected his condition may have been work-related at the time he saw his family physician, he was not certain until Dr. Alam confirmed his diagnosis. (T.41, 42). Petitioner completed a Notice of Injury with Respondent on October 25, 2010. (RX1).

Petitioner continued his treatment with Dr. David Brown, who saw Petitioner on December 1, 2010. (PX5, 12/1/10). Dr. Brown took a history of the development of Petitioner's symptoms over the last two years and documented Petitioner's job duties as a Correctional Officer. *Id.*. After performing his own physical examination and reviewing Petitioner's nerve conduction studies, he agreed that Petitioner suffered from bilateral carpal and cubital tunnel syndrome. *Id.* He specifically noted that Petitioner had no systemic contributory factors for compression neuropathy. *Id.* He recommended conservative treatment by means of splinting and non-steroidal anti-inflammatory medication and stated that he believed that Petitioner's work as a Correctional Officer was in part an aggravating factor in Petitioner's need for further treatment. *Id.*

Petitioner returned to Dr. Brown on January 3, 2011, with no improvement in his symptoms despite conservative care. (PX5, 1/3/11). Dr. Brown noted that Petitioner's condition was not only significant, but also chronic and recommended surgery. *Id.* On April 19, 2011, Dr. Brown still had not

received approval for further intervention. (PX5, 4/19/11). Since Dr. Brown did not take Petitioner's health insurance, he recommended that Petitioner be seen by Dr. George Paletta. *Id.*

Respondent had Petitioner's records reviewed by Dr. James Williams. (PX13, p.11). Based upon Respondent's information concerning Petitioner's job duties, he did not believe that Petitioner's condition was related employment with Respondent. *Id.* at 18, 19. He testified that he did not believe that Petitioner's job duties involved any significant exposure to repetitive, forceful, sustained gripping and/or pinching or any excessive exposure to vibration. *Id.* at 19. He testified that he relied on NIOSH guidelines in rendering his opinion. *Id.* at 55.

On cross-examination, however, Dr. Williams acknowleged that he had no information as to Petitioner's job duties and/or assignments from 1999 to 2009:

> Q: Do you have any information as to his job duties and/or assignments from 1999 until 2009?
> A: I do not, sir. *Id.* at 30.

He further testified that he had no information about any overtime worked by Petitioner. *Id.* at 30, 31. He did not know how often or how long Petitioner worked in segregation. *Id.* at 33. He also acknowledged that performing job duties under the strength demands and frequency listed in CorVel Job Site Analyses could cause or contribute to the development of compression neuropathy. *Id.* at 39, 40. He also acknowledged that the duties of a Correctional Maintenance Officer would cause or contribute to compression neuropathy, and that awareness of Petitioner performing these duties could alter his opinion on causal connection. *Id.* at 48.

Dr. Williams testified that he believed, despite Dr. Alam's clear assessment of moderately severe bilateral compression neuropathy at both the carpal and cubital tunnel, that Dr. Alam's studies were normal. *Id.* at 43, 44. Yet, he testified on cross-examination that he agreed that Petitioner does suffer from carpal and cubital tunnel syndrome and is a surgical candidate based on the failure of conservative treatment . *Id.* at 44, 45. He also acknowledged that Petitioner has no comorbid systemic risk factors for the development of these conditions. *Id.* at 45, 46. Dr. Williams testified that he has made $600,000.00 performing medical-legal work for the State of Illinois. *Id.* at 29.

Dr. Brown also testified by way of deposition. (PX6). Dr. Brown testified that forceful gripping and/or pinching, repetitive motion, repeated or prolonged wrist flexion or extension, forceful turning of the wrist or exposure to vibration are common occupational risk factors for the development of carpal tunnel syndrome. *Id.* at 12. He testified that the risk factors for carpal and cubital tunnel syndrome are essentially the same. *Id.* at 16, 17.

Dr. Brown testified that he had access not only to a personal job description from Petitioner, but also deposition testimony from several employees at Respondent's facility, including other Correctional Officers, a locksmith, and former Correctional Lieutenant Jason Thompson, who also testified at Arbitration. *Id.* at 31, 37. Dr. Brown noted that Lt. Thompson was the one who toured Dr. Williams through the facility. *Id.* at 31. Dr. Brown testified that Petitioner's description of the difficulties encountered in the performance of his job duties, including the condition of the locks and chuckholes, was consistent with the testimony contained in the 5 other depositions which he reviewed. *Id.* at 39, 40. Dr. Brown testified that Petitioner provided him with his work history timeline, outlining his job posts over the course of his career with Respondent. *Id.* at 31, 32. He was also aware that Petitioner worked

overtime equivalent to approximately 50 shifts om 2009 and 2010. *Id.* at 34.

Based on Petitioner's description of his job duties, Dr. Brown believed that Petitioner's job duties played a role in his development of bilateral compression neuropathy at levels of the carpal and cubital tunnel:

> Based on his job description, I felt that he was exposed to occupational stressors at a level that are abnormal outside of the course of daily living, and for an extended period of time that, I felt that those activities would be considered in part an aggravating factor to both carpal tunnel syndrome and cubital tunnel syndrome. *Id.* at 23.

Dr. Brown testified that force, frequency, and duration were the key factors he looked at while he rendered his opinion on causal connection. *Id.* at 23, 24. He testified that Petitioner estimated that he opened and closed 50 or so cell doors an hour, and opened and closed 200 food slots within 30 minutes during feeds. *Id.* at 20. Petitioner also vividly described cuffing and uncuffing inmates and writing tickets. *Id.* at 20. He also testified that Petitioner's symptoms as a result of performing these duties could perhaps not manifest for some time, due to a latency period for compression neuropathy, which is different for and specific to each individual. *Id.* at 24, 25. He stated:

> In repetitive trauma, it's an important concept. The latency period is the duration of exposure. And patients can be exposed to occupational factors that are associated with the development of repetitive trauma conditions for many years and be completely asymptomatic, but eventually they reach a threshold to where that microtrauma accumulates to the point where they be come symptomatic and its manifests itself. So it's an imporant concept in many areas of medicine, but it's also a critical concept in understanding repetitive trauma, which is why duration of exposure is so important. *Id.* at 26.

He testified that Petitioner's age was the only comorbid systemic risk factor for the development of his conditions. *Id.* at 27. He testified that Petitioner's hobbies, including his motorcycle riding, would be important factors, given that the frequency and duration of those activities would be greatly outweighed by the amount of exposure Petitioner received at work. *Id.* at 27. He also noted that the fact that Petitioner may have other contributing factors does not change the fact that his employment was also a factor. *Id.* at 27, 28. He stated that oftentimes patients have multiple factors, both occupational and non-occupational, which contribute to their condition of ill-being. *Id.* at 28. In reference to Petitioner, he stated, "And so the only identifiable nonoccupational risk factor he had was his age, and that certainly wouldn't preclude his over decade of work at Pinckneyville doing those job duties as being an aggravating factor." *Id.* at 28.

Petitioner testified that his symptoms persist and that he would like to receive the treatment recommended by Dr. Brown. (T.32).

CONCLUSION

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment

by Respondent?

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. "The word 'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens...Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254 (1919). Under Illinois law an injury need not be the sole factor, or even the primary factor of an injury, as long as it is **a** causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 205, 797 N.E.2d 665 (Ill. 2003) [Emphasis added]. Even when other non-occupational factors contribute to the condition of ill-being, "[*A*] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (3rd Dist. 2000). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982). The Supreme Court in *Durand v. Indus. Comm'n* noted that the purpose of the Illinois Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918, 925 (Ill. 2006).

The Arbitrator notes that Illinois Courts have refused to adopt any standard threshold which a claimant must meet in order for his or her job to classify as repetitive enough to establish causal connection. In the repetitive trauma case of *Fierke*, the Appellate Court specifically applied the foregoing legal standard of causation specifically to a repetitive trauma case and noted that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Fierke,* N.E.2d at 849. The Court specifically stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.*

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App.2d Dist. 2005). In fact, the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (1991) and *Edward Hines supra.*

The Appellate Court in *Darling v. Indus. Comm'n* even stipulated that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury in reversing a denial of benefits, stating that demanding such evidence was improper. *Darling v. Industrial*

Comm'n, 176 Ill.App.3d 186, 195, 530 N.E.2d 1135, 1142 (1st Dist. 1988). The Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Darling,* N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. The Arbitrator notes that Petitioner's job duties involve the performance of tasks distinctly related to his employment as a Correctional Officer, which are not activities that are even performed by the general public, let alone ones to which the public would be equally exposed.

In *City of Springfield v. Illinois Workers' Comp. Comm'n*, the Appellate Court issued a favorable decision in a repetitive case to a claimant in which the claimant's work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *City of Springfield v. Illinois Workers' Comp. Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (Ill.App. 4th Dist., 2009). As was noted by the Commission and reiterated in the Appellate Court decision in *City of Springfield v. Illinois Workers' Compensation Comm'n*, "while [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

The Commission has also found the at the job duties of a Correctional Officer at Pinckneyville Correctional Center aggravate and contribute to the development of repetitive injuries. *Dustin Bowles v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0842 (2014); *Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014); *Chris Walter v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0634 (2013); *Craig Briley v. Pinckneyville Corr. Ctr.*, 13 I.W.C.C. 0519 (2013). Although Petitioner's comorbid conditions and hobbies may have at some point played a role in his condition of ill-being, this is of no consequence where Petitioner has established that his job duties are a contributing factor in the development of his condition. The Commission has recognized same in a correctional case where the claimant was involved in martial arts activity outside of his employment with Respondent. *Samuel Burns v. Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (2014). In the repetitive trauma case of *Fierke*, the Appellate Court specifically applied the foregoing legal standard of causation specifically to a repetitive trauma case and noted that non-employment related factors that contribute to a compensable injury do not break the causal connection between the employment and a claimant's condition of ill-being. *Id.* at N.E.2d at 849. The Court specifically stated, "The fact that other incidents, whether work related or not, may have aggravated a claimant's condition is irrelevant." *Id.* Dr. Brown specifically noted that the exposure to occupational contributory risk factors outweighed any exposure to risk factors through any non-occupational means.

Dr. Brown credibly testified that Petitioner 's job duties played a role in his development of bilateral carpal and cubital tunnel syndrome. The Arbitrator finds it significant that Petitioner has no systemic risk factors outside of his age for the development of same. The Arbitrator also notes that Dr. Brown had considerable knowledge of Petitioner's job history and the difficulties faced by officers at Respondent's facility.

The Arbitrator finds that the causation opinion of Dr. Brown is more credible than the opinion of Dr. Williams. Dr. Brown had a more thorough understanding of Petitioner's job history and job

duties. Dr. Williams fully acknowledged on cross-examination that he had no knowledge of Petitioner's job post/assignment history. Thus, he had no solid information upon which to base his opinion. The Arbitrator does not believe that Dr. Williams' brief performance of some of the job duties of a Correctional Officer the most favorable, controlled circumstances would give him an accurate understanding of the toll these duties would take when performed repetitively for over a decade. Additionally, Respondent's information upon which Dr. Williams' opinion was based was incomplete. Dr. Williams was entirely unaware of what Respondent's Job Site Analyses were lacking. Dr. Brown, on the other hand, had not only Respondent's information, but also first-hand information from Petitioner and other employees at Respondent's facility concerning actual conditions.

Additionally, Dr. Williams testified that he formulated his opinion using NIOSH standards. The Commission has repeatedly refused to adopt or approve OSHA or NIOSH standards for the purpose of determining whether sufficient force or repetition existed to cause accidental injury and create causal connection based on the Appellate Court's holdings in *Edward Hines*. *See James Peterman v. Gilster-Mary Lee Corp*, 13 I.W.C.C. 641 (2013); *James Keith v. Owens Illinois*, 11 I.W.C.C. 0379 (2011); *Phyllis Haddick v. Porta Central School*, 11 I.W.C.C. 1094 (2011).

Based upon the foregoing, the Arbitrator finds that Petitioner met his burden of proof regarding accident and causal connection.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

Repetitive-trauma injuries occupy an odd niche between accidental injury, compensable under the Act, and occupational disease, compensable under the Workers' Occupational Diseases Act. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879, 710 N.E.2d 837, 840 (Ill. App. 1st Dist., 1999). In choosing to cover such injuries as accidental injuries, as noted by the Appellate Court in *A.C. & S.*, the Supreme Court **deliberately** modified the standards for determining the date of injury for repetitive trauma cases in order provide protection for injured workers. *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 840-841 (Ill. App. 1st Dist., 1999). Even though carpal tunnel syndrome is not treated as an occupational disease in Illinois, we still look to the Occupational Diseases Act for guidance. *Id.*

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining manifestation dates. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2007). Although the date on which the employee becomes aware that he has a condition related to work was the first method for determining a manifestation date, it is not the only permissible means for alleging or proving manifestation. The manifestation date can be set as: **(a)** the date the employee actually became aware of the physical condition and its relation to work through medical consultation; **(b)** the date the employee requires medical treatment; **(c)** the date on which the employee can no longer perform work activities; or **(d)** when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3rd Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

Although a claimant is aware of symptoms and carries a suspicion that these are work-related, the Supreme Court has stated, "The 'fact of injury' is not synonymous with the 'fact of discovery'" *Durand,* N.E.2d at 927. In short, claimants are not charged with filing a claim as soon as they believe they *may* have a work-related condition, nor are they penalized for failing to realize a condition is work-related when the employer feels that he or she should have. In fact, the Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929. The Court likewise noted that the claimants would have had difficulty proving injury with a sketchy and equivocal understanding of same. *Id.* at 930. The standard that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has since become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930. In *Durand*, the claimant was not sure her pain was from carpal tunnel syndrome, but "she believed it was work-related" in 1997, some 3 years before her injuries manifested in 2000. *Durand v. Indus. Comm'n*, 862 N.E.2d at 929-30.

In *Oscar Mayer*, the Court embraced the "date of collapse" method of determination (setting the manifestation date on the date of surgery, or the date the employee could no longer work), allowing compensation to be awarded to a claimant despite his full knowledge that his condition was work-related well before he filed a claim because the claimant diligently served his employer until he could no longer do so without intervention for his repetitive injuries. *Oscar Mayer supra.* The Court noted that no prejudice can occur in employing such a method, since it is not until the employee actually misses work for his injuries that the employer becomes adversely affected; and the notice provisions were not impugned as this flexible and fair provision in no way interfered with an employer's ability to effectively investigate the claim.

In *Three "D" Discount,* the claimant sought treatment with his family physician, Dr. Johnson, who referred him to a Dr. Block for evaluation. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261 (1989). Dr. Block performed an EMG study and a physical examination of the claimant, and sent the EMG results to Dr. Johnson. *Id.* Dr. Block's report stated that his examination suggested bilateral carpal tunnel syndrome. *Id.* Dr. Johnson discussed the results of the EMG with the claimant and referred him to a Dr. McKechnie. Claimant reported to Dr. McKechnie and gave a history of his symptoms, but did not state that his condition was work-related or that Dr. Johnson had so informed him. Dr. McKechnie scheduled the claimant for surgery, and the claimant notified his employer that he required surgery and that it was his physician's opinion that that the condition was related to work. The Appellate Court found that Petitioner's manifestation date was the day he met with Dr. McKechnie and stated the following:

> The evidence in this case establishes that Dr. Carl Johnson discussed Dr. Block's report of the EMG results with petitioner. . . No direct evidence was presented regarding whether Dr. Johnson ever told Petitioner that his injury was work related. . . . It was not until July 10, when petitioner met with Dr. McKechnie, that it became clear that petitioner's condition necessitated surgery. . . Based on the evidence of record, it could be reasonably inferred that petitioner first learned that his condition of ill-being was work-related at some point between July 10, and the first of August, 1984. Applying the reasonable person test to these facts, we find that although petitioner persisted in his employment until August 10, a reasonable person in these circumstances would have been on notice that the condition was both work-related and medically disabling on July 10, 1984. *Three "D" Discount*

Store v. Industrial Commission, 556 N.E.2d 261, (1989) [emphasis ours].

In the case at bar, Petitioner was first diagnosed with bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome following his nerve conduction studies on October 1, 2010; and he testified that at that time, his condition and its relation to work became plainly apparent to him. Accordingly, the Arbitrator finds that Petitioner selected an appropriate manifestation date under the Act.

Issue (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?

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

The Arbitrator finds that all of Petitioner's care has been conservative and reasonable. However, Petitioner has not been cured or relieved of the effects of his injuries. Dr. Williams agreed based on the second nerve conduction studies that Petitioner indeed suffers from bilateral carpal and cubital tunnel syndromes, and further agreed that surgery was appropriate after the failure of conservative care. Petitioner testified that his symptoms persisted despite conservative care, and that he would like to have the surgery recommended by Dr. Brown. (T.32).

Respondent is therefore ordered to pay the medical expenses contained in Petitioner's group exhibit and shall have credit for any amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims from these medical providers arising out of the expenses for which it claims credit. Respondent shall further authorize and pay for the treatment recommended by Dr. Brown, including but not limited to surgery.

This award shall in no instance be a bar to a further hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUCIO MORENO,

Petitioner,

vs. NO: 11 WC 16460

SHOP N SAVE MARKET, LLC-ARCHER, 16IWCC0008

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, permanent partial disability and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Findings of fact and conclusions of law

The Commission finds:

1. Petitioner worked for Respondent as a Butcher. In addition to cutting meat, he handled the delivery of product. He performed heavy lifting of boxes weighing upwards of 140 pounds 10-12 times daily. He had no history of pain or treatment for his right foot or his back.

2. On March 13, 2011 Petitioner reported to work at 2p.m. At 8p.m. Petitioner was walking through the back door when he slipped on his left leg. There was a sink behind him so he twisted with his right foot in order to avoid it. While twisting he felt a crack in his back. He then fell and landed on his right foot. He slipped on

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soapy water that his co-worker was cleaning the floor with. His right knee hit the floor as well.

3. The following day Petitioner had numbness in his right foot. After two days the numbness persisted and his back pain increased, including radiating pain down the back of his leg.

4. As Petitioner continued working, his abilities deteriorated.

5. On March 22, 2011 Petitioner filed a written report and then sought medical care at Marque Medicos. He was taken off work and prescribed physical therapy and an MRI.

6. A March 30, 2011 MRI revealed a disc bulge at L5-S1 and a transitional lumbosacral vertebra with rudimentary S1-2 intervertebral disc.

7. On March 31, 2011 Dr. Engel returned Petitioner to work with restrictions. After returning to work on April 9, 2011 Petitioner's pain increased. After 2 days he was taken off of work again and was referred for an EMG. A foot specialist provided him with a special orthotic shoe.

8. An April 28, 2011 lumbar MRI revealed relatively unremarkable results outside of a minimal disc bulge at L5-S1 with no herniation or impingement. Dr. Levin opined that he could not substantiate any additional chiropractic or physical therapy treatment for Petitioner.

9. Currently Petitioner stays at home and takes care of the house and his children. He occasionally has pain during chores. The pain only requires rest, not medication. He carries laundry weighing 25 pounds, but notices back pain afterwards. He also has pain during cold weather. He cannot sit or stand for longer than 3 hours. He cannot run a lot to play with his kids and has pain with quick movements. He also has pain during relations with his wife.

Based on the evidence, the Commission affirms the Arbitrator's rulings on the issues of causal connection, medical expenses, temporary total disability and penalties and fees.

The Commission, however, modifies the Arbitrator's ruling with respect to permanent partial disability (PPD). The Commission views the evidence slightly different than does the Arbitrator, and hereby increases the PPD award from a 2% to a 4% loss of use of Petitioner's person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $319.00 per week for a period of 5-3/7 weeks, 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 pay to Petitioner

16IWCC0008

the sum of $319.00 per week for a period of 20 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 4% loss of use of Petitioner's person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses through April 28, 2011under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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.

DATED: JAN 5 - 2016
O: 10/29/15
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MORENO, LUCIO
Employee/Petitioner

Case# **11WC016460**

16IWCC0008

SHOP-N-SAVE MARKET LLC
Employer/Respondent

On 4/1/2015, 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 0.13% 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:

1922 SALK, STEVEN B & ASSOC LTD
DAMIAN FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

0210 GANAN & SHAPIRO PC
MICHELLE LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

16IWCC0008

☐	Injured Workers' Benefit Fund (§4(d))
☐	Rate Adjustment Fund (§8(g)
☐	Second Injury Fund (§8(e)18)
☒	None of the above

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

LUCIO MORENO
Employee/Petitioner

Case #11 WC 16460

v.

SHOP-N-SAVE MARKET, LLC.,
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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on March 18, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☐ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☒ Maintenance ☒ TTD?

L. ☒ What is the nature and extent of injury?

M. ☒ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On March 13, 2011, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $12,600.00; the average weekly wage was $450.00.
- At the time of injury, the petitioner was 33 years of age, single with three children under 18.
- The parties agreed that the respondent paid $14,095.71 in temporary total disability benefits.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $319.00/week for 5-3/7 weeks, from March 22, 2011, through April 28, 2011, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $319.00/week for a further period of 10 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 2% loss of the man as a whole.
- The amount of temporary total and permanent partial benefits owed is reduced by the $14,095.71 paid by the respondent.

- The respondent shall pay the petitioner compensation that has accrued from March 13, 2011, through March 18, 2015, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his lumbar spine through April 28, 2011, and for his right foot through April 8, 2011, was reasonable and necessary and is awarded. The respondent is not liable for medical expenses incurred by the petitioner for his lumbar spine after April 28, 2011, and for his right foot after April 8, 2011. The respondent shall pay the medical bills in accordance with the Act, the lowest medical fee schedule or any prior adjustments or negotiated rate. Also, multiple billing for professional services for each chiropractic and physical therapy modalities and the cost for transportation services are denied. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- The petitioner's request for penalties and fees is denied.

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.

Robert E. Williams

Signature of Arbitrator

April 1, 2015

Date

APR 1 - 2015

FINDINGS OF FACTS:

The petitioner, a butcher, sustained injuries while working on March 13, 2011. He continued working through March 22nd, at which time he sought chiropractic care with Dr. Perez at Marque Medicos for lower back pain and right ankle and foot pain. The assessment was lumber and right ankle/foot strains for which physical therapy, medication management by Dr. Engel and no work was recommended. X-rays of his right ankle and lumbar spine were negative for fractures. The petitioner reported continuing back pain at a follow-up on March 30th. An MRI the same day reportedly revealed a disc bulge at L5-S1 and a transitional lumbosacral vertebra with a rudimentary S1/S2 intervertebral disc. The petitioner worked the 9th and 10th of April and reported worsening symptoms on April 11th to Dr. Perez and numbness and tingling in his legs. Dr. Kane's assessment of the petitioner's feet the same day was bilateral plantar fasciitis, right worse than the left. An MRI of his right foot on April 12th indicated a partial-thickness tear of his peroneus longus tendon. Dr. Kane's diagnosis on April 25th was peroneal tendon tear of the petitioner's right foot. The petitioner treated with Dr. Kane through October 17th.

A neurological testing report on April 22nd indicated evidence of bilateral S1 involvement due to the absence of the H-reflexes. Dr. Levin evaluated the petitioner pursuant to Section 12 on April 28th. Dr. Engel gave the petitioner right L5 and S1 transforaminal epidural steroid injections on May 11th, which did not provide the petitioner any pain relief. The petitioner saw Dr. Erickson on June 24th, who opined that the MRI showed a small disc herniation at L4-5. Dr. Erickson performed a L4-5

discectomy and right foraminotomies over the L4 and L5 nerve roots on July 27th. At the request of the respondent, the petitioner was evaluated by Dr. Bernstein on December 1st.

The petitioner followed up with Drs. Perez, Erickson and Engel and continued physical therapy through January 5, 2012, at which time, he reported increased symptoms, aching right low back pain and right lateral thigh numbness to Dr. Perez. An MRI on January 7th showed post-operative changes at L5-S1 related to a right hemilaminectomy and a right paracentral/foraminal protrusion at L5-S1. The petitioner worked for two days after January 15th. Dr. Erickson opined on January 20th that the MRI showed a right paracentral disc herniation. Dr. Engel gave the petitioner right L5 and S1 transforaminal epidural steroid injections on April 4th. On July 3rd, Dr Erickson performed a transforaminal interbody fusion on the right at L4-5, foraminotomies over the L4 and L5 nerve roots and a total facetectomy and ostectomy over the L4-5 segment. On August 27th, the petitioner reported improvement with surgery but increased back pain since an auto collision on August 24th. The petitioner was re-evaluated by Dr. Bernstein in October 2012. The petitioner followed up with Drs. Perez, Erickson and Engel and continued physical therapy through November 29th, at which time he was discharged by Dr. Engel. On December 4th, the petitioner denied any radicular pain or the need for medication for mild back pain. Dr. Erickson limited the petitioner to 50 pounds of frequent lifting.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar spine through April 28, 2011, was reasonable and necessary and is awarded. The respondent is not liable for medical expenses incurred by the petitioner for his lumbar spine after April 28, 2011.

The medical care rendered the petitioner for his right foot through April 8, 2011, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his right foot after April 8, 2011, was not reasonable or necessary and is denied. The petitioner had only a right ankle sprain. He worked April 9th and 10th, 2011 and when he started treatment with Dr. Kane on April 11, 2011, it was for bilateral plantar fasciitis, right worse than the left. The physical therapy and treatment after April 8, 2011, was not reasonable or necessary to relieve the petitioner of the effects of his right ankle injury and is denied.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his condition of ill-being with his lumbar spine through April 28, 2011, and with his right foot through April 8, 2011, was causally related to the work injury. The March 30, 2011, MRI study showed only a 2 mm disc bulge with no evidence of stenosis. Dr. Levin opined on April 28, 2011, that the MRI was relatively unremarkable and revealed just minimal bulging of the L5/S1 disc with no disc herniation or nerve impingement. On May 13, 2011, Dr. Levin opined that based on his examination, the EMG studies and the normal Achilles reflexe, the petitioner did not have any radiculopathy. Dr. Bernstein opined on January 30, 2014, that the MRI was normal without a disc herniation or nerve root compression. Pursuant to a utilization review, Dr. Baylas opined that the lumbar decompression at L4/5 on July 27, 2011, was not medically necessary based on the clinical guidelines, a normal EMG, a 2 mm disc bulge and no stenosis on the MRI, 5/5 motor strength, symmetric reflexes and minimal sensory change.

Also of concern is Dr. Bernstein's finding that there was no evidence of a surgery or entry into the spinal canal on the MRI study of the petitioner on January 7, 2012. Moreover, in *Martin Martinez v. Hot & Fresh, Inc. d/b/a KFC, 14 IWCC 1039 (Dec. 4, 2014,* a similar case involving lumbar surgery, the Commission found Dr. Engel and Dr. Erickson not credible.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

The respondent shall pay the petitioner temporary total disability benefits of $319.00/week for 5-3/7 weeks, from March 22, 2011, through April 28, 2011, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The respondent shall pay the petitioner the sum of $319.00/week for a further period of 10 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of2% loss of the man as a whole.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties and fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM BARNETT,

Petitioner,

vs. NO: 13 WC 27442

MAGNESIUM ELEKTRON,

16IWCC0006

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation and medical expenses, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on June 11, 2013. The Commission also awards benefits consistent with this decision. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Petitioner was a 21 year worker for Respondent, initially as a production supervisor from 1994 to 2003, and a production worker thereafter, noting he had worked the night shift for the 11 years prior to his testimony on December 23, 2014. He testified that his job involved the cleaning and packaging of magnesium products. In performing his work duties, he was required to use a variety of power and hand tools which appear to the Commission to have involved significant gripping and force. (Tr. 9-12, 29).

Petitioner testified that he performs "banding" activities for three to six hours per shift. He had used a manual banding tool up until 2013, when an electric bander was implemented.

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(Tr. 12-13). As to the manual bander, he stated: "you press it to open it up, you feed the banding material into it and then you have a ratchet that you tighten it up . . . After you get it tight, then you – I use my left or my right hand for crimping it . . . You got two handles here, one you ratchet it up to tighten it then release that and you take the other handle. You crimp it with either hand but I use both hands when I'm banding". He noted that he would ratchet with the right hand and crimp with the left hand. When the electric bander came into play, Petitioner indicated he would have to depress a handle to feed in the banding material, use a button to tighten it, and another button that crimps the material. He would then engage it again and pull it off the banding material. (Tr. 12-15).

Petitioner testified his duties also included driving a fork truck, which he entered and exited approximately 64 times per twelve hour shift, and he gripped handles in doing so. He generally worked 8 hour shifts, but every six weeks there would be a two to three week period where he would work 12 hour shifts. He testified that on those shifts, about 10 of the 12 hours were spent banding material. Petitioner also testified that he would have to "flip" sheets of metal (either 48" x 108" or 52" x 108"), which varied in weight but were approximately 46 pounds, using both hands in order to inspect both sides before sending it to the oven or to be coated. (Tr. 15-19). He would have to recoil metal manually for years, noting "that really set me off". (Tr. 24-25).

On cross examination, Petitioner agreed that he uses the forklift on and off with varied frequency. The amount of metal flipping he did also varied, noting it could be done anywhere from once a month to ten times per week, and that it was performed more often on the day shift than the night shift. (Tr. 29-30). He also testified that he did use various hand tools around his home, and remodeled his kitchen and bathroom in 2007 or 2008, in the process using a grinder, staple gun, hammer, crescent wrench and screwdrivers. However, he had not used these tools for any other home projects since that time, other than occasionally tightening a screw. Petitioner has played drums since 1960, but was last in a band seven or eight years prior to his testimony, noting he since plays maybe once a week for a few minutes. He did not have hand symptoms while playing in the band, but did when he was remodeling his home, noting that when he experienced pain he would stop what he was doing. (Tr. 35-39). Petitioner agreed that recoiling metal became automated at some point prior to 2013, noting he and his work partner would do it nightly prior to that time. He couldn't recall when the process changed. (Tr. 39-40).

Petitioner testified that he began to develop hand symptoms over three to four years prior to his testimony, and completed an accident report for Respondent (Petitioner's Exhibit 7) on June 11, 2013, noting that he did not know his diagnosis at that time and just thought he had "sore hands". Petitioner agreed that he may have told Dr. Rotman, Respondent's Section 12 examining physician, in June, 2013 that he'd had symptoms since 2009. He testified that he first was diagnosed with carpal and cubital tunnel syndrome when he underwent EMG testing on May 16, 2013, and that this was when he first learned that his symptoms were work related. (Tr. 20-21, 24-27).

He initially sought treatment with his primary care provider, Dr. Kopjas, who referred him to Dr. Beatty. (Tr. 21-22).

Petitioner testified that he has been diagnosed with non-insulin dependent diabetes since 2005, and treated with practitioners he was referred to by Dr. Kopjas, and agreed on cross examination that it was often poorly controlled before the year prior to his testimony. (Tr. 19-20, 27-28).

Robb Woolen, Respondent's environmental health and safety manager, testified via deposition on December 18, 2014. (Respondent's Exhibit 2). He did not begin working for Respondent until October 14, 2013, but testified that he is familiar with Petitioner's job duties. He did indicate that when he began with Respondent, Petitioner was off work on non-occupational disability, and when he returned he was evaluated on the day shift, had no restrictions and so he was returned to the night shift. (Rx2, pp. 24-25).

Mr. Woolen noted that the banding activities mainly took place during the 4 pm to 12 am shift, so whether Petitioner would perform the task on the night shift depended whether there was a rush item that needed banding. He identified photos of both the manual and automated banding tools, banded product and the forklift, which were attached as exhibits to his deposition, as well as described how each are operated. (Rx2, pp. 8-13). In doing so, he testified that the manual banding process involved more manual work with the hands than the automated process, and that the night workers tended to drive from furnace to furnace using the forklift. He described manual banding as being similar to operating a car jack, with free movement until the tension builds, and then one or two cranks with tension. He indicated there would at most be minor vibration operating the forklift depending on the load. (Rx2, pp. 12-13). Mr. Woolen also prepared a "Job Physical Analysis" (Deposition Exhibit 7), testifying that it was a worst case scenario for all three shifts as far as physical requirements. Woolen testified that he himself had never been employed by Respondent as a production worker, but indicated he had performed all of the required duties at one time or another. The physical analysis lists various job activities, including but not limited to: a) pulling pumps and stirrers (90 to 125 pounds), rolling coils onto a cart (60 pounds force), metal bands from rolls, air and water hoses and slabs; b) lifting multiple items, alone or in tandem, weighing between 60 and 110 pounds; c) pushing 38 pound impact wrenches, loaded dollie carts of various weights, office furniture weighing up to 100 pounds; d) moving magnesium billets suspended from tongs, sheets of aluminum, and sample carts of varying weights; e) handling of tools and equipment including grinders, saws, vacuum cleaners, portable sprayers and pumps, roll grinding sled, common and power hand tools, banders, sledge hammers, coil grabs, sheet lifters and tongs; f) shoveling of aluminum chips. (Deposition Exhibit 7).

The records of Dr. Kopjas indicate that Petitioner initially complained of his hands on April 16, 2013, noting Petitioner's cervical therapists "keep asking him if he has had an NCV due to the fact that he has persistent pain/numbness radiating down his right arm". The referral noted: "paresthesias right arm for 5 months, PT no help". A May 16, 2013, right upper extremity

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EMG/NCV was consistent with severe carpal tunnel syndrome, and bilateral testing on July 11, 2013 showed severe right and moderately severe left carpal tunnel syndrome, probable bilateral cubital tunnel and also underlying peripheral neuropathy most likely due to diabetes. The report also stated: "CTS and ulnar neuropathy are superimposed on the peripheral neuropathy which is by itself mild". (Petitioner's Exhibits 1, 2 & 3).

Dr. Beatty, a hand, plastic and reconstructive surgeon, initially saw Petitioner on June 10, 2013, and his notes indicate he was referred by Dr. Kopjas. Included in his records from that date is a document titled "Job Description". This document states as follows: "Recoiler 20+ times a day for several years (process now automated). Placing a round mandrel in-side of a coil & tightening coil by turning steel handle in a clockwise motion. Coil wt. up to 250#. Mount and dismount fork truck 30 to 60 times a shift. Climbing steel ladders. Variable # of times, as few as 0 & as many as 26 times in a shift to gain access to top of ovens. (stairs have been installed on several ovens). Banding tools, racheting motion to tighten & crimp. Squeezing motion to release". It was also noted that Petitioner used hand or power tools for 4 to 12 hours, depending on shift. (Petitioner's Exhibit 4).

Dr. Beatty testified via deposition on November 6, 2014. (Petitioner's Exhibit 5). Dr. Beatty diagnosed Petitioner with bilateral carpal tunnel syndrome, severe on the right, as well as bilateral cubital tunnel and triggering fingers at the time of the initial examination. His recommendation was bilateral carpal tunnel release surgery. He had no current recommendation regarding the cubital tunnel, noting he would need to examine Petitioner more currently. Dr. Beatty opined that both the carpal tunnel and cubital tunnel conditions were either caused or aggravated by Petitioner's work activities, in particular the banding activities. He noted that while he didn't know exactly how many hours per day Petitioner performed this activity, he stated: "it requires some degree of strength and hand-intensive activity with repetitive use and the gripping and the position of the wrist during this activity", and that this led to Petitioner's compressive neuropathies. (Px5, pp. 29-31). Dr. Beatty also opined that recoiler use, involving tightening a coil by turning a steel handle with the coil weighing up to 250 pounds, also could have caused Petitioner's condition. He acknowledged that Petitioner's diabetes could have also contributed to these diagnoses, but that this did not take away from the fact that the job duties also contributed to them. He testified on cross examination that he was not asked to offer an opinion with regard to the trigger fingers. It should be noted that Dr. Beatty also indicated that Petitioner is ambidextrous. (Px5).

Dr. Rotman examined Petitioner on behalf of the Respondent on May 19, 2014, and testified via deposition on August 4, 2014. His diagnosis was bilateral carpal tunnel syndrome with underlying diabetic peripheral neuropathy, bilateral wrist arthritis, middle finger triggering and mild Dupuytren's syndrome. He also noted that the EMG/NCV was suggestive of left cubital tunnel. He opined that none of these conditions were work related, based on Petitioner's multiple comorbidities: diabetes, age and being overweight. He did not change his opinion after being asked to assume the "Job Physical Analysis" prepared by Mr. Woolen was accurate regarding Petitioner's work duties. (Respondent's Exhibit 1).

16IWCC0006

On cross examination, Dr. Rotman agreed that the Job Physical Analysis was significantly similar to what Petitioner reported to both himself and to Dr. Beatty. He indicated he had opined in the past that carpal tunnel was caused by diabetes, but if the person also had a repetitive, hand-intensive job with a lot of heavy gripping, the job could be an aggravating factor. He further opined that carpal tunnel in almost all cases is multifactorial, and that in a case like this you have to look at the severity of diabetes versus the intensity of the job duties in order to provide a causation opinion. While he agreed that the banding duties Petitioner performed at work was hand intensive, Dr. Rotman did not believe he performed it for long enough periods to be a risk factor in Petitioner's upper extremity conditions, noting he would need to be doing it for the majority of four hours per day. While other activities may or may not have been as hand intensive, Dr. Rotman believed that even four hours per day of hand intensive activity would not be causative, but is an aggravating factor. (Rx1, pp. 21-23).

The Commission finds that Petitioner sustained an accident arising out of and in the course of his employment on June 11, 2013. We believe that this date is when the Petitioner first reasonably knew both the fact of his injuries as well as the causal relationship of the injuries to his employment. It appears that as of his April 16, 2013 visit with Dr. Kopjas, Petitioner did not realize what his condition was or that it was causally related to his employment, as he was treating for his cervical spine at the time. He testified that he didn't realize he had specific upper extremity problems until after he underwent EMG/NCV testing on May 16, 2013. He then was not examined by a specialist in this regard until he saw Dr. Beatty on June 10, 2013. He was advised at that time to notify the Respondent, which he did the next day. (Petitioner's Exhibit 7). Based on the facts of the case, we find that June 11, 2013 is a proper manifestation date under the law, and that the Petitioner promptly provided notice to the Respondent.

While the Commission acknowledges the Arbitrator's decision, and notes that this was a difficult case to decide, we believe that the greater weight of the evidence indicates that the Petitioner's work activities were a causative factor in his development of his bilateral carpal tunnel syndrome and cubital tunnel syndrome conditions.

As our Supreme Court noted in *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill.Dec. 70 (2003), a work related injury need not be the sole or principal causative factor in a claimant's injury, as long as it was a causative factor in the resulting condition.

We find the Petitioner was credible in describing both his work and non-work activities which involved the use of his upper extremities. The job he did for Respondent, particularly the manual banding job, involved significant gripping and force resulting in our finding, as opined by Dr. Beatty, that the job activities at least contributed to these conditions. While Mr. Woolen testified about his understanding of the Petitioner's job duties, he did not begin his employment with the Respondent until October 14, 2013, four months after the manifestation date. This is important in particular given the fact he was not present at Respondent's facility while the

16IWCC0006

manual bender was being used. While the evidence presented certainly indicates other potential non-work related causative elements – diabetes, drumming, use of tools at home, a level of obesity – the Commission nevertheless believes the evidence also indicates a significant level and frequency of gripping force required in Petitioner's job with Respondent. As such, we find the opinion of Dr. Beatty to be more persuasive than that of Dr. Rotman.

The evidence in this case with regard to the cause of Petitioner's Dupuytren's syndrome and trigger fingers is lacking. As such, we have no solid evidentiary basis to find that these conditions are causally related to Petitioner's work. We find that Petitioner has failed to prove a causal relationship of these conditions to the work duties.

The Commission orders the Respondent to authorize carpal tunnel release surgery as recommended by Dr. Beatty. As noted above, the Commission does not order treatment for the trigger fingers and/or Dupuytren's syndrome, as Petitioner has failed to prove causal connection with regard to these conditions. With regard to cubital tunnel, the Commission finds that the evidence presented indicates that the diagnosis was made almost solely, if not solely, on the results of an EMG/NCV test. As the medical records do not reflect complaints by Petitioner that would be directed to the elbow(s), treatment for same is denied.

The Commission finds that Petitioner is entitled to payment of the medical expenses listed in Petitioner's Exhibit 6, totaling $306.00. The interest the provider is attempting to charge, $45.84, is denied, as this claim involved a reasonable dispute.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is reversed as noted above, to find that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on June 11, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $306.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize the carpal tunnel release treatments recommended by Dr. Beatty.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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.

16IWCC0006

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $400.00. 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.

DATED: JAN 5 - 2016
TJT: pvc
O 11/09/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cynthia Clark,
Petitioner,

v.

Case No. 13 WC 31608

Igocare, Inc., d/b/a Right at Home,
Respondent.

ORDER

Petition for Attorneys' Fees Pursuant to Section 16 of the Illinois Workers' Compensation Act having been filed by attorney Kenneth D. Peters, of the law firm of Cronin, Peters & Cook, PC, and due notice having been given, this cause came before Commissioner Joshua Luskin for hearing on June 30, 2015 in Chicago, Illinois. The Commission having jurisdiction over the persons and subject matter and after being advised in the premises, finds:

1. The parties agreed to settle the above matter and settlement contracts were approved by Arbitrator Huebsch on September 9, 2014. As part of this agreement, Petitioner's counsel, Caroline Watson of the law firm of Pomper & Goodman, claimed attorneys' fees in the amount of $3,758.13, or 20% of the total settlement amount (20% x $18,790.63). Furthermore, in signing said settlement agreement, attorney Watson attested that "... any fee petitions on file with the IWCC have been resolved ..." (Comm. III).

2. The record shows that prior to settlement approval, Petitioner's previous attorney, Kenneth D. Peters of the law firm of Cronin, Peters & Cook, PC, filed a Petition for Fees Pursuant to §16 of the Act on March 11, 2014. (Comm. II). Attorney Peters subsequently filed a "Motion to Adjudicate Attorneys' Fees" on May 6, 2015. (Comm. I). The matter was thereupon heard by Commissioner Luskin on June 30, 2015 at which time a record was made.

3. At the time of the hearing on June 30, 2015, as well in his motion, attorney Peters represented that Petitioner contacted his law firm on September 23, 2013 seeking representation, and that the parties entered into an Attorney Representation Agreement on that date. (Comm. I & II). Attorney Peters also represented that he and his firm had expended a total of 3.65 hours in this matter prior to Petitioner's notification on November 1, 2013 that she had retained the services of the law

firm of Miller & Pomper to represent her. (Comm. I & II). Attorney Peters thereupon requested legal fees in the amount of $730 ($200 per hour x 3.65 hours) as well as reimbursement of expenses, namely the subpoenaing of records, totaling $34.19. (Comm. I & II).

4. As part of his testimony, attorney Peters indicated that he filed the present motion to adjudicate fees when he discovered that the case had been settled and approved subsequent to his signing of the stipulation to substitute attorneys. He testified that following his discovery of the settlement agreement he contacted the law firm of Pomper & Goodman and supplied said firm with a copy of his previously filed Petition for Fees. Attorney Peters noted that when did not hear back from the law firm of Pomper & Goodman he filed the present motion to adjudicate. Attorney Peters then went on to reference the time spent by his firm on the file in question, as reflected in the affidavit attached to his motion, the most significant outlay of time involving the initial interview and review of medical records (1.50 hours). Attorney Peters also indicated that he was requesting fees at a rate of $200 per hour, which he felt was "... an extremely reasonable fee given [his] experience here at the Illinois Workers' Compensation Commission." (T.9). In addition, attorney Peters noted that in support of his claimed time spent on the file he had copies of correspondence from the law firm of Pomper & Goodman with respect to the substitution of attorney as well as documentation relating to his review of Respondent's utilization review. (T.19). Finally, attorney Peters stated that "... as an officer of the court I have signed and submitted this affidavit as well as the exhibit and I believe I have testified here and indicated that it is a true representation of the time spent and I think that is more than sufficient." (T.19). Attorney Peters subsequently provided documents purporting to represent the material that was reviewed and obtained by his firm. (Comm. IV).

5. Attorney Watson from the law firm of Pomper & Goodman took exception to attorney Peters basing his claimed fee on an hourly rate, given that fees are typically based on 20% of the settlement amount, as well as the number of hours of work claimed. More to the point, attorney Watson testified that "... we basically did all the work, 95 percent of the work on this case. The only thing Mr. Peters, from what I can see, Mr. Peters' firm did was initially taking the case and would question 1.5 hours of taking in this case. That in my estimation should be no more than 45 minutes. I would question all of these other times on here." (T.12). In addition, attorney Watson maintained that the exhibit in question was prepared in anticipation of litigation and that it should not be "... held up as a fair and accurate representation of the hours that were spent on this case..." (T.18). Instead, attorney Watson argued that in her opinion attorney Peters and his firm worked on the file between 1-1/2 to 1-3/4 hours. (T.14). Attorney Watson also claimed that she was not aware of the existence of the fee petition, and if she had known she would have attempted to resolve the matter prior to hearing. (T.12-13).

Based on the above, and the record taken as a whole, the Commission finds the representations made by attorney Peters to be credible and fair both with respect to the time spent on the claim on behalf of his former client (3.65 hours) as well as the hourly rate to be affixed to the valuation of said services ($200/hour), based on a theory of quantum meruit. Accordingly, the Commission finds that attorney Kenneth D. Peters of the law firm of Cronin, Peters & Cook, PC is entitled to attorneys' fees and costs totaling $764.19 ($730 in fees + $34.19 in costs) pursuant to §16 of the Act, and that attorney Caroline Watson of the law firm of Pomper & Goodman is entitled to the remaining fees in the amount of $2,993.94 pursuant to §16 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that attorney Kenneth D. Peters of the law firm of Cronin, Peters & Cook, PC is hereby awarded attorneys' fees and costs totaling $764.19 pursuant to §16 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that attorney Caroline Watson of the law firm of Pomper & Goodman is hereby awarded attorneys' fees in the amount of $2,993.94 pursuant to §16 of the Act.

DATED: OCT 1 - 2015

r-06/30/15
jdl/po
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

13 WC 41989

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eileen Perkins,
Petitioner,

vs.

NO: 13 WC 41989
consol. 13 WC 19882

City of Chicago,
Respondent.

16IWCC0001

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the sole issue of the nature & extent of Petitioner's permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 5, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 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.

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.

DATED: JAN 4 - 2016
MJB:ell
O-12/14/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PERKINS, EILEEN
Employee/Petitioner

Case# **13WC041989**
13WC019882

CITY OF CHICAGO
Employer/Respondent

16IWCC0001

On 5/5/2015, 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 0.07% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

0113 CITY OF CHICAGO
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Eileen Perkins
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **41989**

Consolidated cases: **13 WC 19882**

16IWCC0001

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **February 20, 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 **November 18, 2013**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$16,256.25**; the average weekly wage was **$312.62**.

On the date of accident, Petitioner was **67** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$1,116.37** for other benefits, for a total credit of **$1,116.37**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

All issues are addressed in the Award of the companion claim under case number 13 WC 19882.

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

May 5, 2015
Date

MAY 5 - 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANDREW TULL,

Petitioner,

vs. NO: 13 WC 42121

EVERGREEN FS, INC.,

Respondent.

16IWCC0003

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, mileage, temporary total disability and permanent partial disability, 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

The Commission finds:

1. Respondent runs a fertilizer warehouse, and Petitioner worked 27 years as Respondent's Facility Manager.

2. On July 11, 2013 Petitioner was helping co-workers open a railcar. He crawled under the railcar to hook a come-along to it. The ground was wet due to rain, and they were unloading DAP, which is a very slick substance. As the workers were pulling on the come-along Petitioner slipped and fell on his left knee and shoulder.

3. Petitioner underwent chiropractic care, and Dr. Li ordered lumbar and left shoulder

MRI's. The left shoulder MRI revealed a moderate to high grade partial thickness bursal surface tear, while the lumbar MRI revealed multi-level disc bulges and endplate spurring throughout the lumbar spine, multi-level facet arthrosis, and multi-level mild foraminal narrowing. He was diagnosed with a left shoulder rotator cuff tear and a lumbar spine herniated disc or possible T12 compression fracture.

4. Petitioner eventually underwent 2 left shoulder surgeries in August 2013, followed by physical therapy for his left shoulder and low back.

5. During physical therapy, Petitioner noted that his right shoulder began bothering him because he was using it more, due to his left shoulder issues.

6. A right shoulder MRI was performed in December 2013, and revealed mild to moderate supraspinatus tendinosis without tear, possible biceps tendinosis, possible labral degeneration and possible subacromial decompression.

7. In January 2014 Dr. Li diagnosed a right shoulder biceps and SLAP tear.

8. Petitioner subsequently underwent right shoulder surgery on April 1, 2014. After additional physical therapy, Petitioner was released to work on August 18, 2014.

9. Petitioner travelled from his home in Colfax, IL to Bloomington, IL for medical treatment.

The Commission affirms the Arbitrator's rulings on the issues of accident, causal connection, medical expenses, temporary total disability and permanent partial disability. However, the Commission vacates the award for mileage.

Petitioner travelled approximately 40 miles round trip to and from his medical providers' place of business for treatment. This mileage calculation does not exceed local travel standards, thus Petitioner is not entitled to reimbursement for such travel.

~~IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to~~ Petitioner the sum of $633.26 per week for a period of 19-6/7 weeks, 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 pay to Petitioner the sum of $569.93 per week for a period of 112.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 12.5% loss of use of Petitioner's person as a whole for his left shoulder injury and a 10% loss of use of Petitioner's person as a whole for his right shoulder injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical expenses in the amounts of $42,271.40 to Orthopedic and Shoulder Center, $27,603.00 to Ireland Grove Surgery Center, $358.20 to Ambulatory Anesthesia, and $4,656.51 to Prescription Partners under §8(a) of the Act.

16IWCC0003

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 $75,000.00. 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.

DATED: JAN 4 - 2016
DLG/wde
O: 11/5/15
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TULL, ANDREW
Employee/Petitioner

Case# **13WC042121**

EVERGREEN FS INC
Employer/Respondent

16IWCC0003

On 4/2/2015, 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 0.13% 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:

0564 WILLIAMS & SWEE LTD
JEAN SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

0000 RUSIN & MACIOROWSKI LTD
JENNIFER MEJIA
2506 GALEN DR SUITE 108
CHAMPAIGN, IL 61821

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Andrew Tull
Employee/Petitioner

v.

Evergreen FS Inc.
Employer/Respondent

Case # **13** WC **042121**

Consolidated cases: _____

16IWCC0003

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 **Bloomington, Illinois**, on **February 24, 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 **Mileage**

FINDINGS

On **7-11-13**, 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 $**49,394.28**; the average weekly wage was $**949.89**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**5,699.38** for TTD, $**4,798.12** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,497.50**.

Respondent is entitled to a credit of $**1,332.80** under Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

ORDER

The Arbitrator finds that all temporary total disability and temporary partial disability benefits due and owing Petitioner prior to April 1, 2014 has been paid and that the credit of $10,497.50 applies to this period of time. Additionally, Respondent shall pay Petitioner additional temporary total disability benefits of $633.26/week for 19-6/7 weeks, commencing April 1, 2014 through August 17, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $42,271.40 to Orthopedic and Shoulder Center, $27,603.00 to Ireland Grove Surgery Center, $358.20 to Ambulatory Anesthesia, and $4,656.51 to Prescription Partners, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $569.93/week for 112.5 weeks, because the injuries sustained caused the 12-1/2% loss of the person as a whole for the left shoulder and 10% loss of the person as a whole for the right shoulder, as provided in Section 8(d)2 of the Act.

Respondent is ordered to reimburse Petitioner in the amount of $2,217.60 for mileage of 3960 miles at $.56 per mile.

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

3/31/15
Date

APR 2 - 2015

16IWCC0003

FINDINGS OF FACT:

Petitioner had been employed by Respondent, Evergreen FS Inc., as a fertilizer plant manager for approximately 26 years prior to July 11, 2013. On that date, Petitioner was called to the plant floor to help open a railcar. Petitioner said that he was using a come-along to pry open the railcar and was pulling with both arms when "something gave." When this occurred Petitioner slipped on a wet floor and went down on his left arm, shoulder and left knee.

Petitioner testified that he noticed immediate pain in his left shoulder, left knee and back. Petitioner said that he continued to work but he noticed left shoulder pain and increasing low back pain.

On July 16, 2013 and July 19, 2013, Petitioner treated with Dr. Duncan, a chiropractor in Colfax. Dr. Duncan's initial intake form and records give a history of accident and symptoms consistent with Petitioner's testimony. Dr. Duncan treated Petitioner's low back and spine. (PX 5)

Petitioner reported his work accident to Respondent and filled out an employee's report of injury for the workers' compensation carrier on July 29, 2013. Both of these forms give a history of work accident and symptoms consistent with Petitioner's testimony. (PX 3, PX 4)

On July 25, 2013, Petitioner treated with his family doctor, Dr. Hancock. Dr. Hancock took a history of accident consistent with Petitioner's testimony. Dr. Hancock's record states that Petitioner had left shoulder and neck pain and that he suspected a rotator cuff tear. Dr. Hancock's record also states that Petitioner had low back pain radiating to his posterior thighs with prior history of degenerative disc disease. Dr. Hancock prescribed light duty work and referred Petitioner to Dr. Li, an orthopedic surgeon. (PX 2)

On July 31, 2013, Petitioner treated with Dr. Li. Dr. Li recorded a history consistent with Petitioner's testimony. Dr. Li rendered an initial diagnosis of left shoulder rotator cuff tear with a lumbar spine herniated disc or possible T12 compression fracture. (PX 19) Dr. Li ordered a MRI of Petitioner's left shoulder and low back on July 31, 2013. With respect to the left shoulder, the radiologist indicated same showed a focal moderate to high grade partial thickness bursal surface tear involving the anterior insertional fibers of the distal supraspinatus tendon, a Grade I to II AC joint separation, and a small amount of fluid in the glenohumeral joint and subacromial-subdeltoid bursa. (PX 6) Petitioner's low back MRI was read as multi-level mild disc bulges without dominant disc herniation or severe spinal stenosis, multiple mild facet arthrosis, and multi-level mild foraminal narrowing. (PX 7)

Petitioner returned to Dr. Li on August 2, 2013. After documenting the MRI results, Dr. Li assessed Petitioner with a left shoulder high grade partial tear of the supraspinatus tendon. Dr. Li recommended surgery for the left shoulder. Dr. Li also assessed Petitioner with a lumbar spine strain and ordered physical therapy. (PX 19)

Dr. Li performed surgery on Petitioner's left shoulder on August 19, 2013 consisting of a left shoulder rotator cuff repair, arthroscopic subacromial decompression, and extensive debridement of anterior, superior and posterior Type I labral tear. Dr. Li's post-operative diagnosis was left rotator cuff tear; impingement syndrome; and Type I anterior, superior and posterior labral tear. (PX 8)

On August 28, 2013, Dr. Li ordered a post-operative CT of Petitioner's left shoulder. The radiologist, Dr. Wong, stated that the anchor device located in the very anterior aspect of the greater tuberoscity of the humeral

head was half embedded within the bony confines of the greater tuberosity and was half outside the bony cortex and extended into the superior aspect of the bicipital groove. (PX 9) Dr. Li recommended a second surgery to remove the suture anchor and revise repair arthroscopically. (PX 19)

On August 30, 2013, Dr. Li performed another left shoulder surgery to debride scar tissue and revise the rotator cuff repair as well as removal of the hardware from the bicipital groove. (PX 10)

Post-operatively, Petitioner underwent physical therapy through Dr. Li's office. Petitioner underwent a few sessions for his lower back and the therapist performed passive range of motion on his left shoulder. Petitioner last received therapy for his low back on September 19, 2013. At that time, the therapist noted Petitioner reported significant improvement with his low back symptoms. It was noted he had returned to full functional mobility. (PX 19)

On October 2, 2013, Petitioner reported to Dr. Li and advised the doctor that his left shoulder pain and mobility was improving. Dr. Li continued physical therapy but noted that Petitioner could stop using the CPM machine and Game Ready compression therapy for his left shoulder. Petitioner continued with left shoulder physical therapy. The physical therapy records indicate that Petitioner began using one to five pound weights during therapy between October 2, 2013 and October 31, 2013. During that period, or specifically October 7, 2013, Dr. Li released Petitioner to return to work with restrictions. (PX 19)

Petitioner testified that he had noticed some right shoulder pain shortly after his accident, but it came and went. Petitioner said that during therapy, he was using the weights with both of his hands and that he was increasing the use of his right arm. Petitioner said that, as the therapist increased the poundage of the free weights he was using, he began to experience increasing right shoulder pain. Petitioner said that the therapist had also recommended home exercises using bands and free weights. Petitioner said that he performed range of motion with the different bands attached to a door. Petitioner said that as he performed these exercises, his right shoulder pain increased and it became more difficult to perform the exercises.

Petitioner testified that on November 8, 2013, he informed his physical therapist that he was having some pain in his right shoulder. Petitioner provided that the pain in his right shoulder after his July 11, 2013 accident was different than the pain he had in the past and as such he mentioned it to his therapist. Therapy records from November 8th, show Petitioner informed the therapist of experiencing pain and weakness of the right rotator cuff. (PX 19)

On November 11, 2013, Petitioner reported that his left shoulder was great, but his right shoulder was sore. Petitioner also provided that he had been performing his Home Exercise Program with one (1) set of ten (10). (PX 11) On November 15, 2013, Petitioner reported that his right shoulder " ...has been bothering me lately..∴ I'm doing more with it than usual." (PX 12) By November 22, 2103, Petitioner complained his right shoulder hurt worse than his left. (PX 13) Petitioner testified that by November 22, 2013, he was lifting up to fifty (50) pounds during therapy.

Therapy notes from December 3, 2013 show Petitioner reported that "[his left shoulder] motion is really good but I can tell my strength isn't all the way back yet. My right shoulder has been bothering me and I want to get my strength all the way back with the left. I'm going to need this left shoulder to be strong because I've been over using my right lately and it's been hurting. I have had problems with my right shoulder in the past so I really need this left shoulder to be full strength." (PX 15)

On January 3, 2014, the therapist's progress note stated that Petitioner had some mild impairment in his left shoulder consisting of weakness doing yard work, hobbies and work. The therapist noted that Petitioner had good range of motion in the left shoulder but still demonstrated mild weakness in the left shoulder

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abduction and external rotation. The therapist stated that Petitioner's shoulder strength was 4+/5. The therapist felt Petitioner met all his goals regarding the left shoulder. However, Petitioner was still expressing concerns about his right shoulder. (PX 15)

At Dr. Li's request, Petitioner underwent a MRI of the right shoulder on January 10, 2014. The radiologist stated that Petitioner had mild to moderate supraspinatus tendinosis without tear, possible biceps tenodesis, and a hyper intensive signal along the base of the superior labrum as well as multifocal post-operative changes. (PX 16) Dr. Li diagnosed Petitioner as having a right shoulder biceps and SLAP tear. (PX 17)

On February 10, 2014, Dr. Li reported Petitioner could advance activities as tolerated and had reached maximum medical improvement with respect to his left shoulder. Dr. Li also provided Petitioner required additional treatment for his right shoulder in the form of a right shoulder arthroscopic shoulder surgery. (PX 19)

Petitioner returned to Dr. Li on March 31, 2014. Dr. Li noted Petitioner wanted to discuss his injury at work related to his right shoulder complaints. Dr. Li recorded the following, "He denies any Right shoulder injury before accident and denies any accident since. He was pulling a comealong with both hands and slipped, falling on his left shoulder. However, he was pulling with his Right shoulder when he slipped but did not fall on it. He noticed more pain with [his] Right shoulder as he was rehabilitating [the] left shoulder. He has had previous Bristow procedure which is extra-articular and is unrelated to current Biceps and Labral pathology." (PX 19)

On April 1, 2014, Dr. Li performed a right shoulder arthroscopy with arthroscopic subacromial decompression, extensive debridement of the anterior, superior and posterior labral tears as well as a partial thickness rotator cuff tear, and biceps tenodesis. Dr. Li's post-operative diagnosis was a right shoulder biceps tendon tear; partial thickness rotator cuff tears; superior labral tear, anterior labral tear, and posterior labral tear; and impingement syndrome. (PX 18)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Michael Cohen on July 9, 2014. In his narrative report Dr. Cohen stated that Petitioner reported that he did not have pain in his left shoulder, however he still had weakness with overhead activities and that his function was pretty close to normal. On the right side, Petitioner reported continued catching in his right shoulder with some decreased strength. Petitioner felt he was 75% to 80% better on the right side than he was pre-operatively. On exam, Petitioner had full abduction and internal rotation which was symmetric in both shoulders. He had full supraspinatus bilaterally with no pain. He had negative impingement signs bilaterally and he had negative Speed's and Yergason's tests on the right shoulder. His right biceps muscle was distally displaced. Dr. Cohen opined Petitioner was at maximum medical improvement on the left shoulder and that the July 11, 2013 accident caused Petitioner's left shoulder condition requiring surgery. Dr. Cohen further opined that because Petitioner did not lodge complaints concerning his right shoulder to Dr. Duncan, Dr. Li, or the physical therapist until November 11, 2013, he did not believe Petitioner had any significant injury to his right shoulder during his work accident on July 11, 2013. Dr. Cohen indicated he would expect Petitioner to be performing most activities with his dominant right arm even without injury. Dr. Cohen opined that the subsequent treatment to the right shoulder was not causally related to said accident. (RX 1)

Post-operatively, Petitioner underwent physical therapy at Dr. Li's office through August 13, 2014. On said date, the therapist recorded Petitioner conveyed right shoulder muscle soreness and a dull ache with 1 out of 10 pain level. The therapist noted that Petitioner's pain was occasional, dull, and aching; Petitioner still had an occasional report of "impingement" type symptoms with overhead work and that he was instructed to take frequent breaks while performing overhead work. Lastly, the therapist noted a slight restriction in range of motion and 4+/5 strength. Petitioner was discharged from therapy with a note that he had met all goals of therapy. (PX 19)

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Dr. Li released Petitioner to return to full duty work on August 13, 2014 with instructions to continue his home exercise program. (PX 19)

On September 3, 2014, Dr. Li authored a narrative report. Dr. Li noted that Petitioner was pulling a come along with both hands and slipped and fell on his left shoulder while at work on July 11, 2013. Dr. Li stated that Petitioner sustained a rotator cuff tear and required surgery on his left shoulder. Dr. Li stated that as Petitioner was rehabilitating his left shoulder, he was relying more on his right arm for daily activities and began to develop pain in his right shoulder. Dr. Li stated that Petitioner required surgery on his right shoulder to address the labral tear and biceps tendon tear. Dr. Li stated that it was his opinion within a reasonable degree of medical certainty that the July 11, 2013 accident contributed to the injury to both of Petitioner's shoulders. Dr. Li stated that the left was more severely injured and more painful than the right. Dr. Li stated that the right shoulder injuries consisting of the labral tears and the biceps tendon tear produced less symptoms and only manifested when he started to resume more normal activities. Dr. Li stated that Petitioner had a previous Bristow procedure in 1983 and that he had not had problems in his right shoulder until after the July 11, 2013 accident. (PX 1)

Petitioner saw Dr. Li on September 10, 2014. At that time, Dr. Li noted Petitioner was tolerating work but that some duties temporarily aggravate his shoulder. The doctor recommended that Petitioner continue his home exercise program and that he advance to activities as tolerated. Dr. Li released Petitioner to full duty work. (PX 19)

On December 3, 2014, Petitioner, at Respondent's request, was evaluated by Dr. Fletcher, for an AMA impairment rating. On exam, Petitioner had tenderness over the anterior right shoulder with some restriction of motion. In his report, Dr. Fletcher stated that Petitioner had a status post-left shoulder rotator cuff repair, impingement syndrome, and Type I anterior, superior and posterior labral tear; a status post-right shoulder biceps tendon repair, partial thickness rotator cuff tear, superior labral tear, anterior labral tear and posterior labral tear, impingement syndrome; and a lumbar strain superimposed on pre-existing degenerative disc disease. Dr. Fletcher gave Petitioner a 0% permanent impairment rating under the AMA guidelines, 6th edition, for the lumbar sprain; 5% for the right shoulder; and 4% for the left shoulder. (RX 2)

Records submitted show Petitioner underwent a right shoulder MRI, at Dr. Li's request, on December 5, 2014. The MRI showed mild to moderate supraspinatus tendinosis without tear; possible biceps tenodesis; possible residual labral degeneration and/or tear, and possible subacromial decompression. (PX 16) Petitioner testified that he returned to Dr. Li on December 8, 2014. At that time the doctor did not recommend any further treatment.

At the time of arbitration, Petitioner testified that his left shoulder improved since the surgery. Petitioner said that he still has some pain in his left shoulder when he reaches over his head and behind himself. Petitioner said that he does not have the strength in his left shoulder that he had before the accident. Petitioner said that he experiences a pinching sensation in his left shoulder when he lifts above shoulder height.

Petitioner denied any problems with his left shoulder before his accident on July 11, 2013. Petitioner stated that he had experienced low back problems ever since he was a young man and that same was intermittent. Petitioner also testified that he had undergone right shoulder surgery approximately 28 years ago. Petitioner said that prior to his July 11, 2013 work accident, he had some aches and pains in his right shoulder that he attributed to as arthritis. Petitioner said that there was physically nothing wrong with his right shoulder when he arrived at work on July 11, 2013. Petitioner provided that currently, his right shoulder is a lot weaker than his left shoulder. He is right hand dominant and his activities are limited with his right shoulder. Petitioner also complained of right shoulder clicking and stiffness.

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Petitioner testified that he underwent a physical examination for work at Medical Hills Internists with Dr. Hancock on July 10, 2012. Petitioner testified and the records show he complained of right anterior shoulder pain around his previous surgical site. He also complained of pain with internal external rotation. An x-ray performed that day showed evidence of a prior surgical procedure from 28 years ago. There was a surgical threaded screw in the glenoid. Also noted were mild degenerative changes. (RX 6) Petitioner testified that Dr. Hancock did not treat him for his right shoulder on July 10, 2012 and that the x-ray was part of the physical exam. Petitioner said that after his accident on July 11, 2013, he did not have any other injury or insult to his right shoulder

Petitioner testified on cross examination that he had undergone a few physical therapy sessions for his back after his accident and that he believed his back returned its prior baseline. Petitioner also testified that although he has a full release to return to work and that he has resumed his duties managing the fertilizer plant, he and Respondent agreed that he should no longer climb or unload railroad cars.

Lastly, Petitioner testified that he lives in Colfax and that there is no orthopedic or medical doctor in Colfax. Petitioner said that, in accordance with Petitioner's Exhibit 22, he made 48 trips at 40 miles a trip to treat at Dr. Li's office before January 10, 2014 and that he made 51 trips at 40 miles a trip thereafter.

With respect to issue (C), Did an Accident Occur That Arose Out of and In the Course of Petitioner's Employment by Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner sustained a work related accident on July 11, 2013 that arose out of and in the course of his employment with Respondent when he was using a come-along with both arms to open a rail car and "something gave" causing him to slip on a wet floor and fall on his left arm, shoulder and left knee.

With respect to issue (F), Is Petitioner's Current Condition of Ill-Being Causally Related to the Injury, the Arbitrator finds as follows:

The Arbitrator finds that, as a result of the accident on July 11, 2013, Petitioner sustained an injury to his left and right shoulder and that he sustained a temporary aggravation of his low back.

Respondent's Section 12 examiner, Dr. Cohen, agrees with Dr. Li that a causal relationship exists between the accident sustained and Petitioner's left shoulder condition which required surgery on July 31, 2013 and August 19, 2013. With respect to his lumbar condition, the Arbitrator relies on Dr. Li's records and finds that Petitioner sustained a temporary aggravation of his pre-existing degenerative lumbar disc disease as a result of the aforementioned accident.

Regarding the right shoulder, the Arbitrator relies on Dr. Li's September 3, 2014 narrative report, the treating physical therapy records, and Petitioner's testimony and finds that Petitioner aggravated his right shoulder condition during the July 11th accident while he was pulling on the come-along and "something gave." In his narrative report, Dr. Li stated that during the accident, Petitioner's left shoulder was more severely injured than his right shoulder and was more painful. Dr. Li stated that Petitioner's right shoulder injuries consisting of labral tears and a biceps tendon tear produced less symptoms than his left shoulder rotator cuff tear and that his right shoulder symptoms manifested when Petitioner began to resume more normal activities. The Arbitrator finds it reasonable to conclude, as Dr. Li and the physical therapy records demonstrate, then when Petitioner was rehabilitating his left shoulder, he was using his right arm more and began to develop more pain and symptoms in his right shoulder.

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The Arbitrator notes that, although Petitioner had some ongoing pain in his right shoulder since his Bristow procedure in 1983, it was intermittent and he did not seek medical care until after the July 11, 2013 accident. After the accident, Petitioner was sedentary and his right shoulder symptoms did not manifest until he became more progressively physically active in rehabilitation for his left shoulder. The Arbitrator notes that Petitioner did not begin lifting one pound free weights with both arms until October 2013. Petitioner voiced complaints to the therapist by November 8, 2013 as the level of weights and activity increased. The Arbitrator finds it significant that Petitioner did not have any other injury or insult to his right shoulder after his July 11, 2013 work accident. The Arbitrator also finds compelling Dr. Li's March 31, 2014 notation that Petitioner's previous Bristow procedure was extra-articular and not related to Petitioner's current biceps and labral pathology.

With respect to issue (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, the Arbitrator finds as follows:

Having found that Petitioner's right and left shoulder conditions requiring surgery and Petitioner's low back condition is causally related to Petitioner's work accident, the Arbitrator orders Respondent to pay the following reasonable and necessary medical bills under the fee schedule:

Orthopedic and Shoulder Center	$47,271.40
Ireland Grove Surgery Center	$27,603.00
Ambulatory Anesthesia	$358.20
Prescription Partners	$4,656.51.

Respondent shall be given a credit of $1,332.80 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to issue (K), What Temporary Total Disability Benefits Are In Dispute, the Arbitrator finds as follows:

The parties stipulated and the Arbitrator finds that Petitioner was temporarily totally disabled and temporarily partially disabled from his left shoulder condition through February 7, 2014. The parties further stipulated, and the Arbitrator finds that all temporary total disability benefits and temporary partial disability benefits for that period of time have been paid.

Petitioner underwent right shoulder surgery on April 1, 2014. Dr. Li released Petitioner to return to work full duty on August 18, 2014. Having found the requisite causal relationship, the Arbitrator therefore awards additional temporary total disability benefits for 19-6/7 weeks, from April 1, 2014 through August 17, 2014.

With respect to issue (L), What is the Nature and Extent of the Injury, the Arbitrator finds as follows:

Pursuant to Section 8.1(b) of the Act, the Arbitrator, in determining the level of permanent partial disability, must use the following factors:

i. The reported level of impairment;
ii. The occupation of the injured employee;
iii. The age of the employee at the time of the injury;
iv. The employee's future earning capacity; and
v. Evidence of disability corroborated by the medical records.

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With regard to (i.) of Section 8.1(b) of the Act:

The Level of impairment reported by Dr. Fletcher pursuant to the American Medical Association's Guide to the Evaluation of Permanent Impairment, 6th Edition, is 0% for the lumbosacral strain; 5% for the right shoulder; and 4% for the left shoulder.

With regard to (ii.) of Section 8.1(b) of the Act:

Petitioner's occupation has been as a facility manager for Respondent, a fertilizer plant, for 26 years. Petitioner's work included some climbing, lifting, and heavy work activities. Petitioner testified that, although he was released to full duties by Dr. Li, he and his employer had made modifications for his work and he no longer climbs or unloads railroad cars since his accident.

With regard to (iii.) the age of employee at the time of the injury:

Petitioner was 55 years old as of the date of loss and had over 10 years to work before retirement age.

With regard to (iv.) of Section 8.1(b) of the Act:

Petitioner's future earning capacity, at the present time, appears to be undiminished as a result of the injuries.

With regard to (v.) of Section 8.1(b) of the Act:

Petitioner has demonstrated evidence of disability corroborated by his treating medical records. Petitioner has credibly testified that he experiences a pain and pinching sensation in his left shoulder when he lifts above shoulder height or behind himself. The Arbitrator finds it credible that Petitioner has less strength in his left shoulder than he had before the accident as this is consistent with a left rotator cuff repair, subacromial decompression and extensive debridement of anterior, superior, and posterior Type I labral tears requiring two surgeries. The Arbitrator notes the January 3, 2014 physical therapy notation that Petitioner had weakness in his left shoulder doing yard work, hobbies and work, and that he had mild weakness in the left shoulder on abduction and external rotation with a 4+/5 shoulder strength. Petitioner's complaints are consistent with Dr. Cohen's report of July 9, 2014 when Petitioner informed Dr. Cohen of pain in his left shoulder and weakness with overhead activities and Dr. Fletcher's AMA impairment examination on December 3, 2014.

As it relates to the lumbosacral pain, Petitioner testified that after physical therapy through Dr. Li's office, he resumed his pre-injury baseline pain.

As it relates to the right shoulder, Petitioner credibly testified that his right shoulder was weaker than his left shoulder and that it was not at full capacity. Petitioner testified that he gets a clicking in his right shoulder and that it is often stiff. Petitioner's testimony is consistent with the therapist's August 13, 2014 note which stated that Petitioner has occasional reports of "impingement" type symptoms with overhead work, a slight restriction in range of motion, and 4+/5 strength in the right arm and shoulder. Petitioner's testimony is consistent with Dr. Li's September 10, 2014 record stating that he was tolerating work but that some duties temporarily aggravate his right shoulder and with Dr. Fletcher's December 3, 2014 AMA impairment report. The Arbitrator notes that Petitioner had a pre-existing right shoulder condition which produced some occasional discomfort prior to his work related accident.

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After considering all five factors, the Arbitrator finds that as a result of the accident sustained, Petitioner is permanently disabled to the extent 12-1/2% under Section 8(d)2 of the Act for his left shoulder condition of ill-being; 10% man as a whole for his right shoulder condition of ill-being; and 0% permanency for the aggravation of Petitioner's pre-existing low back condition.

With respect to issue (O), Mileage, the Arbitrator finds as follows:

Petitioner lived and worked in Colfax, Illinois, a rural town 40 miles from Bloomington, Illinois. This necessitated that Petitioner travel 40 miles round trip to Bloomington to treat with his orthopedic surgeon, Dr. Li. Petitioner made a total of 99 trips at 40 miles a trip, or 3,960 miles, to treat with Dr. Li and to attend physical therapy post-accident. In 2014, the IRS allowed $.56 per mile.

The Arbitrator therefore orders Respondent to reimburse Petitioner in the amount of $2,217.60 for mileage.

STATE OF ILLINOIS)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
CHAMPAIGN		☐ PTD/Fatal denied
	☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Paul Lowther,

Petitioner,

vs. NO. 14WC006442

16IWCC0005

Decatur Ambulance,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the parties herein and notice given, the Commission, after considering the issues of temporary total disability, causal connection, medical expenses, permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2015 is hereby affirmed and adopted.

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

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

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Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,300.00. 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.

DATED: JAN 5 - 2016
SJM/sj
o-11/5/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOWTHER, PAUL
Employee/Petitioner

Case# **14WC006442**

16IWCC0005

DECATUR AMBULANCE
Employer/Respondent

On 4/2/2015, 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 0.13% 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:

0246 HANAGAN & McGOVERN PC
STEVE HANAGAN
123 S 10TH ST SUITE 601
MOUNT VERNON, IL 62864

3150 JAMES M KELLY
4801 N PROSPECT RD
SUITE 832
PEORIA HEIGHTS, IL 61616

STATE OF ILLINOIS)SS.
COUNTY OF CHAMPAIGN)

16IWCC0005

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAUL LOWTHER
Employee/Petitioner

Case # **14** WC **6442**

v.

Consolidated cases: _____

DECATUR AMBULANCE
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 Molly Dearing,** Arbitrator of the Commission, in the city of **Urbana**, on **January 30, 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 **December 10, 2013**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$25,361.14**; the average weekly wage was **$575.20**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$6,122.48** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$8,950.20** in non-occupational indemnity disability benefits.

Respondent is entitled to a credit for **all medical bills** paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

ORDER

Respondent shall pay all reasonable and necessary medical services with dates of service through March 13, 2014, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. All medical bills for services rendered after March 13, 2014 are denied as unrelated to Petitioner's work injury.

Respondent shall pay Petitioner temporary total disability benefits of $383.47/week for 13 weeks, commencing December 13, 2013 through March 13, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $345.12/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 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.

Arbitrator Molly Dearing

March 31, 2015
Date

APR 2 - 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PAUL LOWTHER
Employee/Petitioner

v. Case # 14 WC 6442

DECATUR AMBULANCE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that Petitioner sustained an injury that arose of out and in the course of his employment with Respondent on December 10, 2013. Arb. X 1. At the time of his accident, Petitioner was fifty two years of age and he was employed by Respondent as a paramedic. He had been employed in a capacity as a paramedic for 30 years. Petitioner's job duties for Respondent included performing rig and equipment inspections, cleaning, and responding to emergency and non-emergency calls. In his capacity as a paramedic, Petitioner may be required to lift a patient from the basement of a house, from a 50-foot ravine in a car, or in a confined space in an industrial plant, and he testified that the physical demands of his position depended upon the situation of the call. Transporting patients required placing the patient on a stretcher weighing 60 pounds and the average size of a patient was approximately 250 pounds. Petitioner generally had a partner and a fireman present to assist him in responding to calls. At the time of his accident, Petitioner estimated he responded to eight to twelve calls per shift and worked 56 hours per week.

Petitioner denied any spinal difficulties at the time he began working for Respondent. He testified that over the course of the past ten years, he experienced intermittent, recurrent back pain four to five times per year as a result of both work and home activities. In those instances, he took over-the-counter medication and returned to his next work shift. Petitioner may have taken a sick or personal day to recuperate. Petitioner testified that on one or two occasions, when bringing a patient to the emergency department, he requested a muscle relaxant from the emergency room physician, which he accompanied with rest.

On May 24, 2013 Petitioner was working in a storage unit when he moved a tool box and had an onset of back pain. He presented to the emergency room at Decatur Memorial Hospital on June 1, 2013 and then to Dr. David Fletcher on June 26, 2013. Petitioner reported to Dr. Fletcher injuring his lumbar spine when he lifted a 60-pound tool box. Petitioner complained of a dull aching pain in his low back with intermittent stabbing pains and intermittent pain that radiated into his hips. Petitioner reported that standing, walking and medications help decrease his pain. Dr. Fletcher noted a past medical history of degenerative disc disease and disc herniation, as well as diabetes, heart disease, and obesity. Dr. Fletcher ordered an x-ray of Petitioner's pelvis and hips to rule out degenerative joint disease of the hips, which were interpreted as normal. Dr. Fletcher ordered a CT myelogram of Petitioner's lumbar spine. He referred Petitioner to Dr. Huss for a hip examination and to Dr. Trudeau for lower extremity nerve studies. Dr. Fletcher removed him from work and noted that "I question his ability to do paramedic work; I would suggest he consider

applying for SSDI." PX 2. Petitioner testified that he was advised by Dr. Fletcher to consider applying for Social Security Disability benefits following the May 24, 2013 incident, but denied that Dr. Fletcher advised him he was unable to return to work as a paramedic. He followed Dr. Fletcher's recommendation and applied for Social Security Disability sometime between May 2013 and October 2013 even though he was only temporarily disabled and had reason to believe he would improve. Petitioner testified that at the time he applied, he was uncertain whether he would return to work. He acknowledged that the May 24, 2013 incident was not work related.

Petitioner underwent a lumbar myelogram and CT scan on July 5, 2013. The myelogram revealed moderate anterior epidural defects at L2-3 and L3-4 due to predominant osteophyte formation, some degree of narrowing of the thecal sac at L2-3 and L3-4, and some degree of central spinal stenosis at the mid lumber level. The post-myelogram CT performed the same day showed the lumbar vertebrae to be normally aligned without fracture, deformity, or lesion, a mild disc bulge at L1-2, a moderately large disc/osteophyte complex posteriorly causing a moderate to severe central spinal stenosis at L2-3, marked narrowing of disc space and moderate disc/osteophyte complex posteriorly causing moderate central spinal stenosis at L3-4, marked narrowing of the disc space and small disc/osteophyte complex posteriorly causing at L4-5 and L5-S1, and no definite disc herniations or foraminal stenosis. PX 3.

Petitioner presented to Dr. Edward Trudeau on July 8, 2013 and complained of bilateral low back pain and intermittent pain that radiated into his hips. Electrodiagnostic studies revealed bilateral L3 radiculopathies, left greater than right in electroneurophysiologic testing, and no evidence of other radiculopathy. Dr. Trudeau opined that Petitioner may desire to consider further conservative modalities of treatment, such as physical therapy, stretches, or medication, or more aggressive measures, including injections or an evaluation with a spinal specialist for the possibility of a decompressive surgical procedure. PX 2.

Petitioner presented to Dr. Timothy VanFleet on July 10, 2013. Petitioner reported low back pain and pain radiating to his buttocks and posterior thighs bilaterally. Dr. VanFleet noted bilateral leg weakness, muscle spasms in his legs, but no numbness or weakness of the legs or feet. Upon examination, Dr. VanFleet noted symmetric strength, reflexes and sensation, and no evidence of any tension signs. Dr. VanFleet diagnosed Petitioner with lower back pain and lumbar canal stenosis. Dr. VanFleet opined that Petitioner was symptomatic due to his underlying spinal stenosis. He ordered Petitioner undergo an epidural injection and he removed Petitioner from work. On July 16, 2013, Petitioner underwent left L5 and right L3 transforaminal epidural steroid injections with Dr. Paul Smucker. PX 2.

Petitioner returned to see Dr. Fletcher on July 24, 2013. Petitioner complained of weakness in his legs and a dull pain in his bilateral hips. He reported undergoing an epidural steroid injection that was successful in relieving his pain. Dr. Fletcher received an incident report from Petitioner dated July 8, 2013, wherein Petitioner stated that, "Throughout the past several years I have had episodes of low back pain from work, which were resolved with ICE and Advil for 2-3 days, and also sometimes with a muscle relaxer at home. On 5/24/2013 I was lifting a box of tools when the sharp pain in my back, came back. The latest episode could not be resolved and I was given pain RX and sent home and followed up with my primary M.D., Hima Atluri on 6/4/2013...I was referred to a DR. Trudeau that based on the results of the Myelogram and current condition of my back was a direct result of my job, of being a Paramedic, lifting and twisting, going up and down stairs, carrying Patients, some being very heavy for several years...I have been advised by my

doctors to file for workman's comp benefits." PX 3, RX 12. Dr. Fletcher continued Petitioner's off-work status, and noted that Petitioner had presented a convincing history that his present condition was work related and an aggravation of his pre-existing condition. PX 3, RX 12.

Petitioner presented to Dr. Stephen Huss on August 6, 2013. Petitioner completed a questionnaire dated August 2, 2013 in which he stated that he was seeing Dr. Huss for an injury to both hips that had been reported to workers' compensation, but was denied. Petitioner also completed a pain diagram, wherein Petitioner noted complaints with respect to his low back and lateral buttocks, bilaterally. His chief complaint on August 6, 2013 was a complex of pain involving his back and hips including lateral hips and occasionally descending down to his knees. Dr. Huss injected the right greater trochanteric region and trochanteric bursa with Depomedrol. He diagnosed a lumbosacral strain with spinal stenosis and radicular pain from spine to knees. RX 12.

Petitioner returned to Dr. VanFleet on August 21, 2013 and reported feeling much better following a left L5 and right L3 epidural steroid injection, though he continued to have low back pain after sitting for long periods of time. Dr. VanFleet ordered physical therapy for core muscle conditioning and noted that Petitioner would likely return to work in three to four weeks. PX 2.

On September 25, 2013, Petitioner returned to Dr. VanFleet, at which time Petitioner noted some back pain with improved leg pain. A physical examination demonstrated no evidence of any tension signs, no leg or foot numbness, but continued bilateral leg weakness. Petitioner felt additional therapy would help with his leg weakness. Dr. VanFleet ordered four additional weeks of physical therapy and noted that he anticipated a release thereafter. PX 2.

On October 25, 2013, Petitioner followed-up with Dr. VanFleet after having completed physical therapy, and Petitioner reported feeling well and wanted to return to work. Dr. VanFleet noted that Petitioner was doing well and allowed Petitioner to return to work without restrictions the following day. Petitioner was discharged from Dr. VanFleet's care at that time. Dr. VanFleet ordered additional physical therapy of twice a week for two weeks. PX 2. Petitioner testified he did not undergo the additional two weeks of physical therapy because he was feeling well and that he notified Dr. VanFleet of same. Petitioner testified that at the time of his release to return to work, he felt fine, was without pain, and was able to perform his job. Petitioner returned to working 56-hours per week, and he denied taking any sort of medication, pain relievers, or muscle relaxers at that time.

A physical therapy note from St. John's Hospital Rehabilitation of November 11, 2013 documents a telephone call with Petitioner on that date. Petitioner reported 0/10 pain, good functionality following a return to work full duty, and that he had not attended any therapy visits after October 21, 2013. PX 2.

On December 10, 2013, Petitioner responded to a call at work in which a 300-pound patient had fractured his ankle. Petitioner and his partner lifted the patient from the ground to the gurney when Petitioner's feet slipped out from underneath him and he fell on his buttocks. Petitioner testified he felt immediate pain across his low back, though they were able to move the patient onto the stretcher and transport him to the hospital. Petitioner completed his shift. Thereafter, he rested, applied heat to his back, and took Skelaxin on his following two days off.

objective basis." He opined that Petitioner's work injury aggravated his extensive underlying degeneration and his symptoms had persisted despite conservative care. Dr. Butler noted that Petitioner had exhausted conservative measures for his lumbar condition, and both surgical and nonsurgical options were presented to Petitioner for consideration. Dr. Butler recommended surgical treatment by virtue of a multi-level decompressive laminectomy and spinal fusion from L2 to S1, and Petitioner elected to proceed with surgical treatment. PX 4.

Thereafter, Petitioner returned to Dr. Fletcher on a periodic basis without significant change. Dr. Fletcher continued to excuse Petitioner from work through January 9, 2015. PX 4, 5.

Petitioner testified that he elected not to proceed with Dr. Butler's recommendation of surgical intervention because of the extensiveness of the surgery, his multiple medical problems of diabetes and heart difficulties, and the lack of lumbar mobility the surgery may pose. Petitioner testified that his condition has worsened since the accident and is more severe than it was following the May 24, 2013 incident. He continues to have pain across his lower back and down the lateral sides of both hips. Petitioner testified that his pain oftentimes goes down the back of one leg down into his knee and sometimes into both knees. Petitioner testified that he currently experiences increasing pain towards his mid-thoracic level in his back. He is unable to sit for extended periods of time without pain and he has a limited ability to stand. Petitioner cannot walk extended distances before stopping and he has increased weakness in his legs. Petitioner takes Norco and generic Flexeril four to five days per week, and Tylenol or Advil on other days to avoid narcotic prescription addiction.

Dr. David Fletcher testified by way of evidence deposition on June 19, 2014. Dr. Fletcher is board certified in occupational medicine. Dr. Fletcher testified that he initially treated Petitioner in July 2013 following a non-work related lifting incident with complaints of significant back pain without radicular type pain. At that time, Petitioner related to Dr. Fletcher that his back pain was simply one of many instances of back pain he had while working as a paramedic. Dr. Fletcher indicated that Petitioner provided to him a history of a cumulative trauma origin of his condition at due to the nature of his job duties. Dr. Fletcher opined that Petitioner's job duties as a paramedic over the course of 30 years of bending, lifting, twisting and oftentimes lifting heavy patients would be a causative factor in the development of Petitioner's degenerative lumbar spinal condition. Dr. Fletcher was of the opinion at that time that Petitioner was incapable of returning to work as a paramedic based upon his pre-existing condition. Dr. Fletcher recommended that Petitioner not return to work as a paramedic, consider himself disabled, and apply for disability. PX 1.

Dr. Fletcher testified that following Petitioner's work accident of December 10, 2013, he referred Petitioner to Dr. Jesse Butler, as Petitioner did not wish to return to see Dr. VanFleet because Dr. VanFleet did not operate on him following his injury in May 2013. Dr. Fletcher testified that Dr. Butler recommended a multi-level lumbar fusion from L2 through S1 due to the extensive amount of degenerative disc disease and disc collapse. Dr. Fletcher opined that said procedure was reasonable and necessary in Petitioner's care and treatment given Petitioner's clinical presentation "and the fact that he is no going to get much better to be able to increase his functional activities unless the degenerative disc disease is dealt with...." Dr. Fletcher opined that Petitioner should not return to work as a paramedic even if he were to undergo surgery. Without undergoing surgery, Dr. Fletcher opined that Petitioner could not perform the job tasks of a paramedic because "to put him back as a paramedic at the current time would be like a ticking time bomb because of the amount of degenerative disc disease...It would be, in my opinion, a disaster to return him back

to work at the present time." Dr. Fletcher explained that Petitioner returning to his paramedic position places him at risk for reinjuring himself that could further incapacitate him. Dr. Fletcher opined that the work accident of December 10, 2013 was sufficient to aggravate his pre-existing condition so as to cause it become symptomatic and require treatment. Dr. Fletcher explained that his causation opinion was premised upon a lack of Petitioner having radicular symptoms prior to the work accident and Petitioner's improvement following his period of disability in 2013. He acknowledged that Petitioner reported pain on both sides of his lumbar spine into his buttocks and radiating distally down to at least his knees while undergoing treatment with Dr. Huss and that Dr. Trudeau assessed a L3 radiculopathy following EMG/NCV studies. Dr. Fletcher commented that he had "never been showed these before" when presented with medical records on cross examination. Dr. Fletcher testified that Petitioner suffered a progression in his lumbar pathology at L3-4, though he stated that the different magnets between the MRI and myelogram renders preciseness difficult, and Petitioner's large size compromised the clarity of the testing. He testified that Petitioner's history of smoking could compromise Petitioner's spine condition as smoking decreases the blood supply to discs causing them to degenerate faster than the normal aging process. Dr. Fletcher denied any indications of symptom magnification during his treatment of Petitioner. PX 1.

Petitioner underwent an examination with Dr. Morris Soriano on March 5, 2014 pursuant to Section 12 of the Act. After performing a physical examination of Petitioner, reviewing his medical records and diagnostic studies, and taking a history of accident and illness from Petitioner, Dr. Soriano diagnosed Petitioner with a lumbar strain as a result of his December 10, 2013 work accident. He opined that Petitioner's ongoing subjective complaints have no relationship to any objective findings on physical examination or any relationship to his long-standing multi-level degenerative disc disease in his lumbar spine. Dr. Soriano explained that he found three Waddell's signs upon examination consistent with symptom exaggeration and functional illness. He stated that Dr. Butler's recommendation to fuse L1 through S1 has no relationship to his work lifting injury, as he opined it was improbable that a single lifting injury aggravated five levels of the lumbar spine, the radiological studies do not evidence any acute aggravation of the lumbar spine, and "I know of no standard of care that would recommend complete spinal reconstruction for multi-level degenerative disc disease." Dr. Soriano further opined that Petitioner requires no further treatment for his work injury and that he reached maximum medical improvement from his lumbar strain. He testified that Petitioner could have returned to work from his lumbar strain within four weeks of his work accident, and that he has not suffered any disability pursuant to the AMA Guidelines, 6th Edition resultant from his work injury. RX 1.

Following his review of Petitioner's MRI of February 4, 2014, Dr. Soriano issued an addendum report and stated that he found no change between Petitioner's June 12, 2013 MRI and that of February 4, 2014. He opined that Petitioner's lumbar pathology at L1-2 and L2-3 were all present prior to the accident and were not aggravated by the single lifting indicant of December 10, 2013. His opinions remained unchanged from his report of March 13, 2014. RX 2.

Dr. Soriano testified by way of evidence deposition on October 2, 2014. Dr. Soriano is board certified in neurosurgery, and he is a fellow in the American Academy of Disability Evaluating Physicians. Dr. Soriano testified that, in formulating his opinions, he understood that Petitioner's condition platueaued and he returned to work from October 25, 2013 until December 10, 2013. Dr. Soriano noted that Petitioner's MRI of February 4, 2014 revealed that Petitioner's bones were virtually fused to themselves between L3 and S1 due to osteophyte complexes and because the discs

themselves were so collapsed "the bones are almost basically kissing each other." Dr. Soriano did not feel that the essential bone fusion in Petitioner's lumbar spine was caused or aggravated by his work accident, and he testified that he believes the collapsed disc spaces are sufficient to prevent pain emanating from the degenerative spine. Dr. Soriano opined that because Petitioner's bones are fused with bridging osteophytes, it is not possible, absent fractures of the osteophytes or evidence of spinal instability, for Petitioner to have aggravated his low back condition beyond a temporary aggravation of a facet. He explained that "[i]t would be hard to aggravate a spinal segment where it's already fused to itself from a fall on your buttocks." Dr. Soriano testified that he is familiar with the physical demands of a paramedic as a paramedic/EMT instructor. Dr. Soriano opined that fusing Petitioner from L1 to S1 would have rendered Petitioner totally disabled because he would not be able to bend, twist or turn. Dr. Soriano testified that Petitioner's continued complaints of pain and symptoms into his leg are resultant from nonorganic sources. He stated that, "I think this is a gentleman, as I said, that every quickly applied for Social Security disability, very quickly was off of work, is involved in a worker's compensation medicolegal claim. I think that there is a lot of signs of secondary gain here that might be a good explanation as to why the pain has not been temporary." RX 3.

CONCLUSIONS OF LAW

In regard to disputed issue (F), the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to his work accident. In so concluding, the Arbitrator finds probative Petitioner's treating record from Springfield Clinic of December 12, 2013, two days after his work accident, wherein Petitioner did not report any work injury or any low back complaints. While his appointment on that date was a follow-up visit regarding his type 2 diabetes mellitus, Petitioner apparently thought it significant to report to the physician that he had received his pneumococcal vaccine in November 2012, but did not report any work accident or low back complaints. The Arbitrator notes that Petitioner was reportedly in a "good mood" on that date and the physical examination did not reveal any lumbar symptomatology, which contradicts Petitioner's testimony regarding his condition in the two days following his work accident. If Petitioner had severe pain the morning following his work accident as he reported to Dr. Butler (PX 4), if Petitioner's pain level was indeed a seven out of ten when he reported to St. Mary's Occupational Health Services on December 13, 2013 (PX 3, RX 5), and if Petitioner's pain had remained constant since his work accident as he reported to Dr. Fletcher (RX 5, then it is reasonable to presume that Petitioner would have reported his complaints and/or his work accident while seeing his physician on December 12, 2013. The Arbitrator finds the absence of any such reports from Petitioner on that date demonstrates a lack of any causal relationship between his work accident and his current condition of ill-being.

The Arbitrator also finds the striking similarity of Petitioner's complaints before and after his work injury indicative of a lack of a causal connection between the work accident and his current condition of ill-being. Prior to the accident, Petitioner reported to Dr. VanFleet sharp low back pain that radiated into his buttocks bilaterally and his left and right posterior thighs, as well as spasms and weakness in his lower extremities. His pain was exacerbated by sitting and bending (PX 2), but Petitioner testified that his symptoms also manifested in the absence of any activity. Following his work accident, Petitioner reported complaints of spasms in his right leg, bilateral hip pain, and low back pain worsened by sitting and improved with walking, standing and lying flat. PX 3, RX 11. Essentially, Petitioner's current complaints of low back pain, bilateral hip pain, and lower extremity spasms remain unchanged following his accident when compared with those before December 10,

2013, as does the mechanism that primarily incites those symptoms, namely sitting. The lack of any change in symptomatology undermines the suggestion of a causal relationship between his current complaints his work accident, and instead, suggests his degenerative lumbar condition to be the sole cause of his pre-accident and present condition.

In concluding that Petitioner has failed to prove that his current condition of ill-being is causally related to his work accident, the Arbitrator finds the opinions of Dr. Soriano more persuasive than those of Dr. Fletcher. The Arbitrator notes that Dr. Soriano's opinions are well-informed in that he reviewed Petitioner's pre-accident and post-accident medical records and diagnostic studies when formulating his opinions, whereas it is unclear what Dr. Fletcher had reviewed, as he commented that "I've never been showed [sic] those before" when presented with records on cross examination. PX 1. The Arbitrator also notes Dr. Soriano's credentials and qualifications in comparison to that of Dr. Fletcher. Dr. Soriano is board certified in neurosurgery, treats conditions similar to that of Petitioner's, and regularly performs spinal surgical procedures (RX 3), whereas Dr. Fletcher practices occupational medicine and refers patients to spine surgeons for treatment. PX 1. The Arbitrator finds this distinction significant in this case, given the issue concerning the etiology of Petitioner's current lumbar condition, the nature of Petitioner's condition, and the extensive surgical treatment recommended by Dr. Butler, all of which the Arbitrator finds more properly postured to a neurosurgeon such as Dr. Soriano. The Arbitrator notes that Petitioner did not present any opinions from his treating spine surgeon, Dr. Butler. The Arbitrator also notes Dr. Soriano's experience with the position of a paramedic as an EMT/paramedic instructor (RX 1), whereas Dr. Fletcher's familiarity appears to be gleaned from the physical demands classification of a paramedic by the U.S. Dictionary of Occupational Titles (See PX 1), which goes to the weight of each physician's respective opinions regarding Petitioner's capability of working in that capacity and lends authority to Dr. Soriano's opinions that Petitioner is able to resume work as a paramedic without restrictions.

Further, the Arbitrator finds Dr. Fletcher's opinions unpersuasive in that his opinions are not well-founded in the record. Dr. Fletcher testified that his causation opinion was based upon Petitioner's improvement from his lifting injury on May 24, 2013 following a period of disability and his lack of radicular symptoms prior to the work accident of December 10, 2013. Dr. Fletcher originally believed that Petitioner had returned to work in August or September 2013 following his May 24, 2013 lifting incident, though the record reveals that Petitioner was not released to return to work without restrictions by Dr. VanFleet until October 25, 2013. PX 2. As such, in formulating his opinions, Dr. Fletcher was under the impression that Petitioner was disabled following his May 24, 2013 accident for a shorter time period prior to his work accident than what he actually was. Moreover, the Arbitrator finds that the record is replete with references to Petitioner's radicular symptomatology prior to his work accident, which contradicts a basis of Dr. Fletcher's causation opinion. Petitioner reported pain and weakness in his lower extremities to Dr. VanFleet (PX 2), and pain on both sides of his lumbar spine into his buttocks and radiating down to his knees while undergoing treatment with Dr. Huss. RX 12. Dr. Trudeau assessed a L3 radiculopathy following Petitioner's electrodiagnostic studies of July 8, 2013, and Dr. Fletcher's own records reflect that Petitioner complained of intermittent low back pain that radiated into his hips and weakness in his lower extremities. PX 2, 3. The Arbitrator finds that the evidence in the record undermines Dr. Fletcher's causation opinion, and the Arbitrator accordingly does not afford those opinions evidentiary weight.

The Arbitrator is further disinclined to afford the opinions of Dr. Fletcher weight in light of the totality of his opinions in the record. On June 26, 2013, only one month after Petitioner's May 24, 2013 lifting incident, Dr. Fletcher questioned Petitioner's "ability to do paramedic work; I would suggest he consider applying for SSDI." PX 2. The Arbitrator notes that Dr. Fletcher opined that Petitioner was permanently unable to return to work both before and after the work accident, and he additionally opined that following the work accident, Petitioner was unable to return to his former employment with or without surgical intervention. PX 1, 3, 4, 5. Dr. Fletcher proffered causation opinions in this case based upon an acute trauma theory and a cumulative trauma one, as he opined that Petitioner's current lumbar condition was both aggravated by his work accident of December 10, 2013 and by his general work duties as a paramedic for 30 years. Dr. Fletcher also opined that Petitioner's condition following his May 24, 2013 lifting incident was work related as an aggravation of his pre-existing condition (PX 3, RX 12), which the Arbitrator finds suspect given that Petitioner acknowledged that the May 24, 2013 incident was not work related in any way. The Arbitrator finds that, based upon the foregoing, Dr. Fletcher hastily opines Petitioner to be permanently and totally disabled from his position as a paramedic, and he appears to find Petitioner's incidents are work related irrespective of the facts or circumstances.

Lastly, the Arbitrator echoes the concerns of Dr. Soriano regarding the etiology of Petitioner's ongoing complaints and his motives in pursuing his present worker's compensation claim. The Arbitrator notes Petitioner's attempts at obtaining Social Security Disability very shortly after both his May 24, 2013 and December 10, 2013 incidents despite his acknowledgement that his disability was temporary and that he had reason to believe he would improve following the former injury, as well as his attempt at developing his condition following the May 24, 2013 incident, which he testified was unrelated to his employment, into a cumulative trauma worker's compensation claim. See PX 3, RX 12. This evidence suggests that Petitioner seeks to be deemed disabled by whatever means available, which goes to the reliability of his testimony.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being is causally related to his work accident of December 10, 2013.

In regard to disputed issue (J), consistent with the opinions of Dr. Soriano and the Arbitrator's foregoing conclusions, the Arbitrator finds that Respondent is liable for medical bills incurred in Petitioner's care and treatment up to and including March 13, 2014, the date of Dr. Soriano's report in which he opined that Petitioner required no further treatment relative to his work injury and was at maximum medical improvement. RX 1. Petitioner's treatment from the date of accident to March 13, 2014 was reasonable and necessary to treat his lumbar strain resultant from his work accident of December 10, 2013. Respondent shall pay all reasonable and necessary medical services with dates of service through March 13, 2014, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. All medical bills for services rendered after March 13, 2014 are denied as unrelated to Petitioner's work injury. Respondent shall be given credit for all medical bills that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K), Petitioner seeks temporary total disability benefits from December 13, 2013 through the present Arbitration hearing (Arb. X 1) in which Dr. Fletcher removed Petitioner from work following his work accident. PX 3, 4, 5. Consistent with the

opinions of Dr. Soriano and the Arbitrator's foregoing conclusions, Respondent shall pay Petitioner temporary total disability benefits for a period of 13 weeks, commencing December 13, 2013 through March 13, 2014, at which time Dr. Soriano opined Petitioner could have returned to work within four weeks of the work accident and that Petitioner was at maximum medical improvement for the lumbar strain resultant from his work accident of December 10, 2013. RX 1. All temporary total disability benefits for time periods thereafter are denied. Respondent shall be given a credit in the amount of $6,122.48 for temporary total disability benefits that has been paid, and a credit in the amount of $8,950.20 for nonoccupational indemnity disability benefits that has been paid, as stipulated by the parties.

In regard to disputed issue (L) and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With regard to subsection (i) of 8.1b(b), the Arbitrator notes that Dr. Soriano was requested by Respondent to perform an impairment rating pursuant to the AMA Guides Sixth Edition, and he opined that "[o]n an objective radiological and physical exam basis, I do not believe he has sustained any permanent *disability* as a result of his employment, according to the 6th Edition of the AMA Guides." RX 1 (emphasis added). The Arbitrator recognizes that permanent partial disability and impairment as defined by the AMA Guides Sixth Edition are not the same, and the Arbitrator makes note of this distinction when assessing the weight given to Dr. Soriano's findings and in determining the permanency award. Because it is unclear as to whether Dr. Soriano appropriately applied the AMA Guides in formulating his opinion, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of 8.1b(b), Petitioner was employed by Respondent as a paramedic at the time of his accident, but he has not yet returned to his prior position. Dr. Fletcher testified that a paramedic is classified as a heavy demand position in the U.S. Dictionary of Occupational Titles (PX 1), and Petitioner testified that he transported patients weighing on average 250 pounds on stretchers that weigh 60 pounds. He further testified that he may be required to lift a patient from the basement of a house, from a 50-foot ravine in a car, or in a confined space in an industrial plant. Dr. Soriano, an EMT/paramedic instructor, opined that Petitioner can return to his position as a paramedic without restriction. The Arbitrator concludes that the heavy physical demands of Petitioner's position as a paramedic significantly affect his permanent partial disability, and the Arbitrator places great weight on this factor.

With regard to subsection (iii) of 8.1b(b), Petitioner was fifty two years of age at the time of the accident. Arb. X 1. There was no evidence presented at Arbitration as to how his age has affected any permanent partial disability, and as such, the Arbitrator gives no weight to this factor.

With regard to subsection (iv) of 8.1b(b) and in accordance with the opinions of Dr. Soriano, Petitioner can return to his position as a paramedic without restrictions, and as such, the Arbitrator concludes that Petitioner's work accident has not impaired his future earning capacity. The Arbitrator places some weight on this factor.

With regard to subsection (v) of §8.1b(b), as a result of his work accident, Petitioner sustained a lumbar strain that was treated conservatively with pain medications and physical therapy. Petitioner testified that he continues to have pain in his low back and bilateral hips worsened with sitting. He has pain across his lower back and down the lateral sides of both hips that oftentimes radiates into the back of one leg down into his knee or both knees. Petitioner testified that he also currently experiences pain towards his mid-thoracic level. He is unable to sit or stand for extended periods of time without pain, and he has difficulty with walking distances. On February 14, 2014, Petitioner reported to Dr. Butler suffering continued low back pain, and persistent radiation of pain to the anterior thigh and knee on the right, and Petitioner reported to Dr. Fletcher low back pain, right leg symptoms, and soreness in his low back and hips bilaterally. The Arbitrator finds that Petitioner's complaints following his work accident are corroborated by his treating records, and the Arbitrator places great weight on this factor.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors, and the record in its entirety, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of his person as a whole, pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Beltz,

Petitioner,

vs.

NO. 14WC 32315

16IWCC0002

McDowell Enterprises,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary disability, causal connection, evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 17, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $9,800.00. 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.

DATED:
SJM/sj JAN 4 - 2016
o-11/5/15
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

BELTZ, ANDREW
Employee/Petitioner

Case# **14WC032315**

16IWCC0002

McDOWELL ENTERPRISES
Employer/Respondent

On 4/17/2015, 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 0.10% 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:

0250 HOWERTON DORRIS & STONE
STEPHEN W STONE
300 W MAIN ST
MARION, IL 62959

4476 KELLY LAW
RYAN L POWERS
4801 N PROSPECT RD
PEORIA HEIGHTS, IL 61616

16IWCC0002

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Andrew Beltz,
Employee/Petitioner

v.

McDowell Enterprises,
Employer/Respondent

Case # 14 WC 32315

Consolidated cases: N/A

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **March 12, 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 **7/16/14**, 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 $**53.771.12**; the average weekly wage was $**1,034.06**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Petitioner was entitled to temporary total disability benefits from July 16, 2014 through November 24, 2014 and Respondent shall be given a credit of $**10,734.47** for TTD benefits paid during that period of time.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**689.37/ week** for **14** weeks, commencing **November 25, 2014** through **March 2, 2015**, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary to permanent disability, if any.

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.

Nancy Lindsay
Signature of Arbitrator

April 13, 2015
Date

APR 17 2015

Andrew Beltz v. McDowell Enterprises,
14 WC 32315 (19(b))

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner sustained an undisputed accident on July 16, 2014 which arose out of and in the course of his employment with Respondent. At the time of arbitration, the only issue in dispute was Petitioner's entitlement to temporary total disability benefits from November 25, 2014 through March 2, 2015. The parties stipulated at the time of hearing that any issue as to medical bills was being reserved for a future hearing. (AX 1) Petitioner was the sole witness testifying at the hearing. Respondent tendered no exhibits.

The Arbitrator finds:

Petitioner has worked for Respondent as a truck driver for over nineteen years. He drives a flatbed and a dump trailer hauling rock, sand, and coal. His duties include driving and climbing in and out of the trailer to sweep the bed.

On July 16, 2014 Petitioner was involved in a motor vehicle accident when another semi-truck rear-ended Petitioner's truck. Petitioner sustained a head injury but did not recall being hit. Petitioner was transported by ambulance to Hardin County Hospital for further care. (PX 1, Red Tab 3)

Petitioner was diagnosed with a right forehead laceration and concussion. His forehead laceration was closed with sutures. CT scans of Petitioner's head, neck, chest, abdomen, and pelvis revealed no acute findings.

He was released from work until seen by his primary care physician or Respondent's occupational doctor. (PX 1, Red Tab 3, p. 7/27[1])

Thereafter, Petitioner came under the care of his primary care physician, Dr. Hastie, who kept him off work as of Petitioner's first visit on July 24, 2014 through August 8, 2014 when Petitioner was released to light duty. (PX 1, Red Tab 3, pp. 5/27, 7/27, and 11/27; PX 2)

Petitioner underwent an MRI of his brain at Saline Valley Radiology on August 28, 2014. It showed a small subdural fluid collection on the right side. (PX 1, Red Tab 6) Petitioner also underwent a CT scan of the cervical spine. (PX 1, Red Tab 6)

Petitioner continued on a light duty basis until September 4, 2014 when Dr. Hastie again took him off work. (PX 1, Red Tab 3, p. 13/27; PX 2) As of September 4, 2014 Dr. Hastie noted Petitioner was still having issues with driving, concentration, and occasional headaches and neck pain. He was seeing Dr. Weaver and undergoing physical therapy. Petitioner remained off work, was told to avoid aggravating and exciting factors such as extreme lifting and to follow his neurosurgeon's orders. (PX 1, Red Tab 3, p. 11/18; PX 2)

Dr. Weaver examined Petitioner on September 3, 2014, Petitioner having been referred due to a "brain bleed" seen on the August 28, 2014 MRI. According to Dr. Weaver's notes, Petitioner had a "significant injury" when driving a truck with a lot of soft tissue pain from the neck and scapular regions radiating into the shoulder and "a bit" into the subdeltoid region on the left

[1] The "7/27" refers to page numbers located in the upper right hand corner of PX 3).

side. Petitioner was also experiencing headaches which the doctor felt were probably more of a sequelae of the neck strain than anything else. Petitioner was advised to stay off work as there was some risk of seizure even with a small subdural. He was also prescribed therapy for his neck. Dr. Weaver anticipated a CT scan of the head in about a month. (PX 1 - Red Tab 6)

Petitioner followed up with Dr. Weaver on October 6, 2014 reporting some ongoing headaches, confusion and dizziness. He also complained of neck pain which was, however, improving. Dr. Weaver felt Petitioner's symptoms were consistent with his post-concussive syndrome and he recommended Decadron for the subdural. A repeat CT scan was also taken that day showing a small chronic right-sided subdural hematoma overlying the right frontal and parietal lobe. (PX 1, Red Tab 6)

As of October 7, 2014 Dr. Hastie continued to keep Petitioner off work. Petitioner was also still undergoing physical therapy and seeing the neurosurgeon. (PX 1, Red Tab 3, 9/18)

Dr. Weaver examined Petitioner on November 10, 2014. Dr. Weaver felt Petitioner was suffering from fairly classic post-concussion syndrome symptoms of headache, dizziness, and short term memory loss. He felt Petitioner would continue to improve over time. (PX 1, Red Tab 6)

Dr. Hastie continued Petitioner off work as of November 11, 2014. (PX 1, Red Tab 3, p. 7/18)

Petitioner was receiving temporary total disability benefits throughout the foregoing time period. However, temporary total disability benefits were terminated as of November 23, 2014. (PX 2)

Petitioner returned to see Dr. Hastie on November 25, 2014. Petitioner still wasn't feeling well and was reporting he didn't feel quite ready to go back to work. He still reported headaches. Given the longevity of his symptoms and the force of his impact at the time of the accident, Dr. Hastie referred Petitioner to neurology for further evaluation and back to physical therapy. Petitioner remained off work. (PX 1, Red Tab 3, p. 5/18; PX 2) As of December 29, 2014 Petitioner was advised to continue his current therapy and referred to a neurologist. He remained off work. (PX 1, Red Tab 3, p. 6/9; PX 2)

Petitioner was examined by Dr. Trivedi at the Brain & Spine Institute on January 19, 2015. Petitioner was prescribed Tramadol. (PX 3)

Dr. Hastie's office notes indicate that Petitioner's headaches were improving as of January 29, 2015. Petitioner reported the medication prescribed by Dr. Trivedi was helping. Petitioner was kept off work until seen in follow-up with Dr. Trivedi. (PX 1, Red Tab 3, p. 7/10; PX 2) As of February 13, 2015 Petitioner was reporting fewer headaches with less severity. As Dr. Hastie had not seen any of the neurologist's reports, he kept Petitioner off work. According to the doctor's notes, once he received those, he would review Petitioner's clearance for work. (PX 1, Red Tab 3, p. 5/10; PX 2)

Petitioner testified that Dr. Hastie kept him off work past February 20, 2015, releasing him back to work on March 3, 2015. According to Petitioner,

his employer would not allow him to return to work from the accident until all doctors provided him with a release. Petitioner testified he returned to work on March 3, 2015, and continues to work, having benefitted from medications prescribed by the neurologist.

The Arbitrator concludes:

Issue (L) - Petitioner's entitlement to Temporary Total Disability Benefits.

Petitioner is awarded temporary total disability benefits beginning July 16, 2014 through March 2, 2015, a period of 32 weeks. The parties stipulated that Petitioner was temporarily totally disabled from July 16, 2014 through November 24, 2014. (AX 2) No explanation for Respondent's termination of benefits is in the record. Dr. Hastie has continued to keep Petitioner off work through March 2, 2015 when he was released to return to work. (PX 1, Red Tab 3; PX 2) During this time Petitioner has been treated for a subdural hematoma, concussion, blurred vision, and neck pain. There being no contrary evidence that Petitioner was restricted from work November 25, 2014, through March 2, 2015, Petitioner is entitled to benefits for that time period. He has remained under the care of his doctor during that time and with instructions to remain off work.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matthew Schaeffer,

Petitioner,

vs. NO: 09 WC 11472

16IWCC0106

Brand Services,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical, causal connection, prospective medical, benefit rates, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2015 is hereby affirmed and adopted.

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

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

IT IS THEREFORE ORDERED BY THE COMMISSION that commencing on August 4, 2014, Respondent pay to Petitioner the sum of $662.67 per week for the duration of Petitioner's disability as provided in §8(d)1 of the Act, for the reason that the injuries sustained

16IWCC0106

permanently incapacitated Petitioner from pursuing the duties of Petitioner's usual and customary line of employment.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. 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.

DATED: FEB 5 - 2016

MB/mam
o:12/10/15
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHAEFER, MATTHEW
Employee/Petitioner

Case# **09WC011472**

16IWCC0106

BRAND SERVICES
Employer/Respondent

On 2/4/2015, 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 0.06% 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:

4324 LASHLY & BAER PC
ANDREW TOENNIES
714 LOCUST ST
ST LOUIS, MO 63101-1699

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

16IWCC0106

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MATTHEW SCHAEFER
Employee/Petitioner

v.

BRAND SERVICES
Employer/Respondent

Case # **09** WC **11472**

Consolidated cases: _____

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 **Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **November 14, 2014**. 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 _____

16IWCC0106

FINDINGS

On **November 17, 2008**, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**49,225.80**; the average weekly wage was $**946.65**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **1** children under 18.

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

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

Respondent shall be given a credit of $**139,838.40** for TTD, $**0** for TPD, $**17,264.00** for maintenance, and $**0** for other benefits, for a total credit of $**157,102.40**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

The Respondent shall pay Petitioner permanent partial disability benefits of $622.67/week for the duration of the disability because the injuries sustained caused a loss of earnings as provided in Section 8d1 of the Act.

The Arbitrator awards no TTD or TPD benefits.

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

1/26/15
Date

FEB 4 - 2015

16IWCC0106

ILLINOIS WORKERS' COMPENSATION COMMISSION

MATT SCHAEFER,

Employee,

v. Injury No.: 09 WC 11472

BRAND ENERGY SERVICES,

Employer.

In support of the Arbitrators decision relating to the issues herein the Arbitrator finds the following facts:

Findings of Fact

The parties stipulated that the Petitioner was employed by the Respondent on November 17, 2008, that Respondent was given notice of the Petitioner's injuries. Petitioner is a 48 year old union carpenter, who was injured on November 17, 2008 when a piece of metal scaffolding fell and hit him in the back of the head. He was diagnosed with a herniated cervical disc at C5-6. He underwent a C5-.6 surgical fusion performed by Dr. Keith Wilkey on May 18, 2009. Following his surgical fusion, Petitioner had limited range of motion and persistent neck pain. On April 11, 2011, Dr. Wilkey stated that in his professional opinion, the patient would benefit from at least a trial of a dorsal column stimulator. Dr. Wilkey recommended pain management treatment, which the Petitioner undertook with Dr. Kaylea Boutwell. Dr. Boutwell's treatment included a weaning of the Petitioner's significant narcotic medication. Petitioner testified that he insisted on being weaned off the pain medications in an effort to go back to work. Dr. Boutwell assisted Petitioner in this endeavor and eventually he was weaned off the pain medications by August, 2011. Dr. Boutwell also indicated in her records that she would seek authorization for a spinal cord stimulator, however, due to the passage of time, she indicated in her November 15,

2011 report that a spinal cord stimulator may not be useful. Dr. Boutwell found the Petitioner to be at MMI as of her November 15, 2011 report

Petitioner's surgeon, Dr. Wilkey, referred Petitioner to Dr. William Thom, a pain management specialist regarding the trial of a spinal cord stimulator. Dr. Thom initially saw Petitioner on November 7, 2011. Dr. Thom eventually implemented the spinal cord stimulator on a trial basis and testified the Petitioner's pain had been reduced by 60%. Dr. Thom also conducted his own examination on Petitioner, focusing on any potential psychological barriers to care. Based on the results of that exam and the Petitioner's improvement following the stimulator trial, Dr. Thom believed Petitioner was a good candidate for the implementation of a permanent spinal cord stimulator. Dr. Thom also testified that the spinal cord stimulator may help in getting the Petitioner back to work. Following a 19(b) hearing before Arbitrator Granada and an appeal the Commission Ordered Respondent to pay reasonable and necessary medical treatment for the implementation of the permanant spinal cord stimulator, Dr. Yazdi surgically implanted the permanent spinal cord stimulator on April 25, 2013.

Petitioner testified that since using the permanent spinal cord stimulator, he has more mobility. He is still taking some medication, but is paying for his medication and treatment on his own or through his wife's insurance - which includes the trial spinal cord stimulator. Petitioner testified that he has continued neck and shoulder pain, he tires easily, everything is difficult and he has to rest through the day.

Respondent sent Petitioner to Dr. Michael Boedefeld for an IME examination. Dr. Boedefeld's examination of Petitioer's neck revealed very limited range of motion in all directions. Dr. Boedefeld's report states that Mr. Schaefer can no longer work as a carpenter. Dr. Boedefeld also stated that Mr. Schaefer has restricted range of motion which would make it difficult to

drive and see cars in his blind spots. Dr. Boedefeld stated that Petitioner cannot return to work as a carpenter but could do less rigorous duties. (Pt. Ex. 14)

Dr. William Thom is a board certified, Mayo Clinic trained Pain Management Physician. He has treated Mr. Schaefer for more than three years and personally met with Mr. Schaefer on each visit. Dr. Thom testified that Petitioner can no longer work as a carpenter. He stated that he would place Mr. Schaefer's work capacity at a light to minimal level. Dr. Thom placed Petitioner at a 20-30 mile driving restriction. Since 2009, Petitioner had been on a 30 minute/30 mile driving restriction by Dr. Keith Wilkey, his surgeon. Dr. Thom testified that Petitioner's restricted range of motion affects his ability to drive. He has weakness, pain, and loss of strength in his neck. Dr. Thom opined that it would be "nearly impossible" for Mr. Schaefer to maintain a full time job. Petitioner can only work 2-3 hours at a time, he can't work overhead, he has balance issues and has difficulty climbing. Dr. Thom testified that he has concerns that an employer would not accommodate Mr. Schaefer's need to get off his feet during work hours.

Dr. Thom ordered a Functional Capacity Evaluation(FCE). The FCE found that Mr. Schaefer gave high levels of physical effort, in fact he had to be told by the therapist to stop from lifting too heavy of weights in order to avoid the possibility of injury. (Pt. Ex. 4, page 9 of FCE) In addition, Mr. Schaefer's clinical testing indicated that Mr. Schaefer's subjective reports matched well with his distraction-based objective findings. The FCE found Petitioner to be in the light to medium work capacity.

Dr. Thom testified that Petitioner would require future medical care for maintenance of the leads and batteries for the spinal cord stimulator.

Jim England, the Petitioner's vocational rehabilitation expert indicated that at most, Petitioner can perform a lower to medium job working as a cashier or clerk earning approximately $10-$12 per hour.

Julie Bose is a vocational rehabilitation expert with MedVoc hired by Respondent. Her office performed a labor market study and attempted to speak with potential employers about whether or not they would hire Mr. Schaefer. Ms. Bose was aware of Mr. Schaefer's driving restrictions at the time her office performed the labor market study. Ms. Bose credibly testified that Petitioner can work making $12.32 per hour (R EX 1, pp 32, line 21).

Logan Roche has been a Union Representative for the Carpenters Local for 24 years. He testified that Petitioner was a great scaffold builder. Mr Roche testified that Mr. Schaefer was the Shop Steward on the job at the Baldwin, IL plant at the time of his injury in November, 2008. Because Mr. Schafer was the Shop Steward he would have been the last union scaffold builder to be taken off the job because of his seniority. Mr. Roche testified that Petitioner was a real good scaffold builder and he was not aware of any disciplinary or other work issues with Petitioner.

He testified that a residential carpenter is the most difficult type of carpentry job because they do not have the equipment large industrial job sites have and a residential carpenter must do repetitive bending, lifting and climbing.

Mr. Roche testified that if Mr. Schaefer was able to work today his hourly wage would be $35.67 per hour averaging 40 hours per week (P EX 15 pps 13 & 16).

Petitioner testified that he has been working selling cars for Steibel Auto Body since August, 2014. There he is earning an average of $601.58 per month which is considerably less than that which Ms. Bose found Petitioner capable of earning, supra.

Legal Analysis

Petitioner has met his burden for a wage differential award. To qualify for a wage differential award under Section 8(d)(1) a claimant must prove (1) partial incapacity which prevents him from pursuing his "usual and customary line of employment", and (2) an impairment of earnings. Gallianetti v Industrial Commission, 248 Ill.Dec. 554, 315 Ill. App. 3d 721, 734 N.E.2d 482(2000). Under Gallianetti, these are the only two questions that must be asked. If a petitioner shows that he affirmatively meets these two criteria, then he has fulfilled his burden and is entitled to a Wage Differential under Section 8(d)(1). Benyon v Perillo BMW, 00 IL. W.C. 29298 (2008). In General Electric Co. v Industrial Commission, 89 Ill.2d 432, 438, 60 Ill.Dec.629, 433 N.E.2d 671 (1982) our supreme court expressed a preference for wage-differential awards over scheduled awards.

This type of award is based on the presumption that, but for the injury, the employee would be in the full performance of his duties. Albrecht v Industrial Commission, 271 Ill.App.3d 756, 759, 208 Ill.Dec. 1, 648 N.E.2d 923 (1995). If claimant's injury does not prevent him from pursuing his usual type of employment, he is not entitled to a wage differential award. Similarly, if claimant's injury does not reduce his earning capacity, he is not entitled to a wage differential award.

The evidence presented showed that Petitioner can no longer work as a carpenter. Respondent's IME physician Dr. Boedefeld stated Petitioner could no longer work as a carpenter. The testimony of Logan Roche determined what Petitioner would be earning i.e. $35.67 per hour for 40 hour week, if he were not injured. The testimony of Ms. Bose determined the Petitioner could currently earn $12.32 for a 40 hour week.

Order

Pursuant to Section 8(d)(1) of the Act, Petitioner is entitled to a wage differential award. Respondent shall pay Petitioner permanent partial disability benefits commencing August 24, 2014 of $622.67 for the duration of the disability because the injuries sustained caused a loss of earnings as provided in Section 8d1 of the Act.

The calculation is as follows: 40 hours x $35.67 per hour =$1426.80; 40 hours x $12.32= $492.80. $1,426.80 minus $492.80 = $934.00 which is the differential. That times 2/3 is $622.67 which the 8d1 award.

Respondent shall pay Petitioner 8d1 benefits that have accrued from August 24, 2014 through the date of this award and thereafter shall pay the remainder of the award in weekly payments.

The Arbitrator awards no TTD or TPD benefits

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
JEFFERSON		☐ PTD/Fatal denied
	☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

George Fred Engleby,

Petitioner,

vs. NO: 09 WC 15433

Western Express,

Respondent,

16IWCC0073

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses both incurred and prospective,temporary total disability 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. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds there is no causal connection between the Petitioner's cervical spine condition and the accident on November 9, 2009.

The Commission does find a causal connection between the accident on November 9, 2009 and Petitioner's left carpal tunnel syndrome.

16IWCC0073

Petitioner had a prior cervical surgery in May of 2001. This involved the C5-6 disc level. Dr. Kube admitted under cross-examination, by virtue of this fact alone, there is a 20% to 30% of developing adjacent level disc disease at C4-5. He admitted that that could be the reason he is prescribing the surgery in 2012, 3 years after the accident on March 9, 2009. (Petitioner Exhibit 12 Pgs. 37-38)

Dr. Vaught, an orthopedic spine surgeon, treated Petitioner's cervical spine from August 12, 2009 through November 2, 2009. He reviewed a cervical spine MRI performed on July 29, 2009 in which the radiologist interpreted it as showing a mild bulge at C4-5. He felt that the MRI showed no surgical pathology. Dr. Vaught found that Petitioner was at maximum medical improvement for his cervical strain on November 2, 2009. (Respondent Exhibit 2)

Petitioner did not see another doctor regarding his cervical spine until he saw Dr. Morgan, who had been treating him for his left shoulder, on November 4, 2011. Petitioner complained of left arm problems and Dr. Morgan felt that it was the result of the 2001 cervical surgery. Dr. Morgan saw Petitioner again on January 13, 2012 and Petitioner complained of "acute pain" in his cervical spine. (Petitioner Exhibit 1) Dr. Morgan testified in his deposition that "acute" means "recent pain." (Petitioner Exhibit 2 Pg. 51)

Dr. Kube testified that in his opinion Petitioner needs a C4-5 decompression and fusion surgery. However, he did not see Petitioner until April 4, 2012 over 3 years after the accident. Dr. Kube had not read any of Petitioner's prior treating records and based his causation opinion on the Petitioner's history. Dr. Kube, at his deposition was asked to pull up the June 9, 2009 Cervical MRI as well as the 2012 Cervical MRI. Although the radiologist in the 2009 MRI found a mild stenosis compared to the significant stenosis at C4-5 in the 2012 MRI, he felt that the first radiologist was "wrong." (Petitioner Exhibit 12 Pgs. 43-45) Dr. Kube opined that the November 2009 accident made his symptomology worse and led to the current symptomology requiring the surgery. The accident is "at least" a contributing cause. (Petitioner Exhibit 12 Pgs. 27-28)

The Commission finds Dr. Kube's opinion unpersuasive and finds Petitioner's testimony regarding the intervening accident lacking in credibility. First, he sees the Petitioner almost 3 years after the accident. Secondly, he bases his opinion strictly on Petitioner's testimony. Petitioner told Dr. Kube that there was no real change in his neck pain following the car wreck on May 10, 2010. (Petitioner Exhibit 12 Pgs. 6-8) Yet Dr. Morgan saw Petitioner again on January 13, 2012 and Petitioner complained of "acute pain" in his cervical spine. (Petitioner Exhibit 1) Dr. Morgan testifies in his deposition that "acute" means "recent pain." (Petitioner Exhibit 2 Pg. 51) Third, the Doctor admits that he had no idea what the impact was involved in the auto accident. Fourth, he also admitted after reviewing the hospital records following the car wreck that Petitioner was complaining about neck pain. Fifth, he also admitted that after reviewing the hospital records the car wreck was pretty severe and that if someone's face hit the steering wheel causing facial fractures this would put stress and loading on the cervical spine. (Petitioner Exhibit 12 Pgs. 59-61)

16IWCC0073

The Commission also finds that per the radiologists' reports, the MRI's of 2009, and 2012 show a significant change in Petitioner cervical spine.

Therefore, the Commission finds that Petitioner has failed to prove a causal connection between his current condition as it pertains to his cervical spine and the accident of March 9, 2009. Respondent is not responsible for any medical bills regarding the Petitioner's cervical spine past the November 2, 2009 date when Dr. Vaught found Petitioner at maximum medical improvement.

Petitioner is entitled to temporary total disability from March 27, 2009 through February 12, 2013 based on the shoulder surgery in2009 and his recovery therefrom.

In his deposition, Dr. Morgan was of the opinion that the Petitioner sustained a double crush syndrome of the left hand as well as carpal tunnel syndrome. Petitioner had no history of left hand symptoms prior to the March 9, 2009 accident. He recommended a release of the left hand. The March 9, 2009 accident aggravated the previous carpal tunnel condition because the symptoms escalated. (Petitioner Exhibit 2 Pg. 30- 32)

Therefore, the Commission finds that the Respondent is responsible for the left carpal tunnel release as proposed by Dr. Morgan. It also finds that Respondent is liable for any temporary total disability that results from said surgery.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $517.29 per week for a period of 198 1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the Petitioner for the medical expenses under §8(a) of the Act and 8-2 as they pertain to the left carpal tunnel release performed by Dr. Morgan. Cervical spine surgery as prescribed by Dr. Kube is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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

16IWCC0073

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 $5,000.00. 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.

DATED: JAN 2 8 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 12/1/15
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

ENGLEBY FRED, GEORGE
Employee/Petitioner

Case# **09WC015433**

WESTERN EXPRESS
Employer/Respondent

16IWCC0073

On 3/16/2015, 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 0.09% 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:

0536 RON D COFFEL & ASSOC
502 W PUBLIC SQUARE
PO BOX 366
BENTON, IL 62812

0283 JELLIFFE FERRELL & MORRIS
KELLY R PHELPS
108 E WALNUT ST PO BOX 406
HARRISBURG, IL 62946

STATE OF ILLINOIS)
)SS.
COUNTY OF JEFFERSON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
19(b)

George Fred Engleby
Employee/Petitioner

Case # 09 WC 15433

v.

Consolidated cases: n/a

Western Express
Employer/Respondent

16IWCC0073

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was originally heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on November 8, 2013. The parties waived a full Decision, but this matter was remanded to the Arbitrator for a full Decision. After reviewing all of the evidence that was 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On March 9, 2009, 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 in regard to the left shoulder, left hand and neck is causally related to the accident.

In the year preceding the injury, Petitioner earned $40,348.88; the average weekly wage was $775.93.

On the date of accident, Petitioner was 54 years of age, single with 0 dependent child(ren).

Petitioner has not received all reasonable and necessary medical services.

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $70,330.20 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $70,330.20.

Respondent is entitled to a credit of $27,484.83 under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 22, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $27,484.83 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for the medical treatment recommended by Dr. Richard Kobe including, but not limited to, cervical fusion surgery and the medical treatment recommended by Dr. Richard Morgan including, but not limited to, left hand surgery.

Respondent shall pay Petitioner temporary total disability benefits of $517.29 per week for 240 4/7 weeks commencing March 27, 2009, through November 8, 2013, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

William R. Gallagher, Arbitrator
ICArbDec19(b)

March 9, 2015
Date

MAR 16 2015

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim both of which alleged Petitioner sustained accidental injuries arising out of and in the course of his employment for Respondent. The Application filed in 09 WC 15433 alleged that Petitioner sustained an accident during the course of employment on March 9, 2009, which caused injuries to the neck, left shoulder and left hand (Arbitrator's Exhibit 3). The Application filed in 12 WC 04127 alleged that Petitioner sustained repetitive trauma to both hands which manifested itself on January 20, 2012 (Arbitrator's Exhibit 4). These cases were consolidated and tried on November 8, 2013, in a 19(b) proceeding in which Petitioner sought an order for payment of temporary total disability benefits and medical bills as well as prospective medical treatment.

At the time these cases were tried, counsel for both Petitioner and Respondent waived having the Arbitrator issue a written decision with findings of fact and conclusions of law. The Arbitrator's Decisions in both cases were filed on January 3, 2014. In case number 09 WC 15433, the Arbitrator ruled in favor of the Petitioner and awarded payment of temporary total disability benefits to the date of trial and past medical bills as well as prospective medical treatment. In case number 12 WC 04127, the Arbitrator ruled in favor of Respondent and denied compensability.

Counsel for Respondent filed a review of the Arbitrator's Decision in case number 09 WC 15433 with the Workers' Compensation Commission. The Commission remanded the case to the Arbitrator directing him to issue a full decision with findings of fact and conclusions of law. Counsel for Petitioner did not file a review of the Arbitrator's Decision in case number 12 WC 04127. The Arbitrator directed the Petitioner and Respondent to file Proposed Decisions and they were received on February 17, 2015, and February 18, 2015, respectively.

Petitioner became employed by Respondent in July, 2007, and worked as a truck driver. On March 9, 2009, Petitioner was in the process of pulling on a tarp and he sustained an immediate onset of pain in his neck and left shoulder. Petitioner previously injured his right shoulder while employed by Respondent on April 12, 2008. At the time of the earlier accident, Petitioner injured his right shoulder while tarping a load. Subsequent to the right shoulder injury, Petitioner was treated by Dr. Richard Morgan, an orthopedic surgeon, who performed rotator cuff surgery. Petitioner had just returned to work in February, 2009, approximately one month before sustaining the accident of March 9, 2009.

In 2000, Petitioner underwent left carpal tunnel surgery by Dr. Keith Park. In 2001, Petitioner underwent a cervical fusion at C5-C6 which was performed by Dr. David Kennedy, a neurosurgeon. At trial, Petitioner testified that following both of these prior surgeries, he was able to return to work as a truck driver and had not received any ongoing medical care for a substantial period of time before March 9, 2009.

Subsequent to the accident of March 9, 2009, Petitioner was seen by Dr. Morgan on March 27, 2009. Petitioner informed Dr. Morgan about the accident and that he had symptoms in the left posterior cervical spine with radiation in the left trapezius/shoulder and down the left arm. Petitioner also advised Dr. Morgan that he had a prior cervical fusion but that he had been

asymptomatic until the accident. Dr. Morgan authorized Petitioner to be off work and ordered MRIs of both the left shoulder and cervical spine. In regard to the right shoulder, Dr. Morgan opined that Petitioner was at MMI and not subject to any restrictions for that condition (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Mark Austin on March 31, 2009. Petitioner complained of left shoulder and neck pain. On clinical examination, Dr. Austin noted considerable muscular spasm in the left side of the neck. He suspected a re-injury of the C5-C6 fusion rather than a new cervical disc herniation (Petitioner's Exhibit 3).

MRIs of the left shoulder and cervical spine were performed on June 29, 2009. The MRI of the left shoulder revealed possible partial tears of the supraspinatus tendon. The MRI of the cervical spine revealed the prior fusion at C5-C6 and bulging of the C4-C5 disc. Dr. Morgan referred Petitioner to Dr. Kovalsky for the neck prior to treating the shoulder; however, Respondent did not authorize the visit with Dr. Kovalsky (Petitioner's Exhibit 1).

At the direction of Respondent's Nurse Case Manager, Petitioner was examined by Dr. Kevin Vaught, a neurologist, on August 12, 2009. Dr. Vaught evaluated Petitioner's spinal injuries and opined that Petitioner sustained cervical, thoracic and lumbar strains as result of the March, 2009 accident. He recommended physical therapy (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Michael Milne, an orthopedic surgeon, on August 27, 2009. Dr. Milne the examined Petitioner primarily in regard to the left shoulder injury. He opined that Petitioner sustained a partial thickness rotator cuff tear as a result of the accident and that the accident aggravated her pre-existing impingement syndrome and AC joint arthrosis (Respondent's Exhibit 4; Deposition Exhibit 2).

Petitioner was seen by Dr. Morgan on September 24, 2009, and Dr. Morgan recommended Petitioner have further physical therapy (Petitioner's Exhibit 1). Petitioner received physical therapy during September and October, 2009, for his left shoulder and neck; however, Petitioner did not experience any significant improvement of his symptoms (Petitioner's Exhibit 6).

Petitioner was again seen by Dr. Vaught on October 5, 2009, and Dr. Vaught opined that neck surgery was not indicated; however, he opined that a lumbar MRI be performed. In regard to Petitioner's left shoulder injury, he deferred the determination of restrictions regarding that injury to the orthopedic surgeon. Dr. Vaught saw Petitioner again on November 4, 2009, and he opined that Petitioner was at MMI in regard to the cervical and thoracic injuries and that Petitioner should be evaluated by a physiatrist (Petitioner's Exhibit 4).

Dr. Morgan continued to treat Petitioner and, on October 22, 2009, he recommended that Petitioner have left shoulder surgery (Petitioner's Exhibit 1). Respondent declined to authorize same.

At Respondent's request, Dr. Milne prepared a supplemental report dated December 10, 2009, wherein he opined that a left acromioplasty and distal clavicle resection were medically reasonable (Respondent's Exhibit 4; Deposition Exhibit 3). Dr. Morgan continued to recommend

that Petitioner have left shoulder surgery; however, Respondent still declined to authorize same (Petitioner's Exhibit 1).

On May 17, 2010, Petitioner was in a motor vehicle accident in which the car he was driving struck a tree going approximately 35 to 45 miles per hour. Petitioner was subsequently treated at St. Louis University (SLU) Hospital for an L5 burst fracture, right rib fracture, right styloid process fractures and a nasal bone fracture. Petitioner did experience some neck pain and was provided with a cervical collar. However, while at SLU Hospital, Petitioner did not receive any additional testing or treatment for his cervical spine. Further, Petitioner did not receive follow-up care from the SLU doctors for the cervical spine (Respondent's Exhibit 1).

Subsequent to the car accident, Dr. Morgan deferred proceeding with left shoulder surgery. On January 12, 2011, Dr. Morgan performed left shoulder surgery which consisted of acromioplasty and distal clavicle resection (Petitioner's Exhibit 1). Following surgery, Petitioner received physical therapy, subacromial injections and work conditioning (Petitioner's Exhibit 8); however, Petitioner testified that the surgery did not believe his neck and left scapular pain.

At Dr. Morgan's direction, a functional capacity evaluation (FCE) was performed on June 13, 2011. The examiner concluded that Petitioner could work at a light physical demand level with no overhead lifting on a frequent or constant basis. The examiner noted Petitioner's job as a truck driver required him to lift heavy tarps and pull on chains and those duties were clearly not within his work restrictions. Further, the examiner noted that Petitioner did not exhibit any symptom magnification and he passed 100% of his validity criteria (Petitioner's Exhibit 8).

Dr. Morgan saw Petitioner on June 14, 2011, and he reviewed the FCE at that time. Dr. Morgan opined that Petitioner had a permanent lifting restriction of 20 to 25 pounds as well as no overhead activities. At that time, Petitioner also complained of bilateral numbness/tingling in both hands so Dr. Morgan ordered nerve conduction studies (Petitioner's Exhibit 1).

Nerve conduction studies were performed on July 13, 2011, which were positive for moderate to severe bilateral carpal tunnel syndrome but negative for cervical radiculopathy. Dr. Morgan saw Petitioner on July 19, 2011, and opined that Petitioner had double crush syndrome on the left side (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Juan Carrillo, an orthopedic surgeon, on September 1, 2011. In regard to Petitioner's left shoulder condition, Dr. Carrillo opined that this was related to the accident and that Petitioner was not at MMI. He also opined that the carpal tunnel syndrome was not related to the accident because there was no mention of and in the medical records until June, 2011 (Petitioner's Exhibit 10; Deposition Exhibit 1).

Petitioner continued to be treated by Dr. Morgan and, when evaluated by him on January 13, 2012, Petitioner complained of pain in the cervical spine with radiation into the left trapezius and increased numbness in the left hand. On March 5, 2012, Dr. Morgan referred Petitioner to Dr. Richard Kube, a spine surgeon (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. R. Peter Mirkin, an orthopedic surgeon, on March 7, 2012. Dr. Mirkin and opined that Petitioner sustained a cervical strain as a result of the accident which had resolved. He noted that Petitioner had spondylitic disease and a neck fusion that pre-existed the accident. He opined that Petitioner had been at MMI since four to five weeks post accident and that Petitioner could return to work without restrictions (Respondent's Exhibit 5; Deposition Exhibit 2).

Dr. Kube initially saw Petitioner on April 4, 2012. On clinical examination, Dr. Kube noted paresthesia in the left arm in the C6 and C7 dermatomes. He ordered a new MRI and opined that the accident aggravated pre-existing degenerative disease and possibly caused a herniation (Petitioner's Exhibit 11).

An MRI was performed which Dr. Kube read on May 16, 2012. He noted that it revealed spinal stenosis at C4-C5 and C6-C7. He ordered physical therapy and a discogram (Petitioner's Exhibit 11).

Dr. Kube again saw Petitioner on September 26, 2012, and, at that time, Dr. Kube noted that Petitioner was having difficulties getting the discogram performed because it was not a procedure that Dr. Kube performed. He indicated that he wanted to review the FCE that was previously performed (Petitioner's Exhibit 11).

Dr. Kube subsequently reviewed the FCE and, on October 17, 2012, he opined that Petitioner could work light duty on a permanent basis barring any surgery that might improve Petitioner's situation. He ordered nerve conduction studies which were performed on November 6, 2012, which revealed a C-5 radiculopathy on the left side and bilateral carpal tunnel syndrome (Petitioner's Exhibit 11).

At the direction of Respondent, Petitioner was examined by Dr. Mitchell Rotman, an orthopedic surgeon, on January 14, 2013. Dr. Rotman opined that Petitioner's left shoulder condition, including the need for the surgery that was performed by Dr. Morgan, was not related to the accident of March 9, 2009. In regard to the cervical condition, Dr. Rotman opined that this was an acute problem that had an onset sometime between December 9, 2011, and January 13, 2012, and was not related to the accident. In regard to the carpal tunnel syndrome, Dr. Rotman opined that this was a chronic condition also not related to the accident. Finally, Dr. Rotman opined that Petitioner could return to work without restrictions (Respondent's Exhibit 6; Deposition Exhibit 2).

Dr. Kube performed a cervical epidural steroid injection on February 6, 2013, which gave Petitioner some temporary relief from his symptoms. When Dr. Kube saw Petitioner on March 18, 2013, he recommended that Petitioner have a decompression and fusion procedure performed at C4-C5 (Petitioner's Exhibit 11).

Dr. Milne was deposed on April 19, 2010, and his deposition testimony was received into evidence at trial. Dr. Milne's testimony was consistent with his medical report and he opined that Petitioner's left shoulder condition and the need for the surgery performed by Dr. Morgan were causally related to the accident of March 9, 2009 (Petitioner's Exhibit 9; pp 13-15).

Dr. Carrillo was deposed on January 19, 2012, and his deposition testimony was received into evidence at trial. Dr. Carrillo's testimony was consistent with his medical report and he stated that Petitioner's left shoulder condition was related to the accident of March 9, 2009; however, he also opined that the carpal tunnel syndrome was not related because this diagnosis was not made until June 14, 2011, approximately two years and three months post accident (Petitioner's Exhibit 10; pp 28-30, 40-42).

Dr. Mirkin was deposed on September 17, 2012, and his deposition testimony was received into evidence at trial. Dr. Mirkin's testimony was consistent with his medical report and he reaffirmed his opinion that the neck condition was not related to the accident of March 9, 2009. He opined that Petitioner's current neck symptoms were related to his pre-existing conditions of spondylitis and the prior fusion Dr. Mirkin agreed that he did not review the medical records of either Dr. Kennedy or Dr. Kube (Respondent's Exhibit 5; pp 9-10, 14).

Dr. Kube was deposed on April 10, 2013, and his deposition testimony was received into evidence at trial. Dr. Kube's testimony was consistent with his records regarding his treatment of Petitioner. In regard to the neck injury, Dr. Kube stated that it is common for neck injuries to manifest symptoms in the trapezius and shoulder and that there is significant crossover when there is also a shoulder injury. In regard to causality, Dr. Kube opined that there was a 25 to 30% chance that the prior fusion was the cause of Petitioner's current neck condition; however, he also opined that the accident of March 9, 2009, was, at least, a contributing cause of Petitioner's current condition and the need for the fusion surgery that he recommended (Petitioner's Exhibit 12; pp 11, 27-30).

Dr. Morgan was deposed on June 20, 2013, and his deposition testimony was received into evidence at trial. Dr. Morgan's testimony was consistent with his records regarding his treatment of Petitioner. Dr. Morgan opined that Petitioner had C5 radiculopathy and a possible C4-C5 disc, attritional changes in the rotator cuff, bilateral carpal tunnel syndrome and double crush syndrome on the left. In regard to causality, Dr. Morgan opined that there was a causal relationship between Petitioner's left shoulder condition and the double crush syndrome (inclusive of the left carpal tunnel syndrome) and the accident of March 9, 2009, but that the right carpal tunnel syndrome was not related. In regard to Petitioner's neck condition, Dr. Morgan did not opined as to causality but stated that he would defer to the experts in that area. He renewed his recommendation that Petitioner undergo left carpal tunnel surgery (Petitioner's Exhibit 2; pp 19-22, 27-32).

Dr. Rotman was deposed on July 15, 2013, and his deposition testimony was received into evidence at trial. Dr. Rotman's testimony was consistent with his medical report and he reaffirmed his opinions that none of Petitioner's conditions were related to the accident of March 9, 2009, and that Petitioner could return to work without restrictions (Respondent's Exhibit 6).

Respondent introduced into evidence video surveillance of Petitioner that was obtained on October 9, 2013, when Petitioner was observed putting various items in the back of a pickup truck and driving it afterward (Respondent's Exhibit 7).

At trial, Petitioner testified that subsequent to the prior carpal tunnel and fusion surgeries that he was able to return to work as a truck driver without restrictions and was not receiving any medical treatment for either condition for a significant period of time prior to March 9, 2009. In regard to the motor vehicle accident of May 17, 2010, Petitioner testified that he did not receive any diagnostic procedures or treatment for either his neck or left shoulder when he was hospitalized following the accident.

Petitioner has not been able to return to work and wants to proceed with the fusion surgery recommended by Dr. Kube and the left carpal tunnel surgery recommended by Dr. Morgan.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of March 9, 2009.

In support of this conclusion the Arbitrator notes the following:

While Petitioner had both left carpal tunnel and cervical fusion surgeries performed in 2000 and 2001, respectively, Petitioner's testimony that he was able to return to work as a truck driver afterward and was not receiving any medical treatment for either or both conditions for a significant period of time prior to the accident of March 9, 2009, was unrebutted.

In regard to the left shoulder condition, Dr. Morgan testified that it was related to the accident of March 9, 2009. Two of Respondent's Section 12 examiner's, Dr. Milne and Dr. Carrillo, opined that the left shoulder condition was related to the accident of March 9, 2009; however, two of Respondent's Section 12 examiner's, Dr. Mirkin and Dr. Rotman opined that the left shoulder condition was not related to the accident of March 9, 2009.

The Arbitrator finds the opinions of Dr. Morgan, Dr. Milne and Dr. Carillo to be more persuasive. The Arbitrator notes that Respondent's four Section 12 examiners had inconsistent opinions.

In regard to the cervical spine condition, Dr. Kube testified that the accident of March 9, 2009, was, at least, a contributing factor to his current condition. The Arbitrator finds the opinion of Dr. Kube be more persuasive than that of Respondent's Section 12 examiners, Dr. Mirkin and Dr. Rotman, both of whom opined that none of Petitioner's conditions were related to the accident of March 9, 2009.

In regard to the left hand, Dr. Morgan opined that Petitioner had double crush syndrome (inclusive of the left carpal tunnel syndrome) which was related to the accident of March 9, 2009. The Arbitrator is not persuaded by the opinion of Respondent's Section 12 examiner, Dr. Carillo. Even though Petitioner did not have any left hand symptoms until June, 2011; however, he received extensive medical treatment for his neck and left shoulder conditions and was

diagnosed with double crush syndrome. It was noted that Petitioner had recovered from his prior left carpal tunnel surgery.

The Arbitrator finds the opinion of Dr. Morgan to be more persuasive than that of Respondent's Section 12 examiner, Dr. Carillo.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 22, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of $27,484.83 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the cervical fusion surgery recommended by Dr. Kube and the carpal tunnel surgery recommended by Dr. Morgan.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to payment of temporary total disability benefits of 240 4/7 weeks commencing March 27, 2009, through November 8, 2013.

In support of this conclusion the Arbitrator notes the following:

At trial Petitioner claim entitlement to temporary total disability benefits of 240 4/7 weeks, March 27, 2009, through November 8, 2013 (the date of trial). Respondent's position was that Petitioner was entitled to temporary total disability benefits of 202 4/7 weeks, March 27, 2009, through February 12, 2013. Accordingly, the disputed period of temporary total disability benefits at the time of trial was 38 weeks.

At the time of trial, Petitioner was still unable to return to work as a truck driver and remained in need of active medical treatment.

The Arbitrator was not persuaded by the surveillance video which showed Petitioner loading some items in the back of a pickup truck and driving the truck thereafter. This did not show the Petitioner engaging in activities inconsistent with his claim of being disabled.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven Lewandowski,

Petitioner,

vs.

NO: 09 WC 19050
10 WC 17583
10 WC 35351

Comcast,

Respondent.

ORDER

This matter Coming on to be heard, pursuant to the **"Petition for Penalties and Attorney's Fees for the Non-Payment of Medical Bills, of the Petitioner"** as was filed on July 12, 2015; and a "Stipulation to Dismiss" having been presented to the Commission by the parties on the 22nd day of January, 2016.

The parties having advised the Commissioner of their agreements, as set forth in their "Stipulation to Dismiss," which is attached hereto and made a part hereof;

And it being the agreement of the parties that certain alleged unpaid medical bills have in fact been paid and that the Respondent will hold Petitioner harmless for any collection action prosecuted by the medical providers named in Petitioner's Petition for Penalties and Attorney's Fees;

And it being the agreement of the parties to resolve other issues by the payment of $5,000.00 in consideration of the settlement of those issues;

It is Hereby Ordered that, based upon the Stipulation of the parties, a copy of which is attached hereto and made a part hereof, this Petition for Penalties be and it is Hereby Dismissed.

DATED:
MJB/ell

JAN 2 6 2016

Michael J. Brennan

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Steven Lewandowski,	)		
	)		
Petitioner,	)	IWCC No.:	09 WC 19050
	)		10 WC 17583
vs.	)		10 WC 35351
	)		
Comcast,	)		
Respondent.	)		

STIPULATION TO DISMISS

NOW COMES the parties, by and through their attorneys, and hereby stipulate as follows:

1. Petitioner has filed a Petition for Penalties and Attorney's Fee regarding unpaid medical bills.

2. The parties agree that Respondent has paid the medical bills that are the subject of Petitioner's Petition for Penalties and Attorney's Fees.

3. Respondent indemnifies and holds Petitioner harmless against any collection action prosecuted by the medical providers named in Petitioner's Petition for Penalties and Attorney's fees.

4. Respondent has agreed to pay and Petitioner has agreed to accept consideration of $5,000.00 in resolution of any present or future litigation that has been or could be claimed as a result of Petitioner's October 3, 2008, may 22, 2010, January 2, 2010, and January 10, 2010 work accidents.

5. That pursuant to the aforementioned agreement, Petitioner agrees to dismiss the petition that is currently pending before Commissioner Brennan all matters having been resolved by the parties.

Petitioner's Attorney
Baum, Ruffolo & Marzal, Ltd.
V. Andrew Marzal

Respondent's Attorney
Spiegel & Cahill, P.C.
Christina H. Bawcum

Commissioner Brennan

Dated: _____

STATE OF ILLINOIS)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
SANGAMON		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenneth Osmoe,
Petitioner,

vs.

Freeman United Coal Mining Company,
Respondent.

16IWCC0068

NO: 09WC 26456

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petition herein and notice given to all parties, the Commission, after considering the issues of diease, permanent partial disability, legal issue, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 20, 2015, is hereby affirmed and adopted.

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

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

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.

DATED: JAN 2 8 2016
KWL/vf
O-1/25/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0068

OSMOE, KENNETH
Employee/Petitioner

Case# 09WC026456

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

16IWCC0068

On 7/20/2015, 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 0.10% 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:

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0068

Kenneth Osmoe
Employee/Petitioner

Case # 09 WC 26456

v.

Consolidated cases: n/a

Freeman United Coal Mining Company
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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on May 28, 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 Sections 1(d)-(f) of the Occupational Diseases Act

FINDINGS

On August 28, 2007, 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 not sustain an occupational disease 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 not causally related to the alleged occupational disease.

In the year preceding the injury, Petitioner earned $59,515.40; the average weekly wage was $1,144.53.

On the date of accident, Petitioner was 58 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

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.

William R. Gallagher, Arbitrator

July 14, 2015
Date

JUL 20 2015

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an occupational disease to his lungs and/or heart arising out of and in the course of his employment for Respondent. The Application alleged a date of last exposure of August 28, 2007, and that Petitioner sustained the occupational disease as a result of inhalation of coal mine dust including, but not limited to, coal dust, rock dust, fumes and vapors for a period in excess of 33 years.

At the time of trial Petitioner lived in Mt. Olive, Illinois, and was 66 years old. Petitioner graduated from high school and served in the Army with the 101st Airborne from 1967 to 1969. He worked in the coal mine for 32 years with the first 30 years being underground. In addition to coal dust he was regularly exposed to and breathed silica dust, roof bolting glue fumes, diesel fumes and trowel.

Petitioner last worked in the coal mine for Respondent at its Crown II mine on August 27, 2007, which is when the mine closed. Petitioner was 58 years old at that time and was working on the surface in the prep plant. Petitioner testified that he was exposed to coal dust on his last day of coal mine employment. Petitioner went to work for the Laborers' Union after the mine closed and worked there for about seven years and then retired.

Petitioner worked at Monterey Coal for about a year beginning in 1969. He worked at the face as a buggy runner. After he left Monterey he went to Washington State for about seven or eight years and worked for a paper recycling business. He came back to Illinois around 1980 and took a job with Respondent. He worked for Respondent for the remainder of his mining career. His job classifications at Respondent included buggy runner, roof bolter and continuous miner operator.

As a roof bolter he was exposed to roof bolting glues which had a strong odor. The continuous miner cuts the coal from the face. He testified that the dust at times was so bad that he could barely see. Petitioner testified that he thought the dust exposure was worse on the surface than at the face of the mine because there was no water to knock down the dust.

Petitioner first noticed breathing problems at work about 10 years into his coal mining career. He testified that he could not do what he used to be able to do without wheezing. When he would walk the silos and climb ladders it would cause him breathing problems including wheezing. Petitioner testified that he would have to stop about half way up. He testified that his breathing problems progressively got worse from the time he first noticed them until his last day of employment in the mine and that his breathing problems are about the same now as when he left the mine. Petitioner testified that he uses an inhaler when he starts to wheeze. He has to use it after he cuts the grass and when he is out walking. He testified that his breathing affects his ability to ride bikes and cut his grass with a push mower. He testified that he used to be into exercising, but now he starts wheezing.

Petitioner testified that Dr. Mathur is his family physician. He testified that he talked to Dr. Mathur about his breathing problems. Dr. Mathur sent him to another physician who gave him some shots and conducted an examination and testing and then gave him an inhaler. Petitioner testified that he has never smoked.

Petitioner testified that he was laid off by Respondent when the mine closed. He testified that but for the mine closing, he would have reported for his next shift. Petitioner testified that he received a full retirement pension. It was a normal pension, not a disability retirement. After he left work, he began working out of Local 338 in Wood River. Petitioner worked a lot for Widman at Conoco Refinery and eventually stayed with them throughout the year. Petitioner was a foreman at the dumpsite. He made sure that the bulldozer spread the dirt out and made room to dump other dirt. He testified that there was not much dust out there and when there was, he would go the other way. When the full time work with Widman ended in 2012, Petitioner took other jobs out of the union hall. He worked as a laborer on road construction in 2012. He testified that the jobs did not really require physical effort. He was a flagman most of the time. He had some problems when he had to carry the signs and walk up and down the highways.

Petitioner testified that he won a Strongman contest in Mt. Olive for his age group. He testified that the Strongman contest requires lifting rocks and flipping tires. The heaviest rock that he lifted was 300 plus pounds. In the competition he had to flip big tractor tires. Petitioner testified that the Strongman competition was 10 years ago or more. He testified that he did it just the one time.

Dr. Glennon Paul is the Medical Director of St. John's Respiratory Therapy and a Clinical Assistant Professor of Medicine at SIU Medical School. (Petitioner's Exhibit No. 1, p. 6). Dr. Paul is the senior physician at the Central Illinois Allergy and Respiratory Clinic. Those physicians specialize in allergy and pulmonary diseases. They take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. Dr. Paul reads 15 to 20 chest x-rays per day. It may be a 100 a week or 5,000 a year. (Petitioner's Exhibit No. 1, pp. 7-8). He also interprets about the same number of pulmonary function tests per day. (Petitioner's Exhibit No. 1, p. 8). Dr. Paul's board certification is in allergy, immunology, and asthma. (Petitioner's Exhibit No. 1, p. 12). He has been board certified since 1971. (Petitioner's Exhibit No. 1, Deposition Exhibit No. 1). Dr. Paul testified that at the time he took his boards, he did not have the option to take the pulmonology boards. (Petitioner's Exhibit No. 1, p. 48).

Dr. Paul has provided care and treatment to Petitioner. He was asked by Petitioner's counsel to fill out a letter with 11 questions. (Petitioner's Exhibit No. 1, pp. 12-13). Dr. Paul testified that Petitioner had coal workers' pneumoconiosis caused by his work as a coal miner. He also testified that Petitioner has chronic bronchitis caused at least in part or aggravated and made worse by his exposure as a coal miner. Dr. Paul testified that in light of the diagnoses of coal workers' pneumoconiosis and chronic bronchitis, if Petitioner were to have further exposure to the environment of a coal mine, it would provide a risk to his health in the form of an increased

potential of a progression of those conditions. (Petitioner's Exhibit No. 1, pp. 13-14). Dr. Paul testified that based on his treatment of Petitioner, he concluded that he had asthma or reactive airways disease caused by his exposures as a coal miner. Dr. Paul testified that if Petitioner were to have further exposure to the environment of a coal mine, it would provide a risk to his health in the form of an increased potential of progression of his asthma or reactive airways disease. (Petitioner's Exhibit No. 1, pp. 14-15). Dr. Paul testified that in light of his diagnoses and medicines that he prescribed for Petitioner and based on his clinical presentation, Petitioner did not have the pulmonary capacity to work full time as a coal miner. (Petitioner's Exhibit No. 1, p. 15).

Dr. Paul testified that in order to have pneumoconiosis one must have, in addition to coal mine dust deposited in his lungs, a tissue reaction to it. The tissue reaction known as scarring or fibrosis cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 1, p. 16). He testified that by definition, if one has coal workers' pneumoconiosis, it is true that he has some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (Petitioner's Exhibit No. 1, p. 17). Dr. Paul was not aware of any outside testing that was done on Petitioner. (Petitioner's Exhibit No. 1, p. 35). Dr. Paul testified that he reviewed a chest x-ray of Petitioner dated March 4, 2013. He read that there was pneumoconiosis on the film. He did not assign a profusion rating or put down an opacity type. Dr. Paul testified that he is not a radiologist or an A or B-reader. He testified that Petitioner just had an x-ray that looked like coal workers' pneumoconiosis, whether the opacities were round or fibular or what. (Petitioner's Exhibit No. 1, pp. 35-37).

Dr. Paul testified that the diagnosis of chronic bronchitis requires a history of cough, wheezing and shortness of breath. He testified that sputum is not required for the diagnosis of chronic bronchitis. Dr. Paul had no authority for that assertion other than his own experience. (Petitioner's Exhibit No. 1, pp. 37-38). Dr. Paul testified that Petitioner related wheezing and coughing and shortness of breath for approximately 10 years. He testified that it did not end after he left coal mining. To Dr. Paul's knowledge Petitioner had not worked since he left the mine. (Petitioner's Exhibit No. 1, pp. 38-39).

Dr. Paul testified that in the testing he performed on March 4, 2013, there was no evidence of obstruction until after Petitioner inhaled methacholine. He testified that Petitioner did not have a diffusion abnormality. Dr. Paul testified that he had a positive response to the inhalation of methacholine and then went back to normal after the inhalation of bronchodilators. (Petitioner's Exhibit No. 1, pp. 39-40). Dr. Paul testified that for the change in FEV1 to be significant, most people use 20% as a guideline to determine if the drop is significant, but that cannot be locked in. (Petitioner's Exhibit No. 1, pp. 40-41).

Dr. Henry K. Smith, a board certified radiologist and NIOSH B-reader, interpreted a chest x-ray dated March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/S opacities in the bilateral middle and lower lung zones. Dr. Smith interpreted a chest x-ray of October 14, 2010, as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones. Dr. Smith interpreted a chest x-ray of March 4, 2013, as positive for pneumoconiosis, category 1/0 with P/P

opacities in all lung zones. Dr. Smith also interpreted the chest CT dated October 14, 2010. He noted findings consistent with coal workers' pneumoconiosis with P/P opacities in the upper, mid and lower lung zones bilaterally with a profusion 1/1. (Petitioner's Exhibit No. 4).

Dr. Michael S. Alexander, a board certified radiologist and B-reader, interpreted a chest x-ray dated March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. Dr. Alexander made an identical interpretation of the chest x-ray dated October 14, 2010. (Petitioner's Exhibit No. 5).

Dr. Dani Tazbaz practices pulmonary medicine and provides critical care services in the hospital. (Petitioner's Exhibit No. 3, p. 4). Dr. Tazbaz is board certified in internal medicine, pulmonary disease and critical care medicine. He testified that five to ten percent of his patient census deals with the care and treatment of coal miners or former coal miners. (Petitioner's Exhibit No. 1, p. 5). Dr. Tazbaz had three years of training in pulmonary and critical care medicine under Dr. Robert Cohen at Stroger Hospital. Dr. Cohen is the medical director of the black lung clinics of the nation. In his work with Dr. Cohen, Dr. Tazbaz had an opportunity to take special training and gain specific experience in reading radiographic studies for occupational lung diseases and in performing pulmonary function testing on current and former coal mine employees. (Petitioner's Exhibit No. 3, pp. 5-6).

Dr. Tazbaz evaluated Petitioner on October 2, 2009. (Petitioner's Exhibit No. 3, pp. 6-7). Dr. Tazbaz saw Petitioner one time. He testified that he has seen 10 to 15 individuals at the request of Petitioner's counsel. (Petitioner's Exhibit No. 3, p. 24). Dr. Tazbaz testified that the diagnosis of coal workers' pneumoconiosis can generally be considered an x-ray reading diagnosis. (Petitioner's Exhibit No. 3, p. 8). He testified that in order to have pneumoconiosis, there must be a tissue reaction to the coal dust that is trapped in the lungs. This tissue reaction is called scarring or fibrosis. He testified that the scarring and/or fibrosis of coal workers' pneumoconiosis is permanent and cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 3, pp. 8-9). Dr. Tazbaz testified that a person with coal workers' pneumoconiosis diagnosed by x-ray could still have normal pulmonary function tests, normal blood gases and normal physical exam of the chest. (Petitioner's Exhibit No. 3, p. 10).

Dr. Tazbaz testified that the physical examination of Petitioner's chest was clear. Petitioner reported that he gets short of breath. He reported that he could walk a mile, but he had to push himself. Dr. Tazbaz testified that obesity could also add to some of Petitioner's shortness of breath. Based on the symptoms Petitioner had, which included cough, and his chest x-ray, which looked positive when read by a B-reader, Dr. Tazbaz thought that Petitioner had coal workers' pneumoconiosis. He testified that the coal workers' pneumoconiosis was from exposure to coal mine dust. (Petitioner's Exhibit No. 3, pp. 19-20). Dr. Tazbaz noted on the history that Petitioner had been coughing on a regular basis for about a year although he had cough when he was in the mines. Dr. Tazbaz testified that such a history qualified for a diagnosis of chronic bronchitis because when he was in the coal mines, he was coughing up black secretions. Dr. Tazbaz testified that Petitioner's chronic bronchitis was caused by exposure to coal mine dust.

(Petitioner's Exhibit No. 3, p. 21). Dr. Tazbaz testified that based on the diagnosis of coal workers' pneumoconiosis and chronic bronchitis as well as his symptoms of cough and shortness of breath, Petitioner could have no further exposure to coal mine dust without endangering his health. (Petitioner's Exhibit No. 3, pp. 21-22).

Dr. Tazbaz testified that in the history Petitioner related to him, he did not relate sputum production with his cough on the day that Dr. Tazbaz saw him. The sputum production was a temporary condition for him existing only while he was in the mine. (Petitioner's Exhibit No. 3, p. 24). Dr. Tazbaz testified that one usually has sputum production with a diagnosis of chronic bronchitis. (Petitioner's Exhibit No. 3, p. 25). Petitioner did not relate a history of sputum production in the two years between when he left the coal mine and when he was examined by Dr. Tazbaz. He had a cough with sputum while at the mine, he retired from the coal mine and about a year after that he developed a cough again. (Petitioner's Exhibit No. 3, p. 26).

Dr. Tazbaz testified that shortness of breath is very subjective so it was hard to say if it was relevant or not for somebody like Petitioner. (Petitioner's Exhibit No. 3, p. 27). Dr. Tazbaz testified that Petitioner's review of systems was negative. His past medical history was negative including past history of pulmonary disease. Petitioner was not taking, and according to the history he provided to Dr. Tazbaz, had never taken breathing medication. Petitioner did not relate to Dr. Tazbaz that he left the mine at the time he did on the recommendation of a physician. He did not tell Dr. Tazbaz that he left mining at the time he did due to some respiratory problem or disease. Petitioner did not relate to Dr. Tazbaz any problem in performing the duties of his last job at the mine. Petitioner did not relate to Dr. Tazbaz any problems in performing his current job as a construction worker. On physical examination Petitioner's chest was clear to auscultation, and he had no wheezes or crackles. (Petitioner's Exhibit No. 3, pp. 29-30). Based on the simple spirometry that Dr. Tazbaz performed on Petitioner, he did not have an obstructive defect. Dr. Tazbaz could not rule out a restrictive defect. He testified that to rule out a restrictive abnormality, he would need to have lung volumes which were not performed on Petitioner. He testified that a restrictive defect, if present, would be associated with scarring or obesity or both. (Petitioner's Exhibit No. 3, pp. 30-32).

Dr. Tazbaz is not a B-reader. He did not know when the chest x-ray that he reviewed was performed. He did not document the quality of the film. He did not document what lung zones were involved. He testified that the opacities that were present were all nodular. (Petitioner's Exhibit No. 3, p. 33). Dr. Tazbaz testified that in his opinion coal workers' pneumoconiosis first involves the lower lung zones. Dr. Tazbaz testified that for those who develop coal workers' pneumoconiosis and cease their exposure, the disease is unlikely to progress. He testified that one can have simple pneumoconiosis and have further exposure, and the disease not progress. He testified that an individual can have radiographic evidence of simple pneumoconiosis and yet have no functional impairment. (Petitioner's Exhibit No. 3, p. 34).

Dr. Tazbaz did not review any treatment records regarding Petitioner. He testified that treatment records are of value when evaluating a patient for occupational lung disease to know about

interpretations of prior chest x-rays or the results of prior spirometry. Dr. Tazbaz agreed with the position taken by the American Thoracic Society that an older worker with mild pneumoconiosis may be at low risk from working in currently permissible exposure levels until he reaches retirement age. (Petitioner's Exhibit No. 3, p. 35).

Dr. Tazbaz's diagnosis for Petitioner was cough. He also listed coal dust exposure from working in the mine. Dr. Tazbaz's diagnosis of pneumoconiosis was based upon his positive reading of the chest x-ray and history of exposure to coal dust as well as the report that he saw on another chest x-ray reading. (Petitioner's Exhibit No. 3, pp. 38-39).

Dr. Manish Mathur is a family practice doctor with Staunton Clinic. Dr. Mathur is board certified in internal medicine. (Petitioner's Exhibit No. 2, pp. 4-5). In his practice Dr. Mathur has occasion to treat coal miners and former coal miners. He testified that he treats people for lung disease. (Petitioner's Exhibit No. 2, p. 5). Petitioner's counsel sent Dr. Mathur 10 questions regarding Petitioner's pulmonary status which Dr. Mathur answered. (Petitioner's Exhibit No. 2, p. 6).

Dr. Mathur testified that he had known for some time that Petitioner was a coal miner. (Petitioner's Exhibit No. 2, p. 7). Dr. Mathur testified that based on his knowledge of Petitioner, it was his opinion that Petitioner did not come to his office for treatment every time he had a productive cough. Dr. Mathur testified that Petitioner could or might have chronic bronchitis notwithstanding the number of entries of cough in his treatment records. Dr. Mathur testified that a lack of treatment for productive cough could not be used as a basis for ruling out the existence of chronic bronchitis in Petitioner. Dr. Mathur testified that he saw Petitioner for bronchitis soon after he left the coal mine, but not before. (Petitioner's Exhibit No. 3, pp. 7-8). Dr. Mathur testified that if, in fact, Petitioner had chronic bronchitis, his exposure as a coal miner for 32 years might have been a causative factor or an aggravating and worsening factor to some degree in that chronic bronchitis. He testified that if Petitioner has chronic bronchitis, further exposure to the environment of a coal mine would present a risk to his health in the form of increased potential for progression of chronic bronchitis. (Petitioner's Exhibit No. 3, pp. 8-9).

Dr. Mathur testified there was no x-ray evidence of coal workers' pneumoconiosis in Petitioner's treatment records. (Petitioner's Exhibit No. 2, p. 9). Dr. Mathur testified that he is not an expert in radiologic diagnosis of pneumoconiosis, but he would say that it is possible to have disease which is not detectable on x-ray but may be detectable on more sensitive ways of imaging such as CT scan. Dr. Mathur testified that pathology would really clinch the diagnosis of pneumoconiosis. He testified that there was no way that Petitioner's treatment records could be cited to rule out the existence of asthma or reactive airways disease. (Petitioner's Exhibit No. 2, p. 10). Dr. Mathur testified that if, in fact, Petitioner has asthma or reactive airways disease, his exposures as a coal miner would have been a causative factor in or aggravated such disease. He also testified that if such disease is present, further exposure to coal mine dust would provide a risk to Petitioner's health in the form an increased potential for progression of his asthma or reactive airways disease. Dr. Mathur testified that when a coal miner with 30 years of coal mining ends

his career, some coal dust remains in his lungs for the rest of his life. He will have continuing exposure to coal mine dust in the form of the dust that was trapped in his lungs. It is possible that continued exposure could cause worsening of conditions he may have had from coal mining or initiation of new conditions that had not shown up before. (Petitioner's Exhibit No. 2, pp. 11-12).

Dr. Mathur first saw Petitioner on July 24, 2007, for right shoulder pain. On that date physical examination of his chest was normal. Petitioner was next seen on December 19, 2007, complaining of runny nose and cough. He was diagnosed with upper respiratory infection with bronchitis. (Petitioner's Exhibit No. 2, pp. 13-14). On July 6, 2011, Petitioner was seen for diarrhea and abdominal cramping. (Petitioner's Exhibit No. 2, p. 14). Petitioner was seen again on August 7, 2012, for a sore tongue. Up until this date, Dr. Mathur had not diagnosed Petitioner with chronic bronchitis or asthma. (Petitioner's Exhibit No. 2, pp. 14-15). Petitioner was seen on February 15, 2013, complaining of wheeze and daily cough. Dr. Mathur testified that was the first time he had either of those complaints. Petitioner reported to Dr. Mathur that he was undergoing evaluation for black lung. Dr. Mathur testified that on that date Petitioner requested to see Dr. Paul from pulmonology in Springfield. Up until that date Dr. Mathur had never made a referral to anyone for anything, including respiratory, because he did not see a need for a referral. (Petitioner's Exhibit No. 2, pp. 15-17). Dr. Mathur conducted a physical examination on that date. Petitioner's chest exam was normal. (Petitioner's Exhibit No. 2, p. 17). Petitioner returned to Dr. Mathur on September 27, 2013, for follow up regarding his chronic cough and wheezing. (Petitioner's Exhibit No. 2, p. 20). When Petitioner saw Dr. Mathur on September 27, 2013, he told the doctor that he had recently won a Strongman contest in Mt. Olive. Dr. Mathur ordered a chest x-ray that day to evaluate the chronic cough. Same was performed on September 30, 2013, and interpreted by Dr. Gene W. Spector, a radiologist. Dr. Spector interpreted the film as negative chest. (Petitioner's Exhibit No. 2, pp. 21-22). Petitioner was seen on February 11, 2015, complaining of dyspnea with moderate exertion. Dr. Mathur testified this was the first time that Petitioner complained to him of shortness of breath. Dr. Mathur testified that Petitioner was not audibly wheezing. (Petitioner's Exhibit No. 2, pp. 22-23).

Dr. Mathur testified that he did not know if the testing performed by Dr. Paul was valid in terms of the American Thoracic Society Guidelines. He testified that the American Thoracic Society requires a change in FEV1 of 20% with the methacholine challenge testing to make the diagnosis of asthma. Dr. Mathur testified that he did not have any pathologic or diagnostic evidence in his file of pneumoconiosis. (Petitioner's Exhibit No. 2, pp. 25-26).

At the request of counsel for Respondent, Dr. Jerome F. Wiot reviewed a PA and lateral chest x-ray dated March 29, 2009. Dr. Wiot found the film to be quality 2 because it was done in relative expiration meaning Petitioner did not take a full and complete deep breath and hold it. (Respondent's Exhibit No. 1, p. 48). Dr. Wiot testified that as a result of the underinflation there was some crowding of the bases. He testified that when there is crowding of the bases, the vascular markings are crowded together so it looks like there are more of them. One has to be careful with such a film so as not to over interpret what one is seeing in the bases. (Respondent's

Exhibit No. 1, pp. 49-50). Dr. Wiot testified that there is no evidence of coal workers' pneumoconiosis on this film. (Respondent's Exhibit No. 1, p. 50).

Dr. Wiot was the past President of the American Board of Radiology and served as an examiner for the board. (Respondent's Exhibit No. 1, pp. 11-13). Dr. Wiot was also the past President of the American College of Radiology and as a member of the Task Force on Pneumoconiosis, he helped develop a weekend symposium which eventually became the modern day B-reader program. (Respondent's Exhibit No. 1, pp. 13-19). Dr. Wiot has been teaching the B-reading program since the first weekend course was held in 1970. (Respondent's Exhibit No. 1, p. 37). Dr. Wiot has been a B-reader since the program started. (Respondent's Exhibit No. 1, pp. 26-27).

Dr. Wiot testified that in reviewing a film for the presence of pneumoconiosis, the reader looks at the profusion or degree of involvement as well as the opacity type. (Respondent's Exhibit No. 1, p. 31). For a film to be considered to be positive for pneumoconiosis it must have a 1/0 profusion or higher. A 0/1 profusion is negative for pneumoconiosis. (Respondent's Exhibit No. 1, pp. 30-31). Dr. Wiot testified that with coal workers' pneumoconiosis, the vast majority of the opacities will be round with irregular opacities as a secondary type. (Respondent's Exhibit No. 1, pp. 31-32). Dr. Wiot testified that the reader also indicates what lung zones are involved. Coal workers' pneumoconiosis invariably begins in the upper lung fields. When it progresses, it will move to the mid and lower lung zones. He testified that it is almost invariably worse in the top lung zones than in the bottom. (Respondent's Exhibit No. 1, pp. 33-34). Dr. Wiot testified that the scarring of coal workers' pneumoconiosis is permanent. By definition if a person has coal workers' pneumoconiosis, theoretically he would have an impairment in the function of his lungs at the site of the scar tissue even though that impairment may not be able to be measured by pulmonary function testing. (Respondent's Exhibit No. 1, p. 66). Dr. Wiot testified that it is very important in reading chest x-rays to be able to understand what is normal and what is abnormal. He testified that one has to understand what is acceptable for normal before he can decide if the minor changes are significant. This understanding only comes with experience. (Respondent's Exhibit No. 1, pp. 38-39).

At the request of counsel for Respondent, Dr. Cristopher A. Meyer reviewed chest x-rays of Petitioner dated March 29, 2009, and October 14, 2010, as well as the chest CT scan dated October 14, 2010. Dr. Meyer rated both chest x-rays as quality 2 due to underinflation. He testified that underinflation results from the failure of the patient to take a full and complete breath and hold it. He testified that if the patient's lung volumes are low, it will cause the pulmonary arteries and veins to be crowded. He testified that this accentuates the pulmonary vasculature. (Respondent's Exhibit No. 3, pp. 40-41). Dr. Meyer testified that there were no radiographic findings of coal workers' pneumoconiosis on the chest x-rays. He testified that on the chest CT the lungs were clear. He described some calcified subcarinal lymph nodes and no findings of coal workers' pneumoconiosis. (Respondent's Exhibit No. 3, pp. 41-42). Dr. Meyer testified that the CT scan is more sensitive, ergo, more accurate than a chest x-ray for interstitial lung disease. (Respondent's Exhibit No. 3, p. 42).

Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 3, p. 7). Dr. Meyer has been a B-reader since 1999. (Respondent's Exhibit No. 3, p. 19). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot. (Respondent's Exhibit No. 3, pp. 19-20). Dr. Wiot was on the original committee that designed the training course which is called the B-reader program. (Respondent's Exhibit No. 3, p. 21). Dr. Meyer has recently been asked to have a more active academic role with the B-reader course. (Respondent's Exhibit No. 3, p. 32). Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is. (Respondent's Exhibit No. 3, pp. 34-35).

Dr. Meyer testified that the B-reader looks at the films of the lung to decide whether there are nodular opacities or any linear opacities and based on the size and appearance of those small opacities, they are given a letter score. (Respondent's Exhibit No. 3, p. 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. (Respondent's Exhibit No. 3, pp. 28-29). The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process. (Respondent's Exhibit No. 3, pp. 22-23). The last component of the interpretation is the extent of the lung involvement or the so-called profusion. (Respondent's Exhibit No. 3, p. 23). Dr. Meyer testified that the profusion defines the density of the small opacities in the lung. (Respondent's Exhibit No. 3, p. 30).

Dr. Meyer reviewed a chest x-ray dated March 4, 2013. He testified that the film was quality 2 because of overexposure. Dr. Meyer testified that there were no findings of coal workers' pneumoconiosis on the film. He testified that if a film is overexposed it can make the abnormalities of coal workers' pneumoconiosis less apparent. (Respondent's Exhibit No. 6, pp. 3-4).

Dr. James Castle, who is board certified in internal medicine and pulmonary disease as well as being a B-reader, interpreted chest x-rays of Petitioner dated March 29, 2009, and March 4, 2013. Dr. Castle found the March 29, 2009, film to be quality 2 due to improper position. He found no abnormalities consistent with pneumoconiosis on the film. Dr. Castle also noted the March 4, 2013, chest x-ray was quality 2 due to overexposure. Dr. Castle found no abnormalities consistent with pneumoconiosis on that film. (Respondent's Exhibit No. 7).

Dr. Jeffrey Selby examined Petitioner at the request of Respondent's counsel on October 14, 2010. (Respondent's Exhibit No. 2, p. 8). Dr. Selby is board certified in internal medicine and pulmonology. He has been a B-reader since 1985. (Respondent's Exhibit No. 2, pp. 4-5). Dr. Selby has a general pulmonology practice that entails both inpatient and outpatient. He does all manner of consultation work as far as chest, lungs or breathing disorders. His practice also includes occupational lung disease including individuals with coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, pp. 5-7).

Dr. Selby's examination included a complete occupational history, physical examination and various laboratory testing. (Respondent's Exhibit No. 2, p. 8). Dr. Selby testified that Petitioner's chief complaint was wheezing and shortness of breath. Dr. Selby found no abnormality on his examination of Petitioner's chest. (Respondent's Exhibit No. 2, pp. 9-10). Dr. Selby also performed spirometry on Petitioner. He testified that there was no evidence of an obstruction based on the spirometry. He also measured Petitioner's lung volumes. Based on those measurements there was no evidence of restriction. Dr. Selby testified the total lung capacity and residual volume were normal. (Respondent's Exhibit No. 2, p. 10). Dr. Selby testified that Petitioner's diffusion capacity was super normal at 125% of predicted. Dr. Selby also put Petitioner through exercise testing. (Respondent's Exhibit No. 2, pp. 10-11). Dr. Selby testified that the exercise testing helps him to know if the patient has a normal exercise capacity and if not, why not. Dr. Selby testified that there is no better test to determine an individual's cardiopulmonary exercise capacity other than exercise testing. (Respondent's Exhibit No. 2, pp. 12-13). Dr. Selby testified that the exercise testing performed on Petitioner revealed no abnormality. It did not reveal any pulmonary limit to exercise and did not provide any basis to explain Petitioner's complaint of shortness of breath. (Respondent's Exhibit No. 2, pp. 17-18).

Dr. Selby also reviewed chest x-rays of Petitioner dated March 29, 2009, and October 14, 2010. Dr. Selby found the March 29, 2009, film to be quality 2 because of underinflation. He testified that it is important to know that underinflation exists in a film because it will cause a false positive reading due to increased lung markings that can look like scars which are not truly there. He testified that it accentuates the pulmonary vasculature, which is particularly true of the bases. (Respondent's Exhibit No. 2, pp. 18-19). Dr. Selby did not find any parenchymal or pleural abnormalities consistent with pneumoconiosis on the March 29, 2009, chest x-ray. He rated the October 14, 2010, chest x-ray as quality 2 for underinflation as well. His interpretation of that film was the same. (Respondent's Exhibit No. 2, pp. 19-20). Dr. Selby also ordered a high resolution CT scan of the chest to be performed on Petitioner. He testified that high resolution CT scans augment plain films of the chest in the diagnosis of coal workers' pneumoconiosis. He testified that high resolution CT scans are more sensitive in picking up the presence of emphysema than a plain film. The CT scan was interpreted by Dr. Anthony Perkins, a board certified radiologist, as showing no evidence of coal workers' pneumoconiosis. (Respondent's Exhibit No. 3, pp. 20-21).

Dr. Selby testified that Petitioner did not have any respiratory or pulmonary abnormality as a result of coal mine dust inhalation. Petitioner did not have coal workers' pneumoconiosis. He had the pulmonary or respiratory capacity to perform all previous coal mine employment duties including his last job in plant maintenance. Dr. Selby noted that Petitioner was very obese and deconditioned which was a major, if not the only, cause for any shortness of breath or wheezing. (Respondent's Exhibit No. 2, pp. 21-22). Dr. Selby noted that Dr. Tazbaz had testified that Petitioner related to him a history of cough with sputum production that ended at the time he left the mine and that after he was out of the mine for about a year he developed a cough again. Dr. Selby testified that assuming those facts are true, the cough that Petitioner developed a year after his last employment at the coal mine could not be related back to his coal mine employment. Dr.

Selby testified that the fact that he had cough and sputum that ended with his coal mine employment meant he did not have something permanent which was related to working in the coal mine. The fact that it ended with his employment indicated that condition was one that was simply temporary. (Respondent's Exhibit No. 2, pp. 22-23).

Dr. Selby testified that for a person to have coal workers' pneumoconiosis, he must have coal mine dust in his lungs and a tissue reaction to that coal dust. The scarring of coal workers' pneumoconiosis cannot perform the function of normal, healthy lung tissue. Dr. Selby testified that by definition, if a person has pneumoconiosis, he would have impairment in the function of his lung at the very site of his scarring whether that impairment could be measured by spirometry or not. (Respondent's Exhibit No. 2, pp. 26-27). Dr. Selby testified that removal from any further exposure to coal dust is the only treatment for coal workers' pneumoconiosis. He testified that there is no cure for coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 31). Dr. Selby testified that if a miner leaves the coal mine with category 1 pneumoconiosis and does not have any more exposure, for the vast majority it does not progress any. (Respondent's Exhibit No. 2, p. 32).

Dr. Selby saw Petitioner for a second time on March 10, 2014, to perform a methacholine challenge test. Dr. Selby testified that the testing was valid. (Respondent's Exhibit No. 5, pp. 3-4). Dr. Selby testified that Petitioner gave poor effort, but his best efforts and maximum dose showed he had at most an 11% decline in his FEV1 after the methacholine challenge testing. (Respondent's Exhibit No. 5, pp. 4-5). Dr. Selby testified that methacholine challenge testing is done to try to determine whether or not an individual has asthma. The test is a more valuable test in terms of ruling out asthma versus ruling it in. He testified that the methacholine challenge testing, when done appropriately according to the American Thoracic Society Guidelines, is more likely to give a false positive than a false negative. (Respondent's Exhibit No. 5, p. 6). Dr. Selby testified that in Dr. Paul's testing, Petitioner had a 14% decline in his FEV1. Dr. Selby testified that same is not positive for asthma. (Respondent's Exhibit No. 5, p. 6). Dr. Selby testified that in order for the test to be considered positive, there must be consistent valid effort by the subject with appropriate methodology, which means following the American Thoracic Society Guidelines. If those conditions are met, the test equipment is calibrated and accurate, and everything is of valid testing protocol, there must be a drop from the baseline FEV1 of 20% to be considered a positive test. (Respondent's Exhibit No. 1, p. 7). Dr. Selby testified that most people have some reactivity to methacholine so you have to have a 20% decline in the FEV1 for it to be diagnostic of asthma. (Respondent's Exhibit No. 5, pp. 7-8). Dr. Selby testified that there has been a board certification for pulmonary disease since 1941. (Respondent's Exhibit No. 5, pp. 11-12).

Conclusions of Law

In regard to disputed issues (c) and (f) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner did not sustain an occupational disease arising out of and in the course of his employment for Respondent that manifested itself on August 28, 2007.

In support of this conclusion the Arbitrator notes the following:

Dr. Tazbaz testified that based on the simple spirometry he performed on Petitioner, he did not have an obstructive defect. Dr. Tazbaz testified that he would need to have lung volumes performed on Petitioner to rule out a restrictive abnormality. Dr. Selby testified that there was no evidence of restriction based on Petitioner's lung volume measurements. Dr. Paul testified that the testing he performed on March 4, 2013, did not show any evidence of obstruction until after Petitioner inhaled methacholine. Dr. Paul testified that Petitioner had chronic bronchitis that was caused or aggravated by his exposure as a coal miner. Dr. Paul testified that sputum was not required for the diagnosis of chronic bronchitis. Dr. Tazbaz testified that Petitioner qualified for a diagnosis of chronic bronchitis because he coughed up black secretions when he was in the coal mines. Dr. Tazbaz testified that the sputum production was a temporary condition for Petitioner, existing only while he was in the coal mine. Dr. Tazbaz testified that usually one has sputum production with a diagnosis of chronic bronchitis. Dr. Mathur testified that Petitioner might have chronic bronchitis and that same could not be ruled out based on the lack of entries of cough in Dr. Mathur's treatment records. The first time that Petitioner reported a cough to Dr. Mathur was on February 15, 2013. Dr. Tazbaz testified that Petitioner gave him a history of cough with sputum while he was at the mine which went away when he left the mine. About a year after leaving the mine, he developed the cough again. Dr. Selby testified that a cough developing one year out of his last employment in the coal mine would not be related back to Petitioner's coal mine employment.

Dr. Paul testified that the chest x-ray he reviewed of March 4, 2013, looked like coal workers' pneumoconiosis. Dr. Paul is not an A or B-reader. He did not assign the film a profusion rating or record an opacity type. Dr. Tazbaz also found Petitioner's chest x-ray to be positive for pneumoconiosis. Dr. Tazbaz, however, is not a B-reader. Dr. Smith, who is a board certified radiologist and B-reader, interpreted chest x-ray dated March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/S opacities in the bilateral middle and lower lung zones. Dr. Smith interpreted the chest x-ray of October 14, 2010, as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones. Dr. Smith's interpretations are not consistent with the usual progression of coal workers' pneumoconiosis which according to Dr. Wiot and Dr. Meyer generally begins in the upper lung zones. Dr. Alexander, a B-reader and board certified radiologist, interpreted chest x-ray of March 29, 2009, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. He made an identical interpretation of the October 14, 2010, chest x-ray. Dr. Alexander's readings are not consistent with the B-readings of Dr. Smith. Dr. Selby, Dr. Wiot and Dr. Meyer consistently read Petitioner's chest x-rays as negative for pneumoconiosis. These B-readers also noted that the chest x-rays of March 29, 2009, and October 14, 2010, were quality 2 films due to underinflation. The physicians testified that underinflation will accentuate the pulmonary vasculature, particularly in the lung bases.

The Arbitrator finds the opinions of Dr. Selby, Dr. Wiot and Dr. Meyer to be more persuasive and credible than those of Dr. Paul, Dr. Tazbaz, Dr. Smith and Dr. Alexander.

Further, in his testimony Petitioner stated he had won a Strongman contest approximately 10 years ago. When examined by Dr. Mathur on September 27, 2013, Dr. Mathur noted that Petitioner advised he had recently won a Strongman contest in Mt. Olive. Accordingly, the Arbitrator finds Petitioner's credibility to be suspect.

In regard to disputed issues (l) and (o) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issues (c) and (f).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Parente,

Petitioner,

vs. NO: 09 WC 36395

City of Chicago,

Respondent.

ORDER

This matter Coming on to be heard, pursuant to Respondent's Petition for Review as was filed on July 16, 2015, and notice given to all parties, the Commission hereby grants Respondent's Motion to Dismiss the Petition for Review.

The relevant facts are as follows: On July 1, 2015, Respondent filed a Motion to Correct Clerical Error under Section 19(f) of the Act of the Arbitration Decision filed in this case on June 12, 2015 by Arbitrator Robert Williams. On July 16,2015, Respondent filed a Petition for Review of the Arbitration Decision. On July 24, 2015, Arbitrator Williams denied the motion due to lack of any definitive clerical errors.

On August 21, 2015, Petitioner filed a Motion to Correct an Error under Section 19(f) of the Act. On October 20, 2015, the Commission issued a Rule to Show Cause and set a hearing date for October 30, 2015. Hearing on the Motion to Correct, as well as Respondent's Motion to Dismiss the Review for Failure to File a Certified Transcript and the Commission's Rule to Show Cause, was held before Commissioner Michael J. Brennan on October 30th, 2015.

At hearing, Commissioner Brennan noted that a Certified Transcript had not been filed as required by the Rule to Show Cause and that Arbitrator Williams had denied the prior Motion to Correct Clerical Error of the Arbitration Decision. As such, Commissioner Brennan found that the review was not perfected as required under the Act and the Commission lacks jurisdiction over this case. Commissioner Brennan further noted that Respondent "indicated that they have no intent of pursuing the review and in fact they are going to allow the review to be dismissed." (T.8-9) Therefore, based on the aforementioned reasons, Commission Brennan denied Petitioner's Motion to Correct an Error and granted Respondent's Motion to Dismiss the Review

for Failure to File a Certified Transcript.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Motion to Correct an Error is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss the Review for Failure to File a Certified Transcript is hereby granted.

DATED:
MJB/ell
52

FEB 3 - 2016

Michael J. Brennan

STATE OF ILLINOIS)	☒ Affirm and adopt	☒ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WINNEBAGO		☐ PTD/Fatal denied
	☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Smith,

Petitioner,

16IWCC0052

vs. NO: 09 WC 48190

Lamplight Rockford Incorporated and the
Illinois State Treasurer, as Ex-Officio Custodian of the
Injured Workers Benefit Fund,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, vocational rehabillitation and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 24, 2015 is hereby affirmed and adopted.

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

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

The Illinois State Treasurer as ex-officio custodian of the Injured Worker's Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and

16IWCC0052

allowed under section 4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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.

DATED: JAN 2 2 2016
KWL/vf
O-1/12/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

16IWCC0052

SMITH, CHARLES

Employee/Petitioner

Case# 09WC048190

LAMPLIGHT ROCKFORD INCORPORATED AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND

Employer/Respondent

On 2/24/2015, 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 0.06% 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.

0529 GREG TUITE & ASSOC
RYAN M GAILEY
119 N CHURCH ST SUITE 407
ROCKFORD, IL 61101

0000 LAMPLIGHT ROCKFORD INC
1523 BROADWAY
ROCKFORD, IL 61104

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

6STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

☒ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0052

CHARLES SMITH ,
Employee/Petitioner

v.

LAMPLIGHT ROCKFORD INCORPORATED And The ILLINOIS STATE TREASURER, as Ex-Officio Custodian of the Injured Workers Benefit Fund ,
Employer/Respondent

Case # 09 WC 48190

Consolidated cases: NONE.

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Rockford**, on **January 22, 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: Did Respondent receive timely and appropriate notice of the hearing in accordance with the Rules of Practice of the Commission? Insurance Compliance/Automatic Coverage?

FINDINGS

On **December 18, 2008**, 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 **$6,864.00**; the average weekly wage was **$132.00**.

On the date of accident, Petitioner was **60** years of age, ***single*** with **no** dependent children.

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

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

Respondents are entitled to a credit of $ **0.00** for payment of medical benefits under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$132.00**/week for **13-5/7** weeks, commencing **December 19, 2008** through **March 24, 2009**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$132.00**/week for **75.25** weeks, because the injuries sustained caused the **35%** loss of use of his **left leg**, as provided in Section 8(e) of the Act.

Respondent shall pay to Petitioner reasonable and necessary medical services in the amount of **$24,685.74**, subject to the provisions of the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

The Respondent shall pay the Petitioner compensation that has accrued from **December 18, 2008** through **January 22, 2015,** and shall pay the remainder of the award, if any, in weekly installments.

The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of the Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of the Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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 JOANN M. FRATIANNI

February 19, 2015
Date

FEB 24 2015

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

Petitioner testified that on December 18, 2008 Respondent-Employer *Lamplight Rockford Incorporated,* operated as a bar or tavern serving alcoholic beverages to the general public. Paragraph 12, Section 3 of the Act provides for automatic insurance coverage under the Act for "establishments open to the general public wherein alcoholic beverages are sold to the general public for consumption on the premises."

Based upon the above, the Arbitrator finds that Respondent-Employer *Lamplight Rockford Incorporated,* were operating under and subject to the Illinois Workers' Compensation Act and specifically, the provisions of Sections 3(12) apply to this case.

B. Was there an employee-employer relationship?

Petitioner testified that on December 18, 2008, he was employed by Respondent-Employer *Lamplight Rockford, Incorporated* to clean the bar, and later became responsible for serving drinks. He worked from 11:00 a.m. to open the bar daily, clean in the morning, count the cash, and began serving drinks around noon. Petitioner identified the owner of Respondent-Employer as Verna Kail.

Based upon the above, the Arbitrator finds that on December 18, 2008, an employee-employer relationship existed between the Petitioner and Respondent-Employer *Lamplight Rockford Incorporated.*

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?

Petitioner testified that on December 18, 2008, he was employed by Respondent-Employer *Lamplight Rockford Incorporated.* Petitioner testified his job duties included cleaning the facility and serving drinks to customers. Petitioner testified that on December 18, 2008, he was struck in the head and shot in the left thigh during a robbery of the tavern.

There is no indication in the evidence before this Arbitrator that Petitioner was the aggressor of this incident and the altercation was clearly related to his work for Respondent-Employer.

An evidence deposition of Rockford Police Officer Michael Booker (Px11) reflects that Respondent-Employer was located in a high crime area known as Patrol Zone 6, which had the highest overall crime activity for Rockford and the second highest reported number of aggravated assaults. (Px11)

Medical records of treatment introduced into evidence corroborate the injury that occurred on December 18, 2008.

Based upon the above, the Arbitrator finds that on December 18, 2008, Petitioner sustained an accidental injury that arose out of and in the course of his employment by Respondent-Employer. Based further upon said findings, the Arbitrator finds the date of accident was December 18, 2008.

E. Was timely notice of the accident given to Respondent?

See findings of this Arbitrator in "C" and "D" above. Petitioner testified that after receiving medical treatment at Swedish American Hospital on December 18, 2008, he telephoned Ms. Verna Kail, owner of Respondent-Employer, and told her of his injuries and the robbery. Petitioner further testified that Ms. Kail was aware of the incident and reported to him that she had dealt with the police.

Based upon the above, the Arbitrator finds that Petitioner gave Respondent-Employer timely notice of this accidental injury as defined by the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

See findings of this Arbitrator in "C" and "D" above.

Petitioner first received medical treatment for this injury through the emergency room of Swedish American Hospital on December 18, 2008. He received treatment for multiple cuts and abrasions and received 5 staples to close his head wounds. Petitioner was also treated for a gunshot wound to his left leg. Petitioner was prescribed a CT scan to his head which was reported as being normal and multiple bullet fragments were seen in the proximal and distal thigh with evidence of soft tissue swelling. Petitioner also noticed a problem with his left foot. Petitioner was discharged from the hospital on December 22, 2008.

On December 29, 2008, Petitioner had the 5 staples removed at Crusader Clinic. Petitioner then returned to Crusader Clinic on February 13, 2009 with complaints of chronic headaches. He reported that since the shooting he was walking with a cane and complained of some numbness, swelling and tingling to his left leg. Petitioner was prescribed Neurontin and Celebrex along with physical therapy. On March 24, 2009, Petitioner returned to the clinic, having completed physical therapy and reported that he could walk without his cane. Petitioner complained his left leg swelling was worse at the end of the day but wanted to return to work with no restrictions. Petitioner was prescribed a T.E.D. hose for leg swelling.

Petitioner then returned to Crusader Clinic on October 6, 2009 and reported left extremity numbness, especially around the ankle. He reported that physical therapy had improved his ability to stand, but he could only do so for 20 minutes before his ankle felt like it would give way. Petitioner was prescribed more physical therapy and advised not to be standing at work. Petitioner testified he was not working at this time as Respondent-Employer had closed the business. On November 23, 2009, Petitioner underwent an EMG/NCV of the left lower extremity. This revealed some evidence of sensory motor polyneuropathy but no active denervation.

Petitioner then returned to Crusader Clinic on February 17, 2010 with reports of cramping, aching that worsened with exertion or standing on his left leg. He was diagnosed with chronic pain syndrome due to the gunshot wound trauma.

Petitioner then began regular visits to the V.A. Medical Center in April of 2010. His medical records reflect a history pre-dating 2008 of abnormal liver function tests, alcohol abuse, shoulder pain, sciatica and hyperlipidemia. He reported difficulty walking long distances and experiencing pain and numbness to his left foot. On June 15, 2012, he underwent a physical at the V.A. Medical Center. This revealed 20 pound occasional and 10 pound frequent lifting restrictions, standing and sitting restrictions for 2 hours of a 8 hour day, and changing positions every 30 minutes.

Based upon the above, the Arbitrator finds that the condition of ill-being as noted above is causally related to the accidental injury of December 18, 2008.

G. What were Petitioner's earnings?

Petitioner testified that he was paid $6.00 an hour and worked 20-30 hours a week. This would calculate to an average weekly wage of $120.00 to $180.00. Petitioner testified he also worked 4-5 hours each shift and worked daily. Petitioner claims $132.00 a week as an average weekly wage.

Based upon the above, the Arbitrator finds the average weekly wage to be $132.00 and the annual earnings to be $6,864.00.

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?

Petitioner testified that he was 60 years old, which is corroborated by the medical records in evidence, on December 18, 2008. Petitioner testified that he was single with no dependents, as of December 18, 2008.

Based upon this finding, this Arbitrator finds that on December 18, 2008, Petitioner was 60 years of age, single with no dependent children under the age of 18.

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?

Petitioner introduced into evidence the following charges that were incurred after this accidental injury:

Crusader Clinic	$ 360.00
Dr. Mohammed Afzal	$ 881.25
Infinity Health Care/Swedish American Hospital (ER)	$ 872.00
Northern Illinois Scanning	$ 2,687.00
Radiology Consultants of Rockford	$ 669.00
Rockford Surgical Service	$ 785.00
Swedish American Hospital	$17,693.58
Swedish American Infusion Services	$ 178.59
VA Rockford Medical Center	$ 503.39
Prescriptions and bandages	$ 55.93

These charges total $24,685.74.

Based upon the findings of this Arbitrator in "F" above, the Arbitrator further finds that the above charges represent reasonable and necessary medical care and treatment that was causally related to this accident, and further finds Respondent-Employer to be liable for same, subject to the provisions of the medical fee schedule.

K. What temporary benefits are in dispute?

See findings of this Arbitrator in "C," "D" and "F" above.

Petitioner testified that he does not recall when he returned to work for Respondent-Employer. Petitioner did not supply any off work slips at trial. Medical evidence before this Arbitrator establishes that Petitioner was not working and was treating for this injury from December 19, 2008 through March 24, 2009. On March 24, 2009, Petitioner expressed an interest to his doctor in returning to work.

Based upon the above, the Arbitrator finds that Petitioner is entitled to receive temporary total disability benefits from Respondent-Employer commencing December 19, 2008 through March 29, 2009.

L. What is the nature and extent of the injury?

See findings of this Arbitrator in "C," "D" and "F" above.

As a result of this accidental injury, Petitioner suffered a gunshot wound to his left leg causing a nerve injury. Petitioner has since been diagnosed with chronic pain syndrome, and testified to experiencing numbness, pain, tingling and left leg swelling. Petitioner also testified to left ankle and foot weakness and instability since the accident.

On October 24, 2012, Petitioner was examined by Dr. Jeffrey Coe. Dr. Coe examined him at his own request. Dr. Coe noted persistent left leg swelling and numbness with tingling, along with weakness and left leg fatigue. Petitioner was walking with a limp and using a cane. Dr. Coe noted left thigh atrophy, swelling to the left calf and ankle, and left foot and ankle dysestheas, which he related to the gunshot wound. Petitioner was noted to have post traumatic headaches.

On October 31, 2014, Petitioner underwent a rehabilitation conference via Skype with Susan Entenberg, a certified rehabilitation counselor. He reported living alone and not owning a computer or telephone. He has a GED education and receives $800.00 monthly in social security retirement benefits. He has no computer skills, no hobbies and has no drivers license for the past 20 years. He worked for Respondent for 2-3 years, working 3-4 hours daily. Ms. Entenberg described this work as being light to medium in exertion level, with lifting and constant standing and walking. The bartending aspect was deemed low to semi-skilled and the cleaning aspect unskilled.

Petitioner has a prior employment history as a meat wrapper and packer at a grocery store for 15 years, and operating a freight elevator for National Lock for 10 years. Ms. Entenberg concluded that Petitioner was not capable of returning to work as a cleaner/bartender. It is not clear if she was aware that Petitioner had returned to work for Respondent full duty, or finding another job with restrictions. She determined he was not an appropriate candidate for vocational rehabilitation and there was no stable job market for him, based on his limited work skills, physical limitations, lack of clerical and computer skills, lack of transferable skills, his advanced age and limited educational background.

Based upon the above, the Arbitrator finds that as a result of this injury, Petitioner has not become permanently totally disabled from work but is entitled to receive an award of compensation pursuant to Section 8(e) of the Act at 35% disability to the left leg.

M. Should penalties or fees be imposed upon Respondents?

Petitioner has failed to show or prove entitlement to any penalties or attorneys fees under the Act.

All claims for penalties and attorneys fees made by Petitioner in this matter are thus hereby denied.

N. Is Respondent due any credit?

Petitioner testified that he received no benefits from Respondent-Employer in this matter following this accidental injury. Respondent-Employer is not entitled to any credit against this award under these circumstances.

O. Did Respondent receive timely and appropriate notice of the hearing in accordance with the Rules of Practice of the Commission? Insurance Compliance/Automatic Coverage?

This action commenced pursuant to the Workers' Compensation Act by Petitioner seeking benefits from Respondent-Employer Lamplight Rockford Incorporated. On January 22, 2015, a hearing was held before this Arbitrator in Rockford, Illinois. Respondent-Employer did not appear for the hearing and was not represented by counsel. Respondent-Employer was notified of the hearing by mail. (Px1) Respondent-Employer prior to the hearing filed for Bankruptcy, then the owner subsequently passed away. (Px3) The Illinois Attorney General's office appeared on behalf of the Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, and participated in the hearing, as the Respondent-Employer did not have Workers' Compensation Insurance.

Based upon the above, the Arbitrator finds that Respondent-Employer *Lamplight Rockford Incorporated* received timely notice of hearing in this matter.

Based further upon the above, *The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund,* is also found to have been properly named as a Respondent and responsible for the payments awarded in this matter.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIREYA GARCIA,

Petitioner,

vs.

NO: 10 WC 09050

16IWCC0050

STAFF FORCE COMP U.S.A.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner Attorney Lulay herein and notice given to all parties, the Commission, after considering the issue of attorney fees, and being advised of the facts and law, affirms and adopts the Notice of Rejection of Settlement Contract and Order as stated below and provides further explanation for this affirmance, which is attached hereto and made a part hereof.

The Commission wishes to make clear the reasons why we believe that the Arbitrator's analysis and determinations regarding attorneys fees were very fair and just, and in accordance with law.

Attorney Scholl represented Petitioner from March, 2010 until December, 2012, when the Petitioner discharged Attorney Scholl in favor of Attorney Lulay.

In a review of the approved settlement contract in this case, which is part of the Commission file, the contract was initially executed by Respondent's Attorney Scarpelli on June 7, 2013. Attorney Scarpelli, on the record on February 21, 2014, indicated that he had sent Attorney Lulay the contracts on June 7, 2013. After some time, he then contacted Attorney Lulay to inquire about the status of the contracts. Attorney Scarpelli resent the contracts via email on

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August 14, 2013. Thus, it appears that Attorney Lulay did not contact Attorney Scarpelli between June 7 and August 14, 2013 with regard to why he hadn't received the contracts. Attorney Scarpelli indicated that Attorney Lulay acknowledged receipt of the settlement contracts on August 14, 2013 via email. (2/21/14 Tr. 11-12).

The contracts themselves evidence that the Petitioner did not sign the contracts until December 6, 2013, approximately 16 weeks after they were received by Attorney Lulay. While it is possible that the Petitioner took some time to make certain that she wanted to settle her case, this appears to the Commission to be a significant delay, and Attorney Lulay has provided no information or evidence regarding the basis for this delay. The contracts indicate that Attorney Lulay then did not sign the contracts himself until 11 weeks later, on February 20, 2014.

Meanwhile, Attorney Lulay filed his own Motion to Adjudicate Attorney Fees on January 9, 2014. The case in chief, which had still not been presented for settlement, was above the "red line" at that point. Pursuant to Commission Rule 7020.60(b)(2)(C), the matter was set for hearing on February 21, 2014 (*50 Illinois Administrative Code, Chapter II, Section 7020.60(b)(2)(C)*), along with Attorney Lulay's Motion. There is no evidence that Attorney Lulay made written request for a continuance of the case for good cause, pursuant to the same Commission Rule.

As noted by the Arbitrator, Attorneys Scholl and Scarpelli appeared before the Arbitrator on February 21, 2014, but Attorney Lulay did not. According to Attorney Lulay's Motion to Augment Proofs (Lulay Exhibit F), he indicated he did not know the case was above the red line. Attorney Lulay's Exhibit F contains a letter to Attorney Scholl indicating the February 13, 2014 status date, that a "must appear" hearing would be scheduled, and that he planned to pick February 24, 2014 to proceed. This letter makes it clear that Attorney Lulay was well aware that the case was above the red line, and that he must appear at that time. Additionally, Attorney Scholl stated on the record that he had received facsimile confirmation of the February 21, 2014 hearing date from Attorney Lulay. (2/21/14 Tr. 7-8).

The Arbitrator asked Attorney Scholl to call Attorney Lulay to determine why he had not appeared. Attorney Scholl did so, reporting that Attorney Lulay indicated he was sitting at his desk at his office, that he had emailed Attorney Scholl the night prior indicating he would not appear, and that he was not planning to do so. (2/21/14 Tr. 14-15). Attorney Scholl stated that the email was sent to his firm's general email address, not to Scholl's personal email address. Attorney Scholl stated that the first time he had seen the email was when Attorney Scarpelli showed it to him on the morning of February 21, 2014. The email chain itself, which was submitted by Attorney Lulay as part of his Exhibit F, indicates on its face that it was reviewed by Attorney Scholl's colleague, Attorney Fohrman, at approximately 8 p.m. Attorney Scarpelli indicated that, while he had received the email with regard to the fee dispute issue, he nevertheless expected Attorney Lulay or someone from his office to appear based on the case being above the red line, and that he appeared "to make sure that I was protecting my client in that regard." (2/21/14 Tr. 8-14). Attorney Scholl reported that he told Attorney Lulay during the phone call that he planned to proceed on his Petition for Attorney Fees.

Attorney Lulay then stated that when he received a phone call from Attorney Scholl on February 21, 2014, which was at the Arbitrator's request based on Attorney Lulay's failure to appear, that Attorney Scholl essentially told him it was too bad that he hadn't appeared, that it was Attorney Lulay's problem, and that the case was going ahead without him. (3/12/14 Tr. 13A-14A). Despite this, the record reflects no attempt by Attorney Lulay to appear following this phone call. The Arbitrator, on the record on February 21, 2014, noted that she had received no email correspondence from Attorney Lulay indicating he would not be appearing, or providing a reason why he did not do so.

In the Commission's view, Attorney Lulay was aware that the Petitioner's case was above the red line and, in his own words, a "must appear", had filed a motion that was to be heard on the same date, failed to appear at that time and was given an opportunity to do so by the Arbitrator, and he instead chose to remain at his office. While there is evidence that Attorney Lulay contacted Attorney Scholl advising him not to appear via email, it is equally clear that this email was not sent until after business hours on February 20, 2014, the night before the hearing date. The Commission notes that both Attorney Scholl and Attorney Scarpelli indicated that the email was sent at 7:12 p.m. The email chain submitted by Attorney Lulay as Exhibit F indicates it was sent at 5:12 p.m. It is unclear which of these are accurate.

Even if we accepted the theory that Attorney Scholl did not need to appear on February 21, 2014, this in no way would have relieved Attorney Lulay of the obligation to appear on an above the red line case that had been set for hearing.

The February 20, 2014 email from Attorney Lulay to the firm of Attorney Scholl itself indicates that, because he had not received what he believed to be sufficient proof of work that would prove a split of attorney fees, that he had been waiting for same since August 2013, and that he would provide the "professional courtesy" that Attorney Scholl need not appear. He noted, however, that should he not receive such sufficient proof, he would simply motion the case up for hearing in March, 2014 and seek to dismiss Attorney Scholl's attorney fee petition for lack of sufficiency stated with detail. What is unclear to the Commission is what was stopping Attorney Lulay from doing so on February 21, 2014, being that the issue was scheduled to be heard at that time based on his own motion. Instead, it appears that Attorney Lulay decided he was not going to appear, and attempted to justify this failure to appear as "professional courtesy" to Attorney Scholl.

The Commission has discretion with regard to the awarding of attorney fees. In this case, we agree with the Arbitrator's determinations of the proper allocation of fees to Attorneys Scholl and Lulay.

The Commission notes that while the Arbitrator indicated that Petitioner and Attorney Lulay signed the Settlement Contract Lump Sum Petition and Order on February 20, 2014, a review of the contract indicates that the Petitioner actually signed the contract on December 6,

2013. Thus, it took Attorney Lulay two months after the Petitioner signed the contract to sign it himself. While an argument could be made that the contract was not signed by Attorney Lulay because he was first trying to resolve the attorney fee issue, this would only make sense if the contract were never signed by Attorney Lulay, as the attorney fee issue remained unresolved when he signed on February 20, 2014. Additionally, Attorney Lulay submitted the contracts to a different Arbitrator on May 30, 2014. It appears that Attorney Lulay simply delayed submitting the settlement contracts.

At one point at the March 12, 2014 hearing, Attorney Lulay stated: "So my qualm with proceeding, we have one experience and I have another, when I am going - - want to proceed on a particular day and my opponent has not returned any of my phone calls, has not submitted anything that indicates preparation for that day, my basic assumption is that they want to mess with me, they want me to show up –." (3/12/14 Tr. 7A-8A). He further stated as the reason for his failure to appear on February 21, 2014: ". . . for the several months leading to that date that I had made amicable efforts in writing and by making phone calls to solicit what amount (Attorney Scholl's) firm wanted and the basis for it by way of any time or detail or description went completely and utterly unanswered all the way up until I had to make my motion to adjudicate and/or dismiss off of the February call. . . And being that there was a question in my mind as to whether they would indeed appear on that date and then whether they would indeed be prepared to proceed that date, and it was my intention to call the client and pay for an interpreter that date. They had not returned any of my phone calls or returned any for the Petitioner or supplied the subsequent information we would need to proceed that date. I sent an email the evening before . . ." (3/12/14 Tr. 11A-12A).

Attorney Lulay's arguments and reasoning are unclear to the Commission. First, regardless of any motions being filed or not, the matter was a red line case, meaning that counsel for Petitioner was required to appear, with the potential consequence of a failure to do so being dismissal of the claim. Secondly, Attorney Lulay indicated that he filed a motion regarding the attorney fee issue precisely based on an allegation that Attorney Scholl was not responding to his attempts to make contact, and then indicated that he didn't appear on the motion based on Attorney Scholl's failure to respond. This makes no logical sense. If the reason for the motion by Attorney Lulay was due to Attorney Scholl's failure to respond, we cannot fathom a reason why Attorney Lulay would not appear to address the issue directly. We also fail to see how anyone was "messing" with Attorney Lulay, when it was his case that was above the red line, and his motion that was pending for the same date. Instead, it appears to the Commission that Attorney Lulay's convoluted explanations for his failure to appear support the Arbitrator's determination that it was proper to proceed on February 21, 2014 in Attorney Lulay's absence.

Attorney Lulay argued that Attorney Scholl was not entitled to a fee in this matter based on his conclusion that any ongoing TTD or medical benefits that were provided to the Petitioner during her representation by Mr. Scholl were not disputed. However, the issue in this matter involves attorney fees based on a final settlement of permanency and unpaid medical expenses. (3/12/14 Tr. 19A-20A).

A large part of Attorney Lulay's argument as to his failure to appear on February 21, 2014 was Attorney Scholl's failure to provide a substantive basis for his claim for attorney fees. Attorney Scholl produced a substantive basis for his claim at the February 21, 2014 hearing date. Had Attorney Lulay bothered to appear that day, he would have had the opportunity to review same. Petition's for attorney fees by a former attorney against a substituting attorney are routinely entered and continued to disposition of the case without the former attorney providing a "substantive basis" (see Attorney Lulay's "Motion to Vacate/Augment Proofs on Prior Attorney's Fee Claim" in Lulay Exhibit F) in advance of a hearing or agreement regarding the issue of fees upon disposition of the case. Again, we fail to see how Attorney Lulay unilaterally determined that because, in his estimation, he did not have the substantive basis for Attorney Scholl's request for fees, that he could just pick and choose when he wanted to appear. While he complains about being "messed" with, his failure to appear resulted in Attorney Scholl being required to spend over three hours at arbitration, incurring more of his attorney time.

In the same Motion to Vacate/Augment Proofs, Attorney Lulay requested that the Arbitrator either reset the fee dispute issue for a new hearing, or alternatively to set the matter "for further proofs to afford evidence to be submitted by Petitioner's current counsel in conjunction with whatever record (Attorney Scholl's) firm already made in support of his claim." The Arbitrator opted for the latter approach, after which Attorney Lulay failed to submit any evidence which would allow the Arbitrator to try to properly determine a fee split in this case.

Pursuant to *DeLapaz v. Selectbuild Construction*, 394 Ill.App.3d 969, 917 N.E.2d 93 (2009), the determination of attorney fees by a trial court is discretionary. As stated by the Court in that case:

> "A client may discharge his attorney with or without cause at any time, even in a contingency fee based agreement. *Thompson v. Hiter*, 356 Ill.App.3d 574, 580-81, 292 Ill.Dec. 362, 826 N.E.2d 503, 509 (2005). When the attorney is discharged, the contingent fee contract no longer exists and the contingency term is no longer operative. *Thompson*, 356 Ill. App.3d at 581, 292 Ill.Dec. 362, 826 N.E.2d at 509. A discharged attorney, however, is entitled to payment for the services rendered prior to discharge on a *quantum meruit* basis. *Thompson*, 356 Ill.App.3d at 580, 292 Ill.Dec. 362, 826 N.E.2d at 509. The term *"quantum meruit"* literally means "'as much as he deserves.'" *Much Shelist Freed Denenberg & Ament, P.C. v. Lison*, 297 Ill.App.3d 375, 379, 231 Ill.Dec. 625, 696 N.E.2d 1196, 1199 (1998), quoting *First National Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill.2d 353, 97*97 365, 228 Ill.Dec. 202, 688 N.E.2d 1179 (1997). Several factors are considered in determining the *quantum meruit* amount for services rendered, which include "the time and labor required, the attorney's skill and standing, the nature of the cause, the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client." *Will v. Northwestern University*, 378 Ill.App.3d 280, 304, 317 Ill. Dec. 313, 881 N.E.2d 481, 504-05 (2007). If

16IWCC0050

an attorney performed much of the work on a case before discharge and a settlement immediately follows the discharge, the factors used to determine a reasonable fee "'would justify a finding that the entire contract fee is the reasonable value of services rendered.'" *Will*, 378 Ill.App.3d at 304, 317 Ill.Dec. 313, 881 N.E.2d at 505, quoting *Wegner v. Arnold*, 305 Ill.App.3d 689, 693, 238 Ill.Dec. 1001, 713 N.E.2d 247 (1999)."

Attorney Scholl presented evidence supporting his claim for quantum meruit fees, the Arbitrator, within her discretion, determined that this resulted in a finding that Attorney Scholl was entitled to 75% of the contractual fee in this case via quantum meruit, with the remaining 25% of the contractual fee going to Attorney Lulay.

IT IS THEREFORE ORDERED BY THE COMMISSION that the March 28, 2014 order of the Arbitrator is affirmed and adopted with regard to the issue of attorney fees of Attorneys Scholl and Lulay.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,100.00. 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.

DATED:
TJT: pvc
o 11/24/15
51

JAN 2 2 2016

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF REJECTION OF SETTLEMENT CONTRACT AND ORDER

Mireya Garcia
Employee/Petitioner

v.

Staff Force/Comp USA
Employer/Respondent

Case # 10 WC 9050

16IWCC0050

The attached settlement contract was submitted to the undersigned Arbitrator for review on March 12, 2014. Arbitrator's Exhibit 1. I am rejecting the contract in its current form, and have made findings and reached conclusions on the disputed attorney's fees and costs as explained *infra*.

Findings

In an unusual hearing on February 21, 2014 and March 12, 2014, Petitioner's current attorney of record, Mr. Lulay of Lulay Law Offices, and Petitioner's former attorney, Mr. Scholl of Donald W. Fohrman & Associates, Ltd., dispute whether the other is entitled to any portion of the $4,000.00 attorney's fees and costs deductions noted in the $20,000.00 settlement amount accepted by Petitioner and Mr. Lulay, in writing, on February 20, 2014.

Petitioner engaged Mr. Scholl as her attorney and eventually retained Mr. Lulay as counsel. On February 11, 2013, Mr. Scholl filed a Petition for Fees under Section 16a. At some point, Mr. Scholl signed a Stipulation to Substitute Attorneys, which was filed on February 13, 2013. Lulay Exh. C. Mr. Scholl's Petition for Fees under Section 16a was entered and continued to case resolution by Arbitrator Dollison on May 3, 2013. Due to Arbitrator rotations in the downstate calls, Petitioner's case was eventually assigned to the undersigned Arbitrator.

Petitioner's case was above the "red line" at the February 13, 2014 status call in Geneva. The case was set for final resolution by trial or presentation of executed settlement contracts during the February trial cycle on February 21, 2014 due to the age of the case.

Petitioner and Mr. Lulay signed the settlement contracts on February 20, 2014, the day before her case was set for final resolution on February 21, 2014. Neither Petitioner nor Mr. Lulay appeared in court on February 21, 2014. Petitioner's former counsel, Mr. Scholl, did appear on February 21, 2014 insisting on a hearing on his Petition for Fees given his understanding that the case was now settled. Respondent's counsel, Mr. Scarpelli, appeared also and indicated that Respondent had indeed made a settlement offer to Petitioner in the summer of 2013. The settlement contracts reflect Mr. Scarpelli's signature on Respondent's behalf during the prior year on June 7, 2013. Mr. Scarpelli requested that the case not be dismissed for want of prosecution, in particular because that would likely require his presence again for a hearing on a petition to reinstate the case which seemed a waste of the parties' and Arbitrator's time and resources under the circumstances. The Arbitrator agreed.

Both Mr. Scholl and Mr. Scarpelli attempted to reach Mr. Lulay at the Arbitrator's request on February 21, 2014 to determine why he was not present given the "red line" status of the case which was discussed on the record at the hearing that morning. Mr. Lulay had settlement contracts for many months and dismissal of the

case for want of prosecution would only cause further costs and delay to the Petitioner herself without necessity. Under these unusual circumstances, the Arbitrator allowed Mr. Scholl to present evidence in support of his petition for fees given Mr. Lulay's unexplained absence.

In essence, on February 21, 2014 Mr. Scholl proffered evidence including an itemization of his time and efforts on Petitioner's behalf in support of a *quantum meruit* argument for $4,800.00 in attorney's fees. *See* February 21, 2014 Hearing Transcript. Mr. Scholl and Mr. Scarpelli also made representations on the record regarding their telephone and email communications with Mr. Lulay prior to February 21, 2014 and on that date, which essentially resulted in his unexplained refusal to appear either to adjudicate the attorney's fees issue or explain why his client's case should not be dismissed for want of prosecution.

Mr. Lulay eventually took some action and provided a courtesy copy of a motion entitled "Motion to Vacate/Agument [sic] Proofs on Prior Attorney's Fee Claim" to the Arbitrator, Mr. Scholl and Mr. Scarpelli via email on February 25, 2014. This motion was not file-stamped, but Mr. Lulay later represented that he was waiting for it to be returned from the Commission with a file-stamp. In response to the courtesy copy of his motion, the Arbitrator indicated to Mr. Lulay the expectation that he and Petitioner would be present on whatever date was assigned at the following status call. After the attorneys determined their availability, a Notice of Motion and Order of a "Motion to Adjudicate Petition for Attorney's Fees" was presented at the next status call setting in New Lenox on March 4, 2014. Notably, no such motion was attached to the notice. Given the parties availability, Petitioner's case and the attorney's fees issue was set for a hearing on March 12, 2014.

Mr. Lulay, Mr. Scholl, and Mr. Scarpelli appeared on the assigned date to resolve Petitioner's case and any attorney's fees issues. Mr. Lulay submitted contracts for approval—which, again, had been signed by him and by Petitioner on February 20, 2014—and his request to augment proofs regarding attorney's fees was granted. A hearing was held. *See* March 12, 2014 Hearing Transcript. Notwithstanding the Arbitrator's previous indication to Mr. Lulay that Petitioner should be present at the hearing, she was not present.

At the hearing, despite repeated requests by the Arbitrator that Mr. Lulay refrain from speculation and argument, he failed to provide evidence of his claimed entitlement to the entire $4,000.00 in requested attorney's fees as claimed. Mr. Lulay argued extensively that Mr. Scholl is not entitled to any fees because according to him Petitioner's case was undisputed while Mr. Scholl represented Petitioner and the only time any issues came into dispute occurred while he represented Petitioner. Mr. Lulay provided no evidence of these assertions, but argued them repeatedly.

The only basis on which the Arbitrator finds Mr. Lulay to have established his entitlement to receive any attorney's fees is the agreement of all three attorneys that the first and only settlement offer made by Respondent to Petitioner occurred while she was represented by Mr. Lulay as reflected in the settlement contracts signed by Mr. Scarpelli on June 7, 2013. Mr. Lulay did not offer any itemization of his time expended on Petitioner's behalf. He did not provide any evidence that the $245.00 in costs identified in the settlement contracts were actually expended by his office on Petitioner's behalf. Nor did Mr. Lulay offer any evidence that the largest deduction for payment of disputed medical bills totaling $6,648.53 were resolved by him in complete satisfaction of Petitioner's debts.

The lack of evidence to support Mr. Lulay's contention that he is entitled to the entire $4,000.00 requested in attorney's fees or that the claimed deductions have been properly resolved by him is brought into further

question by a serious misrepresentation. Mr. Lulay attested and signed the settlement contracts on February 20, 2014 indicating that "*any fee petitions on file with the IWCC have been resolved. Based on the information reasonably available to me, I recommend this settlement contract be approved.*" AX1 (*emphasis* added). As reflected in the hearing record, Mr. Lulay made extensive statements and provided correspondence with Mr. Scholl establishing the exact opposite.

Conclusions

After careful consideration of the record, the Arbitrator rejects the contracts as submitted, declines to award the entire $4,000.00 in attorney's fees or deduct $6,893.53 ($6,648.53 + $245.00) in costs as claimed by Mr. Lulay, and orders as follows:

(1) The settlement contracts shall be amended to reflect that

(a) The $4,000.00 (20% of the total settlement offer of $20,000.00) attorneys' fees portion is divided between Mr. Scholl's firm and Mr. Lulay's firm totaling $3,000.00 (75% of $4,000.00) to Mr. Scholl's firm and $1,000.00 to Mr. Lulay's firm on the basis of *quantum meruit*.

(b) The $245.00 in costs deducted from the total amount to be paid to Petitioner shall be removed and this amount will be added to the amount payable to Petitioner.

(c) The $6,648.53 deducted from the total amount to be paid to Petitioner for medical bills shall be removed and these amounts shall be paid directly to the indicated providers only on production of an affidavit from Petitioner that these amounts resolve any disputed medical bills related to her claim in full, as well as an affidavit from a translator that these matters were explained to her in Spanish, and Mr. Lulay attaches written confirmation of the agreements reached by his office and these providers that the indicated amounts have or will resolve the disputed medical bills in full.

(d) The total amount payable to Petitioner shall be re-calculated to include the foregoing amendments.

(2) The foregoing amendments shall be initialed and dated by Petitioner, Mr. Lulay, Mr. Scholl and Mr. Scarpelli on the settlement contracts.

The parties have ☐ have not ☒ been advised that, after assignment by the Review Unit, they may have the rejected contract reviewed by a commissioner, who may approve or reject the contract.

Barbara N. Flores, Arbitrator

March 28, 2014
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Phyllis Lightfoot

Petitioner,

vs. NO. 10WC031484

Pace,

16IWCC0084

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary disability, causal connection, medical expenses, prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 27, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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.

No bond is required for the removal of this cause to the Circuit Court. 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.

DATED: FEB 1 - 2016
SJM/sj
o-12/17/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

LIGHTFOOT, PHYLLIS
Employee/Petitioner

Case# **10WC031484**

16IWCC0084

PACE
Employer/Respondent

On 4/27/2015, 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 0.09% 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:

0062 TEPLITZ & BELL
JOEL M BELL
221 N LASALLE ST SUITE 1900
CHICAGO, IL 60601

1505 SLAVIN & SLAVIN LLC
DAVID VanOVERLOOP
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0084

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Phyllis Lightfoot
Employee/Petitioner

v.

Pace
Employer/Respondent

Case # 10 WC 31484

Consolidated cases: _____

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 **Maria S. Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **2/24/2015**. 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Prospective Medical and TTD**

Phyllis Lightfoot v. Pace
10 WC 31484

16IWCC0084

FINDINGS

On the date of accident, **1/25/10**, 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 $**39,806.00**; the average weekly wage was $**765.50**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**122,229.72** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**122,229.72**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability (TTD) benefits of $510.33/week for 247 1/7 weeks, commencing 1/28/10 through 4/22/10, 7/29/10 through 10/05/11, and 11/01/11 through 2/24/15 as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $122,229.72 for TTD paid.

Respondent shall authorize and pay for the lumbar re-exploration and instrumented stabilization of the petitioner's lumbar spine as recommended by Dr. Martin Luken.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

4/27/15
Date

ICArbDec19(b)

APR 27 2015

FINDINGS OF FACT

Phyllis Lightfoot ("Petitioner") testified she was a 58 year old bus driver who injured herself on 1/25/10 when she attempted to manually lift up a wheelchair lift on her bus. She felt "charley horse" in her entire body. It is undisputed that Petitioner provided notice to Respondent. She was taken to Ingalls Occupational Health.

On 1/28/10, Petitioner presented to Ingalls Occupational Health where it was documented Petitioner suffered a low back injury after lifting a lift at work. Medicine and restricted duty was prescribed. On 2/1/10, Petitioner followed up with Ingalls, noting ineffective pain medication, radiating pain down the right leg posteriorly down the foot and numbness. Pain was rated 10 out of 10. Neurologically, left knee reflex was 2+ at L2-4, left ankle reflex (S1) was 2+, right knee reflex (L2-4) was 2+ and right ankle reflex was 2+. Ingalls diagnosed right sided sciatica and stated that the cause of Petitioner's problem was related to work activities. Light duty was continued. On 2/2/10, Petitioner underwent initial evaluation with Accelerated Rehabilitation. Assessment was symptoms consistent with back strain. Therapies continued 2/4, 2/5, 2/9, 2/11 and 2/12.

On 2/8/10, Ingalls noted Petitioner's ongoing complaints of lower back pain. She described the pain as intermittent, made worse by sitting, improved with lying down, accompanied with numbness down the right leg to the foot when sitting. Diagnosis was unchanged and light duty was continued. On 2/15/10, Petitioner's exam showed ability to heel-toe, pain with extension and lateral movement, pain at end-flexion and positive straight leg raise on the right. Ingalls continued light duty, held any further PT and ordered an MRI of the lumbar spine. On 2/24/20, MRI showed degenerative disc disease at L5-S1, with diffuse posterior disc bulge and a superimposed broad-based left-sided disc herniation with slight inferior extrusion with significant bilateral neural foraminal narrowing along with mild posterior disc bulge at L4-L5 with moderate to severe central stenosis."

On 3/1/10, Ingalls referred Petitioner to Dr. Zaki Anwar, a pain specialist for an injection. Petitioner complained of constant low back pain and into the hips and buttocks. On 3/8/10, Ingalls continued light duty as Petitioner awaited for injection approval. Medrol dosepak was prescribed. It was noted Petitioner had developed bilateral hip pain with mild antalgic gait. On 3/10/10, Petitioner saw Dr. Anwar who noted significant pain o flexion of the lumbar spine with radiation of pain to the right side, positive straight leg raise, and quadriceps weakness on the right. Dr. Anwar read the MRI as showing at L5-S1 modic type II changes, left sided herniation with slight extrusion and bilateral neuroforaminal narrowing. He opined she suffered from lumbar radiculitis. He recommended transforaminal epidural injection (TESI) at L4-5 and L5-S1 along with holding therapy to avoid exacerbation.

On 3/15/10, Petitioner followed up with Ingalls who noted ongoing back pain with radiation to the right leg but that Petitioner was more concerned now with her constant buttock pain. On 3/18/10, Dr. Anwar performed and Petitioner underwent bilateral L4-5 and L5-S1 TESI at Flossmoor Pain Institute. On 3/25/10, Ingalls noted improvement in back pain and leg numbness having returned only the day before. Light duty was continued.

On 4/7/10, Petitioner complained of left lower back pain and nearly 70-80% relief following the first TESI. Dr. Anwar recommended repeat TESI. On 4/21/10, Dr. Anwar performed and Petitioner underwent bilateral L4-5 and L5-S1 TESI at Flossmoor Pain Institute. On 4/22/10, Ingalls noted Petitioner reported feeling much better, that her gait was normal and that Dr. Anwar had released her to full duty. On 5/5/10, Dr. Anwar noted 50% improvement following the latest injection. Petitioner reported slight irritating pain with activity. By 5/18/10, Petitioner reported to Ingalls low back pain with radiation to the bilateral buttock, pain with bending and steady gait. Regular duty was continued.

On 6/2/10, Dr. Anwar noted Petitioner reported almost 60-70% improvement with the first 2 injections that she continued to work full duty albeit with discomfort. He recommended a third injection. Full duty work was continued. On 6/23/10, Dr. Anwar performed and Petitioner underwent bilateral L4-5 and L5-S1 TESI at Flossmoor Pain Institute. On 6/30/10, Ingalls noted Petitioner presented with slightly guarded gait, pain in the low back area radiating to both hips, 8 out of 10 pain and that she reported improvement but without resolution. On 7/28/10, Petitioner followed up with Dr. Anwar. He noted that after she returned to work as a bus driver she began having severe pain and problems with sitting on her back, along with weakness and numbness in the region of the right thigh. The doctor believed Petitioner was suffering from symptomatic discogenic pain and recommended a provocative lumbar discography with discogram. On that same day, she reported 10 out 10 daily pains to Ingalls.

On 9/8/10, CCMSI drafted a letter to Dr. John Andershak regarding a scheduled Section 12 exam for Petitioner asking the doctor to answer interrogatories of findings, diagnosis, recommendations, future medical treatment, causation and work capabilities. On 9/13/10, Dr. Anwar continued his recommendation for discography. On 9/27/10, Petitioner underwent a Section 12 examination with Dr. Andershak of OAD Orthopedics. History of present illness was positive for weakness in the back, calf and thigh and positive for numbness in the calf and thigh. The doctor diagnosed back pain and spinal stenosis. He noted objective findings of minor mechanical low back pain and disagreed with discogram and CT scan. He recommended standing x-rays to rule out spondylolisthesis which would explain some of her mechanical low back pain. The doctor stated that given her positive response to the injections, she was a candidate for L4-5 laminectomy with bilateral foraminotomies at L4-S1 to "open up the stenosis." He stated discogram is indicated only in cases of mechanical low back pain as her stenosis was indicative of radicular and sciatic pain. He found causal relation, noting that Petitioner likely had pre-existing degenerative disease and stenosis likely aggravated by the injury. The doctor did not have an opportunity to visualize the MRI images and instead relied on the report alone.

On 10/18/10, Dr. Anwar continued to recommend lumbar discogram and CT scan to rule out the need for invasive surgery and to explore further options. On 12/15/10, Dr. Anwar saw Petitioner and recommendations were unchanged. On 12/29/10, Petitioner underwent bilateral L4-5 and L5-S1 TESI with Dr. Anwar. On 1/12/11, Dr. Anwar continued to note Petitioner's sciatic and mechanical low back pain. He continued to recommend injections and discography.

On 1/28/11, Petitioner began treating with Dr. Martin Luken at the referral of her primary care doctor. He noted Petitioner's work accident, protracted conservative care and Dr. Andershak's opinions. Review of the MRI showed degenerative changes of the L4-5 and L5-S1 spinal motion segments and that at both interspaces disk space narrowing with bony parenchymal reactive changes above and below the disk and spinal stenosis. The doctor concluded there was "no practical doubt that Ms. Lightfoot's relentless and incapacitating symptoms are the result of her demonstrated spinal degenerative disease, many of the changes of which are undoubtedly chronic," and that the condition was "aggravated by the injury," so as to "precipitate the symptomatic course and necessitate the numerous treatment efforts." The doctor opined that Petitioner had exhausted comprehensive conservative treatment and was a surgical candidate. Specifically, the doctor stated that, "given the prominence of the mechanical back pain in the account of her symptoms Ms. Lightfoot gave to me today, in my view prudence would dictate proceeding with instrumented stabilization of her lower lumbar segments in addition to decompression of her spinal stenosis and resection of her L5-S1 disk herniation; on this point, I respectfully disagree with Dr. Andershak, who specifically alludes elsewhere in his report to 'her mechanical-type pain,' but apparently discounts its significance."

On 2/23/11, Respondent issued a letter to Dr. Andershak asking for an addendum opinion and enclosing the medical opinions of Dr. Luken. On 3/10/11, Dr. Andershak issued his response, stating that he could neither agree nor disagree with Dr. Luken as he still did not have any MRI films to review. He noted that mechanical low back pain is always worse with sitting and not standing. Further, he stated that fusions are sometimes necessary where there is extensive bony resection in the foramen and the almost complete facetectomy often needed. He surmised that if Dr. Luken were correct and if there was extensive facetectomy then a posterior spinal fusion would be indicated based on the resultant instability. On 4/14/11, Dr. Anwar saw Petitioner and continued to note radiation of pain into the leg with significant mechanical low back pain with flexion. He recommended another TESI for pain and a diagnostic discography. Medications were continued. On 4/20/11, Petitioner underwent a 5th TESI at L4-5 and L5-S1. On 4/28/11, Petitioner followed up with Dr. Anwar and reported relief.

On 5/13/11, Dr. Andershak did in fact review the MRI films, findings that it showed multilevel degenerative disc disease at L4-5 and L5-S1, bilateral foraminal stenosis at L4-5 and L5-S1 secondary to facet arthroplasty and disc collapse and some reactive end plate changes at L5-S1 consistent with modic type II changes. He concluded that the foramen appeared to be able to be decompressed without the need for stabilization and therefore without fusion surgery. On 6/23/11, Dr. Anwar recommended outpatient lumbar microdiscectomy to resolve discogenic pain. He did not think Petitioner was not a fusion candidate given her short stature and the fact that that she weighed 240 pounds. In the interim, he recommended another TESI. On 6/29/11, Petitioner underwent a 6th TESI at L4-5 and L5-S1. On 7/13/11, Dr. Anwar continued to recommend surgery and TESI in the interim. On 8/10/11, Petitioner underwent an outpatient lumbar microdiscectomy/percutaneaus lumbar discectomy at L5-S1, discography and discogram interpretation. The doctor noted that surgery was indicated based on Petitioner's "clinical history of intractable axial low back and left leg pain."

On 8/18/11 and 9/28/11, Petitioner followed up with Dr. Anwar, who noted Petitioner's continued intense low back pain and he recommended decompression and fusion surgery. On 11/1/11 and 11/14/11, Dr. Anwar recommended "comprehensive pain control and then consider spinal cord stimulator implant as well as lumbar laminectomy and decompressive laminectomy." He referred Petitioner to Dr. Luken and for a psychiatric evaluation for the recommended spinal cord stimulator. On 11/2/11, Petitioner was cleared by Dr. Kahn for trial spinal cord stimulator placement.

On 12/14/11, counsel for Respondent issued a letter to Dr. Andershak asking him to re-evaluate Petitioner in light of recent medical treatment and Dr. Anwar's recommendations. On 12/15/11, Dr. Anwar now recommended consideration of laminectomy and spinal stimulator. On 12/16/11, Dr. Luken saw Petitioner and recommended decompression and fusion. He deferred endorsing a spinal cord stimulator pending outcome of her recommended surgery. On 12/28/11, Dr. Andershak re-evaluated Petitioner and found the examination and symptoms consistent with his prior opinions and maintained his previous recommendation that Petitioner required a laminectomy at L4-5 with bilateral foraminotomies. On 1/19/12, Dr. Anwar continued to opine his agreement with Dr. Luken's recommendation of comprehensive pain control, spinal cord stimulator, decompressive lumbar laminectomy and fusion surgery at L4-5 and L5-S1 in the future.

On 2/8/12, Dr. Anwar performs implantation of trial dorsal column stimulator targeted at the L2-2 epidural space. On 2/10/12, Dr. Andershak noted that Petitioner presented for follow up of spinal cord stimulator. Petitioner reported ineffective relief following spinal cord implantation and scheduled removal and clearance for back surgery. On 2/13/12, Dr. Anwar indicated that Petitioner reported more than 60% relief following cord implantation. Petitioner was directed to follow up with Dr. Luken. On 2/29/12, Dr. Andershak confirmed on new MRI Petitioner's spinal stenosis at L4-5 and L5-S1 showing central and foraminal stenosis with subarticular recess stenosis. The doctor recommended laminectomy at L4-5 with bilateral foraminotomies that he believed would resolve her pain, which he opined was stenotic in nature.

On 3/29/12, Dr. Andershak performed and Petitioner underwent L4-5 laminectomy and bilateral L4-5 and L5-S1 foraminotomies at Central DuPage Hospital. On 4/11/12, Petitioner reported to Dr. Andershak better back pain, absence of leg pain and some leg numbness on the right. Follow up and physical therapy was ordered. On 4/26/12, Dr. Anwar wrote that Petitioner was reported "extreme excruciating pain and is having issues of acute pain around the scar tissue as well as continues to complain of right sided leg pain which is a new onset pain." He recommended physical therapy and another implantation of spinal cord stimulator.

On 5/9/12, Dr. Andershak noted that Petitioner still had some back pain, right leg with some numbness. Medications, light duty and physical therapy were ordered. In an undated FCE with PTSIR, who noted that Petitioner failed 7 of 15 performance criteria, less than full participation, over-guarding and that though Petitioner may possess true dysfunction, that data may not represent true status. Musculosketal results showed difficulty assuming a functional squatting position, use of a cane for ambulation and poor body mechanics with material handling. Petitioner reported pain the lower back described as stabbing, burning, throbbing

sensations along with radicular pain in the left lower extremity. For the occasional lifting and carrying testing portion, therapists noted Petitioner complained of pain in the left hip and left lower extremity and noted poor mechanics. Frequent lifting test showing reported pain greater than 6 out of 10 in the low back and left hip. Functional activity circuit showed perceived exertion of 11-12 out of 20, reported low back pain 10 out of 10 after 3:55 minutes of activity.

On 7/6/12, Dr. Andershak noted some ongoing back pain with right sided leg numbness. Petitioner had not yet been walking as previously recommended. The doctor noted inconsistencies in an FCE. The doctor recommended work conditioning, increasing walking distances, review of a job description and that Petitioner avoid lifting and bus driving. On 8/21/12, Underwriters Safety & Claims, Inc. faxed a copy of Petitioner's job description for bus operator. On 8/31/12, Dr. Andershak recommended that Petitioner discontinue physical therapies as it was not progressing her overall condition. He opined that her permanent restrictions were ability to drive buses with no lifting over 15 pounds, no standing greater than 30 minutes. He recommended follow up with her medical doctor for flare ups of pain or inflammation. Petitioner was placed at maximum medical improvement and released. Petitioner testified that work never took her back after the release and vocational rehabilitation was begun but terminated after a few meetings with the counselor.

The next record appears on 2/6/13, wherein Underwriters denied further medical treatment. On 2/20/13, Dr. Luken documented denial of approval by workers compensation for treatment. On 12/25/13, Petitioner presented to Ingalls Memorial Hospital for evaluation of pain to the right lower back. The pain was documented as chronic, radiation to the right buttock, sciatica on the right for greater than 6 months. Petitioner reported pain exacerbated by movement and relieved by being still. Petitioner was given morphine and was directed to follow up with Dr. Luken. CT scan of the lumbar spine showed moderate to severe left lateral recess stenosis and bilateral neural foraminal stenosis at L5-S1 and moderate to severe bilateral neural foraminal stenosis at L4-5.

On 1/24/14, Dr. Luken saw Petitioner and noted that following surgery, Petitioner did not have any notable relief of her symptoms and that he was not surprised given that her primary preoperative symptom was mechanical back pain. Exam showed antalgic gait and positive bilateral straight leg raise. He recommended an MRI of the lumbar spine and dynamic lumbar radiographs. On 3/7/14, MRI of the lumbar spine showed herniation versus granulation at L5-S1 with underlying bulge narrowing the foramina, diffuse bulge at L3-4 and L4-5 narrowing the foramina and mild-moderate spinal stenosis, partly congenital.

On 5/2/14, Dr. Luken "explained to Ms. Lightfoot that in my view the only surgical intervention which appears to me to have a reasonable likelihood of relieving her would involve lumbar re-exploration and instrumented fusion of her mid-and lower lumbar segments." On 8/8, 9/5 and 10/3/14, Petitioner followed up with Dr. Luken who noted he continued to recommended re-exploration and fusion surgery and continued to await approval.

On 10/29/14, Dr. David Spencer conducted a Section 12 exam of Petitioner at the request of Respondent. He concluded Petitioner did not have symptomatic spinal stenosis and that she

did not need the L4-L5 laminectomy and that ongoing complaints of pain in her back and legs to any degree, is more probably than not related to the unnecessary interventional treatment that she has had rather than any original injury and that further surgery is not necessary. Dr. Spencer further opined that Petitioner was capable of returning to full-duty work as a bus driver.

Petitioner testified that she presently takes Hydrocodone four times a day and Valium twice a week. She still has pain in her tailbone, both hips down to her right big toe, numbness in her legs and that she is willing to undergo the fusion recommended by Dr. Luken. Petitioner also testified that her temporary total disability benefits terminated on 11/4/14. At hearing Petitioner testified that the epidural steroid injections administered by Dr. Anwar only lasted an hour if even that long, and that she has been and continues to be in constant pain. Furthermore, Petitioner testified that she has not worked since the day of the accident. Petitioner testified that the pain increases when she sits or lies down for too long causing her to shake. Petitioner testified to one such incident where she had to sit for four hours waiting for a doctor's appointment and the next morning was taken by ambulance to a hospital because her whole right side "was in a charley horse." Petitioner did not introduce any records of this incident into evidence.

CONCLUSIONS OF LAW

ISSUE (F) Is Petitioner's Current Condition Of Ill-Being Causally Related To The Injury?

Here, there is no doubt the parties agree that Petitioner's condition as it existed on 8/31/12, was causally related to her original work injury, which is not in dispute. The current dispute arises over whether Petitioner's current condition is causally related given her MMI release date and given what appears to be a "gap" in treatment following this MMI release date. For the reasons that follow, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to her work injury.

The Arbitrator adopts the recommendations and opinions of Dr. Luken. In doing so, the Arbitrator notes that Dr. Luken has continuously and consistently recommended Petitioner for a fusion surgery given the location of her condition on MRI and her continued mechanical low back complaints. When Dr. Andershak concluded Petitioner was not a fusion candidate, he initially did so without imaging studies. Subsequently, the doctor reviewed those imaging studies and stated that the foramen appeared to be able to be decompressed without the need for stabilization. During surgery, however, Dr. Andershak noted significant facet arthropathy and nerve roots severely narrowed under the articular facets. In the Arbitrator's view, the doctor's reading of the imaging studies was equivocal when compared to Dr. Luken's firm opinion from the outset that Petitioner needed a fusion and decompression. Dr. Andershak also conceded that if an extensive facetectomy was performed than a fusion may be indicated based on the resultant instability.

Following surgery, while medical records certainly document some improvement in symptoms and pain following surgery, Dr. Andershak's records also document Petitioner's ongoing complaints of pain in the low back and right sided leg numbness. Physical therapy records leading up to her MMI date show Petitioner unable to complete certain tasks due to reported increased low back pain. Those therapies were discontinued by Dr. Andershak and considered ineffective by the doctor as not helping Petitioner improve. In reviewing Petitioner's FCE, it is noted that although she appeared to not give full effort, therapists explained that this did not necessarily dismiss the likelihood of impairment only the extent to which Petitioner perceived pain and disability. Further, therapists during the FCE noted Petitioner reporting low back pain as "stabbing, burning, throbbing sensation along with radicular symptoms in left lower extremity." The fact that Dr. Andershak released Petitioner with permanent restrictions consistent with the findings of the FCE belies any contention that the results were invalid. If the results were invalid, it would stand to reason that Dr. Andershak would have released Petitioner otherwise.

Further, Dr. Andershak disclosed and explained to Petitioner right before her lumbar surgery that inherent risks of surgery included failure to achieve desired result and otherwise failure to obtain relief. Petitioner's documented complaints following surgery and following her MMI date, along with her testimony, support Dr. Luken's current opinion that Petitioner's surgery was not successful in addressing her complaints. In addition, at the time of her MMI release date, Dr. Andershak suggested that Petitioner should seek to re-enter treatment if she experienced flare-ups and pain, which his precisely what the record shows Petitioner attempted to do. In rejecting the opinion of Dr. Spencer, who ultimately concludes that Petitioner did not even need an L4-5 laminectomy, the Arbitrator notes that Dr. Spencer's opinion that no surgical intervention was needed at all in the first place is at odds with the medical opinions of Drs. Andershak, Luken and Anwar, even if those opinions differed on the nature and type of surgery to be performed. Further, Dr. Spencer's conclusion that any current symptoms or conditions would be related to the surgery and not the injury misses the well established rule that any complications flowing from the work related surgery would be ultimately related to the injury in question as a sequela or consequence of that injury.

In addressing Respondent's contention that Petitioner's condition of ill-being is unrelated to her original work injury due in part to the large "gap" in treatment following her MMI release date, the Arbitrator notes that Petitioner's credible testimony was that she never obtained optimal relief following surgery. Those statements are corroborated in the treatment records leading up to her MMI release date and treatment records following the MMI release date. In fact, doctors had differed from the outset whether Petitioner should undergo a fusion surgery or a simple laminectomy. In addition, imaging studies post release date show Petitioner's condition had in fact not yet stabilized and that there was evidence of ongoing stenosis along with other issues. Following Petitioner's release on 8/31/12, the next record appears on 2/9/13 denying authorizing for continued medical treatment. In the Arbitrator's view, this does not suggest a willful gap in treatment but supports Petitioner's contention that she had been experiencing ongoing back pain and leg pain that she attempted to re-enter some type of treatment which was ultimately denied. For whatever reason, the medical note potentially referenced in the 2/9/13 denial letter does not

appear in the record. However, the Arbitrator need not review it in order to find Petitioner's complaints consistent and persuasive during this time.

Given that Petitioner had both low back, mechanical-type in nature along with radicular/stenotic pain that was treated with conservative treatment and surgical intervention, which has ultimately proven unsuccessful based on ongoing documented complaints, the Arbitrator concludes that Petitioner's current condition of ill-being is causally related to her work injury.

ISSUE (K), (O) Is Petitioner Entitled To Any Prospective Medical Care?

Having found in favor of Petitioner on the issue of causal connection, the Arbitrator finds Petitioner is entitled to prospective care. When seen by Dr. Luken on May 14, 2013 he opined " that in my view the only surgical intervention which appears to me to have a reasonable likelihood of relieving her would involve lumbar re-exploration and instrumented fusion of her mid-and lower lumbar segments." which was the same opinion he had in January 2011. The Arbitrator finds Dr. Luken to be credible and his recommendation for a spinal fusion to be reasonable and necessary to relieve the petitioner's pain. The Arbitrator finds Dr. Spencer to less persuasive in his opinion that the Petitioner does not need further surgery. The Arbitrator concludes and orders that Respondent shall authorize and pay for the lumbar re-exploration and instrumented stabilization of the Petitioner's lumbar as recommended by Dr. Luken including any pre and post operative care.

ISSUE (L), (O) What Temporary Benefits Are In Dispute?

Having found in favor of Petitioner on the issues of causal connection and prospective medical care, the Arbitrator finds that Petitioner was released to return to her job as a bus driver by Dr. Andershak but was not taken back within her restrictions by Respondent. Further, the Arbitrator finds that Petitioner's condition of ill-being has not yet stabilized and therefore Petitioner, being unable to work and Respondent otherwise unable to accommodate, is entitled to temporary total disability benefits. The Arbitrator declines to adopt the medical opinion of Dr. Spencer that Petitioner is able to return to work full time without restriction as this not only runs counter to the evidence showing her condition is not yet stabilized but also runs contrary to Dr. Andershak's recommendations, which had initially placed Petitioner with permanent work restrictions.

The Arbitrator concludes that Petitioner is entitled to TTD and Respondent shall pay Petitioner TTD benefits of $510.33/week for 247 1/7 weeks, commencing 1/28/10 through 4/22/10, 7/29/10 through 10/05/11, and 11/01/11 through 2/24/15. Respondent is entitled to a credit of $122,229.72 for TTD paid.

ARBITRATOR SIGNATURE

4/27/15
DATE

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF WILL	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Frank Klein,

Petitioner,

vs. NO. 10WC044620

All Chicagoland Moving and Storage,

16IWCC0085

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, permanent disability, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2015 is hereby affirmed and adopted.

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

16IWCC0085

No bond is required for removal of this cause to the Circuit Court. 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.

DATED:
SJM/sj FEB 1 - 2016
o-1/21/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KLEIN, FRANK
Employee/Petitioner

Case# 10WC044620

16IWCC0085

ALL CHICAGOLAND MOVING & STORAGE
Employer/Respondent

On 7/2/2015, 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 0.11% 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:

4262 ROMANEK & ROMANEK
DARON ROMANEK
ONE N LASALLE ST SUITE 425
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
JASON D KOLECKE
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

16IWCC0085

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Frank Klein,
Employee/Petitioner

v.

All Chicagoland Moving & Storage,
Employer/Respondent

Case # **10** WC **44620**

Consolidated cases: **none**

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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **5/7/15**. 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. [x] 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. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] 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 **8/16/10**, 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 not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**52,000.00**; the average weekly wage was $**1,000.00**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **no** dependent children.

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on August 16, 2010, and as a result likewise failed to prove that his current condition of ill-being is causally related to said alleged accident. Accordingly, Petitioner's claim for compensation is hereby denied.

No benefits are awarded.

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

6/16/15
Date

JUL 2 - 2015

STATEMENT OF FACTS:

Petitioner, a 50 year old packer, testified that he had worked for Respondent for about 13 years and had worked as a mover for the past 30 years. He noted that as a "packer" for Respondent he did both commercial and residential moving, and sometimes used a small truck to move items. Petitioner testified that on August 16, 2010 he was assigned to work a residential job in Lemont, Illinois. Petitioner was working with two other employees on that day, Mike Gotfried and Mike Stiltner. Petitioner testified upon his arrival he unloaded the boxes and reams of paper that would be needed to pack the household items. He indicated that he started the day packing items in the kitchen. These items consisted of dishes, pots, pans and wall hangings.

Petitioner testified that he loaded two boxes that morning weighing 40 to 50 pounds each. He noted that while in the process of lifting the second box he experienced extreme pain up and down his back and neck. He indicated that the pain also brought on headaches and numbness in his right arm. Petitioner testified that he was unable to work the rest of the day and actually ended up lying in the truck while his co-workers finished the job. He testified that he informed the dispatcher, Sandy Koslowski, of the accident that day. Petitioner testified that he did not seek any medical attention on the date of the alleged work accident.

On cross examination, Petitioner also claimed that he spoke to Joe Illingworth, Respondent's operations manager, on the date of the alleged accident. Mr. Illingworth testified that he spoke to Petitioner every day, to go over paperwork and send him out on jobs. However, Mr. Illingworth noted that Petitioner did not mention any accident at work until the day he was let go on September 10, 2010. More to the point, Mr. Illingworth indicated that Petitioner had about 10 to 12 jobs after the alleged accident and never reported any neck injury, and that the crew that worked with Petitioner never mentioned it either. In addition, Mr. Illingworth noted that during the period following the alleged accident he did not notice Petitioner having a problem holding his head up or otherwise having problems with his neck. Mr. Illingworth testified that if Petitioner had told him about an accident before he was let go he would have instructed him to go to Concentra for treatment. Mr. Illingworth noted that Petitioner had previously reported injuries to his hand and back and had received treatment at Concentra for same in the past before returning to work.

Petitioner testified that on August 17, 2010, or the day following the alleged accident, he worked on another job but was unable to lift anything. He noted that on that date he drove and was the "boss", and that Respondent provided him a helper, Lenny Baron, to assist him. Mr. Illingworth testified that Mr. Baron worked in the office as a dispatcher. He noted that Mr. Baron had hurt his back a long time ago and had not done any packing or moving since. Mr. Illingworth was also not aware of any jobs after the alleged date of accident where Petitioner was supplied with an extra helper.

Petitioner testified that he continued to work his regular duties for Respondent through September 10, 2010. Petitioner noted that on that date he went in to get his check and was informed by Mr. Illingworth that they had to let him go and that he was fired. Petitioner testified that he was not given a reason. Mr. Illingworth testified that he informed Petitioner on that date that things were getting slow on account of the economy and that they had decided to keep the other packing crew. Mr. Illingworth testified that Petitioner then informed him that he would sue him for his back, and drove off.

Petitioner testified that after his termination of employment he did not work any of other moving jobs or seek alternative employment. He noted that the pain in his neck continued and that he subsequently sought treatment with Dr. George Nahra on September 28, 2010. At that time Petitioner completed a history intake form. (RX3). This form indicates that Petitioner listed his complaint as "back pain, with a date of on set on

August 16, 2010." The form further documented Petitioner previously undergoing a low back discectomy and fusion surgeries in 1992 and 1995. (RX3).

The medical records from the date of Petitioner's first treatment with Dr. Nahra, September 28, 2010, reflect a history of low back pain after a lifting injury on August 16, 2010. A physical exam taken on that date documents low back pain with restricted bending and a positive straight leg test at 75 degrees. The record also indicates that Petitioner's neck was examined and his cervical range of motion was normal. Dr. Nahra provided a diagnosis on that date of "exacerbation of chronic low back pain." The record makes no reference to any neck or cervical pain. Petitioner was also provided an off work note on that date with the diagnosis indicating low back pain. (PX1).

On October 12, 2010, Petitioner returned to see Dr. Nahra at which time it was noted that Petitioner complained of "significant low back pain with radicular symptoms and neck pain/stiffness." Physical therapy was prescribed and Petitioner was restricted from work with a diagnosis of low back pain. (PX1).

Based on Dr. Nahra's prescription for physical therapy, Petitioner began treating at Orthogo on October 13, 2010. (PX3). At the time of Petitioner's first visit, the therapist completed a Lumbar Spine Assessment form. On the form Petitioner indicated that his present symptoms included "neck pain, low back pain, with stiffness." Petitioner indicated the symptoms were present for the last 4-5 years. Petitioner also indicated that the pain commenced as a result of lifting heavy boxes weighing over 100 pounds. Petitioner was examined on that day and the report details that all treatment was focused on the lumbar spine. The physical therapy treatment goals were tailored to Petitioner's lumbar spine. There was no mention of treatment goals for Petitioner's cervical spine. (PX3).

Petitioner's next physical therapy visit was on October 18, 2010. On that date Petitioner completed a cervical spine assessment form. The symptoms included posterior cervical spine right greater than left with symptoms to the elbow. The form indicates that these symptoms had been present since July of 2007. These symptoms commenced as a result of "moving furniture, twisted neck and force of movement." There is no mention of an August 16, 2010 work accident. The form also has a section labeled "accidents" and wherein Petitioner indicated "no." (PX3).

On November 2, 2010, Petitioner returned to Dr. Nahra with improvement but continued complaints of right radicular symptoms. Petitioner continued to treat sporadically with Dr. Nahra for his neck symptoms through April 6, 2012. (PX1). These records do not provide a history of cervical spine injury on August 16, 2010.

On December 14, 2010, Petitioner underwent a CT myelogram of his cervical spine. This exam revealed severe spinal stenosis at C5-6 based on a large posterior endplate osteophytes and associate disc bulge with uncovertebral spurring causing moderate stenosis. (PX5).

On February 4, 2011, Petitioner was examined by Dr. Edward Goldberg at the request of Respondent pursuant to §12 of the Act. At that time Petitioner provided a history of sustaining a neck injury on August 16, 2010 while lifting. Petitioner also acknowledged prior neck pain for four years with episodes of parasthesias in the right arm and weakness that caused him to drop things. Dr. Goldberg's diagnosis was spinal stenosis at C5-6 and C6-67 causing neck and right radicular arm pain. Dr. Goldberg opined that based on Petitioner's self-reported history of four years of intermittent neck pain and radicular symptoms prior to the August 16, 2010 accident, as well as no mention of cervical pain in the records until two months after the accident took place, that his cervical condition was not caused or aggravated by the work accident. (RX2).

Petitioner eventually came under care of Dr. Alexander Ghanayem. He began treating with Dr. Ghanayem on May 11, 2011. At that time Petitioner provided a history of being a mover and having neck pain that developed four years prior, which was intermittent in nature. Petitioner indicated his condition worsened in August 2010 with moving activities. Dr. Ghanayem diagnosed Petitioner with cervical spondylosis, which was aggravated through his work activities in August 2010. Dr. Ghanayem recommended that Petitioner undergo a cervical diskectomy and fusion at C5-6 and C6-7. (PX7).

On January 30, 2012, Dr. Ghanayem performed surgery consisting of an anterior cervical discectomy and decompression at C5-6 and C6-7 with an interbody fusion at the same levels. (PX6). Following surgery, Petitioner continued to follow up with Dr. Ghanayem and participated in physical therapy. On June 4, 2012, Dr. Ghanayem indicated that Petitioner's neck felt good, the arm pain was essentially gone, his strength was good and there were no focal deficits. A functional capacity evaluation was prescribed. (PX7).

Petitioner eventually underwent an FCE on September 18, 2013 at which time he was found capable of working in the medium physical demand level with the ability to lift up to 57 pounds. (PX8). Thereafter, Dr. Ghanayem found that Petitioner had reached maximum medical improvement and released him from care on September 30, 2013 per the FCE restrictions. (PX7).

At the time of trial Petitioner testified that he was not taking any medication but had daily pain in his neck. Petitioner noted that he had limited motion in his neck and some difficulty with driving. He also stated that he experienced frequent headaches that were not present prior to the accident. Petitioner indicated that he had looked for work driving bread routes, but had not obtained any stable employment.

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

Petitioner testified that on August 16, 2010 he loaded two boxes weighing 40 to 50 pounds each when he experienced extreme pain up and down his back and neck. He indicated that the pain also brought on headaches and numbness in his right arm. Petitioner testified that he was unable to hold his head up and that he ended up lying in the truck while his co-workers finished the job. These co-workers were not called to testify. Furthermore, Petitioner testified that he informed the dispatcher, Sandy Koslowski, of the accident that day. Once again, Ms. Koslowski was not called to testify. Petitioner did not seek any medical attention on the date of the alleged work accident. In fact, the record shows that Petitioner continued to work and did not seek medical attention until September 28, 2010, or roughly two (2) weeks after he was laid off and more than six (6) weeks after the alleged date of accident.

Petitioner testified that he also spoke to Joe Illingworth, Respondent's operations manager, on the date of the alleged accident. Mr. Illingworth testified that he spoke to Petitioner every day, to go over paperwork and send him out on jobs. However, Mr. Illingworth noted that Petitioner did not mention any accident at work until the day he was let go on September 10, 2010. More to the point, Mr. Illingworth indicated that Petitioner had about 10 to 12 jobs after the alleged accident and never reported any neck injury, and that the crew that worked with Petitioner never mentioned it either. In addition, Mr. Illingworth noted that during the period following the alleged accident he did not notice Petitioner having a problem holding his head up or otherwise having problems with his neck. Mr. Illingworth testified that if Petitioner had told him about an accident before he was let go he would have instructed him to go to Concentra for treatment. Mr. Illingworth noted that Petitioner had previously reported injuries to his hand and back and had received treatment at Concentra for same in the past before returning to work.

Petitioner testified that on August 17, 2010, or the day following the alleged accident, he worked on another job but was unable to lift anything. He noted that on that date he drove and was the "boss", and that Respondent provided him a helper, Lenny Baron, to assist him. Mr. Illingworth testified that Mr. Baron worked in the office as a dispatcher. He noted that Mr. Baron had hurt his back a long time ago and had not done any packing or moving since. Mr. Illingworth was also not aware of any jobs after the alleged date of accident where Petitioner was supplied with an extra helper.

Petitioner testified that he continued to work his regular duties for Respondent through September 10, 2010. Petitioner noted that on that date he went in to get his check and was informed by Mr. Illingworth that they had to let him go and that he was fired. Petitioner testified that he was not given a reason. Mr. Illingworth testified that he informed Petitioner on that date that things were getting slow on account of the economy and that they had decided to keep the other packing crew. Mr. Illingworth testified that Petitioner then informed him that he would sue him for his back, and drove off.

Petitioner testified that after his termination he subsequently sought treatment with Dr. Nahra on September 28, 2010. A physical exam taken on that date reflects low back pain with restricted bending and a positive straight leg test at 75 degrees. The record also indicates that Petitioner's neck was examined and his cervical range of motion was normal. Dr. Nahra provided a diagnosis on that date of "exacerbation of chronic low back pain." The record makes no reference to any neck or cervical pain. Instead, the history intake form completed on that date shows a complaint of "back pain, with a date of on set on August 16, 2010." The form also noted that Petitioner had previously undergone a low back discectomy and fusion surgeries in 1992 and 1995. (RX3).

The record further shows that Petitioner had experienced symptoms of neck pain and radiating right arm pain prior to the alleged accident on August 16, 2010. Petitioner testified that these symptoms included dropping things and pain so bad at times that his co-workers would do his work so he could rest. The cervical CT myelogram Petitioner underwent on December 14, 2010 revealed severe spinal stenosis caused by a large posterior endplate osteophytes and associated disc bulge with uncovertebral spurring causing moderate stenosis. Dr. Goldberg noted that the CT myelogram provided no evidence of an acute condition and "disc osteophyte complexes" develop over time as a disc wears out. (RX1, p.10). Petitioner's treating surgeon, Dr. Ghanayem, confirmed this fact, noting that this is "...not an acute condition." (PX11, p.47).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on August 16, 2010. The Arbitrator finds Petitioner's claim that he injured his back and/or neck on the date in question to be unsubstantiated by the histories and witness testimony. Furthermore, it would appear that Petitioner had cervical complaints prior to the date of the alleged accident, and that subsequent radiographic evidence failed to support his claim that he suffered an acute injury to his cervical spine on August 16, 2010. Accordingly, Petitioner's claim for compensation is hereby denied.

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

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident (issue "C", supra), the Arbitrator finds that Petitioner failed to prove that his current condition of ill-being is causally related to said alleged accident. Along these lines, the Arbitrator finds the opinions of Dr. Goldberg to be more persuasive than those offered by Dr. Ghanayem on the question of causation. Accordingly, Petitioner's claim for compensation is hereby denied.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to medical expenses pursuant to §8(a) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to temporary total disability benefits pursuant to §8(b) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

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

Based on the above, and in light of the Arbitrator's determination as to accident and causation (issues "C" and "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to an award for permanent partial disability. Accordingly, Petitioner's claim for same is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Javier Delgado,

Petitioner,

vs. NO: 10 WC 46666

Ferrara Pan Candy Company, Inc.,

16IWCC0060

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent of Petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission herein, however, does correct clerical errors of the Arbitrator to reflect Petitioner's injury and award to his LEFT middle toe and LEFT foot.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- On the date of accident, September 14, 2010, Petitioner testified that the forklift ran over his foot (LEFT). Petitioner was taken via ambulance to Loyola University Medical Center emergency room and was admitted to the hospital through September 17, 2010. Petitioner continued to follow up with Dr. Francis Rottier from Loyola after discharge. During a follow up, Dr. Rottier recommended surgery to amputate Petitioner's 1st and 2nd toes of his left foot and that surgery was performed October 22, 2010. Petitioner viewed PX 6 and he identified it as photos of his left foot prior to surgery (also noted was the damage to the 3rd toe and top of his foot). Petitioner continued follow up with the doctor post-surgery and that included a regimen of physical therapy and work conditioning; at Industrial Rehab Allies. By April 22, 2011 Petitioner had completed therapy and work

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conditioning. Petitioner returned to Dr. Rottier on May 23, 2011 and noted then that his left foot was in pain (at the top and side of his foot) and swollen. The doctor at that time prescribed medication and a special boot with a steel toe. Once Petitioner got the boot the doctor said he could return to work with restrictions. Petitioner testified that once he got the boot, Respondent initially was not able to accommodate the restrictions, but eventually did accommodate the restrictions. Petitioner underwent a functional capacity evaluation at Industrial Rehab Allies. Petitioner then followed up with Dr. Rottier on October 31, 2011 who then prescribed orthotics and pain medication and maintained petitioner on light duty work restrictions. Through the date of hearing, March 3, 2015, Respondent continued accommodate the light duty restrictions (Petitioner was doing inventory). Doing inventory involves working three hours per day on the computer; checking the system to see what is in inventory and then going on the floor to see if everything is the same. For an hour he walks doing the same, checking inventory, and for six hours he works on the forklift putting merchandise away. Petitioner no longer picks/gathers orders but he still does drive the same type of forklift as before. Petitioner testified that in his new position he gets in and out of the forklift less than his prior position; currently he gets in and out of the forklift only 25-35 times per day. Petitioner does wear special footwear (steel toes) while performing his job. In his inventory job, Petitioner works with Mark Morelli who did that job previously. Mr. Morelli did the job in the office, but did not drive a forklift.

- Petitioner had follow up visits with Dr. Rottier since October 31, 2011 with the most recent visit being September 4, 2014. Petitioner then had returned to the doctor as he was having pain and swelling in the left foot, and the doctor then prescribed medication for the pain. Petitioner indicated Dr. Rottier informed Petitioner to follow up when he has pain in his foot for the pain medication refills.

- Petitioner testified that through the current day Petitioner has continued to work for Respondent in the modified duty work that included getting in and out of the forklift. Petitioner testified that currently when performing job activities he used his left foot to get in and out of the forklift. Petitioner stated that he puts all his weight on his left foot and that is when he notices the pain at the top of his foot and the side. Petitioner testified the job also requires him to stand while he operates the forklift and when he stands on the forklift he had been getting pain in his 3rd toe, blisters in the middle of the toe and at the bottom of his foot as well as pain where he puts his weight at the bottom of his foot by the 3rd toe. Petitioner agreed his job currently requires him to walk the aisles to check the inventory. Petitioner indicated that while walking he gets pain on the side as all his weight is on his left foot. Petitioner testified that he can walk for about a block before he starts feeling the pain. Petitioner indicated to manage the pain he will sit down at the computer. When Petitioner gets home after his work shift he has the pain in the same areas previously noted, with the swelling on the side and top to the ankle. Petitioner testified when he gets home he takes off his steel toe boots and he takes the medication. He does use a topical cream at the end of the day and his girlfriend will rub his foot. Petitioner agreed that Dr. Rottier has prescribed special footwear as well as the orthotics throughout his treatment; Petitioner had a special orthotic and the steel toe boots. Throughout the course of treatment the doctor had tried various modifications to the

orthotics and had prescribed the pain medication for his foot. Petitioner testified that the treatment had not successfully eliminated the pain in his left foot.

- Petitioner testified that prior to the accident he enjoyed playing basketball about three times per week; he was on a league that played every Sunday. Petitioner testified that had been his primary form of exercise prior to the accident. Petitioner no longer plays basketball; he had tried playing but he would get the pain; he played for only a couple minutes before he got the pain. Petitioner currently does not exercise because of the pain. Prior to the accident he picked up his two children at school a block away and previously he walked that; he is able to walk that distance to get his children from school but on the way back he starts having the pain. Petitioner's highest education was high school. Prior to working for Respondent he had worked at another candy company as a forklift driver. Petitioner had no other outside training or specialized technical training. Petitioner testified that other than the inventory work he does at Respondent on the computer he is not familiar with computers.

- Petitioner removed both shoes/boots and socks for the Arbitrator to view his feet. Petitioner noted that he only wore the orthotics in his work boots. The Arbitrator noted some bone loss of the 3rd toe (tip being floppy). The Arbitrator noted the great toe and 2nd toe completely removed at the base. The Arbitrator noted some discoloration at the base at the amputations. The Arbitrator noted the whole left foot slightly swollen compared to the right (consistent with testimony), and the Arbitrator noted the left foot a little darker and veinier that the right. Petitioner indicated the doctor indicated the difference due to the nerves. The Arbitrator viewed the sole of his feet and noted a bad blister at the bottom of Petitioner's middle toe, and calluses at the forefoot with the callus at the distal area of the middle toe unusual. Petitioner indicated the pain medication he receives is a topical cream (Lidoderm) he applies to the top of the foot. He does not take any oral medication for the pain.

The Commission notes that the medical records are consistent with Petitioner's testimony and the description in testimony of the condition of Petitioner's LEFT foot/toes and with the two amputations. Petitioner remains working for Respondent in a modified position but he does not perform the order picking duties getting in and out of the forklift as frequently now in his inventory control position. Petitioner still does have to walk and operate a forklift in his current duties. Petitioner noted the problems with pain and swelling walking beyond a block and being on his feet; the daily post work problems and the records are consistent with that testimony. Petitioner currently earns more per hour due to a merit increase prior to hearing, so while he is working modified restricted work, his earning capacity has not diminished. The awards regarding the toes (statutory amputations previously paid and that credit should appropriately be applied to the award) and the foot are certainly supported in the evidence and testimony. The award regarding person as a whole, with all facts and evidence considered, are certainly supported in the evidence and testimony and within prior Commission decisions. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability, other than correcting the clerical error to reflect Petitioner's LEFT foot/toe injuries.

16IWCC0060

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2015 is hereby affirmed and adopted, with the exception of correcting clerical errors as noted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to an award of 12.5% loss of use of Petitioner's person as a whole under §8(d)(2) of the Act (62.5 weeks) (less credit of $19,057.68 for statutory §8(e) losses for Petitioner's LEFT great toe and LEFT 2nd toe), 70% loss of use of Petitioner's **LEFT** middle toe (9.1 weeks), and 25% loss of use of Petitioner's **LEFT** foot (41.75 weeks) under §8(e)(7 & 11) of the Act, at $373.68 per week (113.35 total weeks) = (($42,356.63 total PPD less the credit for statutory amputations=Net PPD $23,298.95)).

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $42,500.00. 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.

DATED: JAN 25 2016
d-1/7/16
DLG/jsf

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DELGADO, JAVIER
Employee/Petitioner

Case# 10WC046666

16IWCC0060

FERRARA PAN CANDY CO INC
Employer/Respondent

On 6/1/2015, 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 0.08% 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:

4788 HETHERINGTON KARPEL BOBBER
ANDREW B PIPPIN
120 N LASALLE SUITE 2810
CHICAGO, IL 60602

0532 HOLECEK & ASSOCIATES
GRANT ELLIS MILLER
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

14IWCC0181

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Javier Delgado
Employee/Petitioner

v.

Ferrara Pan Candy Co., Inc.
Employer/Respondent

Case # 10 WC 4666

Consolidated cases: _____

16IWCC0060

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **March 3, 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. [x] 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 **September 14, 2010**, 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 $**32,385.60**; the average weekly wage was $**622.80**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**19,057.68** under Section 8(j) of the Act for statutory Section 8(e) losses of Petitioner's left great toe and left second toe.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $ 373.68 week for 62.5 weeks, less a Section 8(j) credit of $19,057.68, because the injuries sustained caused the 12.5 % loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $ 373.68 for 9.1 weeks, because the injuries sustained caused the 70% loss of use of the right middle toe.

Respondent shall pay Petitioner permanent partial disability benefits of $ 373.68 for 41.75 weeks, because the injuries sustained caused 25% loss of use of the right foot.

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

05-01-15
Date

JUN 1 - 2015

Javier Delgado v. Ferrara Pan Candy Co., Inc.
10 WC 4666
Addendum to Arbitration Decision

I. Findings of Fact

On September 14, 2010, Mr. Javier Delgado ("Petitioner") was a 33 year old forklift operator for Ferrara Pan Candy Co., Inc. ("Respondent").

Petitioner testified that his duties as a forklift operator for Respondent required him to collect or "pick" orders with the help of a co-worker. To do this, he and his co-worker would drive separate forklifts to the specific location of an ordered product. Once there, Petitioner would use his forklift to lower the desired pallet of product from a stack. He and his co-worker would then exit their respective forklifts and gather the needed product, placing it into a pallet hauled by his co-workers' forklift. Thereafter, Petitioner would re-enter his forklift, return the pallet he previously lowered, and he and his partner would proceed to their next order. During the course of his average work day, Petitioner estimated that this picking activity required him to get in and out of his forklift two-hundred and fifty times. Petitioner further explained that the entrance to the forklift is approximately one foot off the ground and, due to its cramped design, he was required to step in and out of the forklift using his left foot first. Once inside the forklift, he would drive it by pressing an accelerator with his left foot. He was not required wear to any special type of footwear to do this job.

While performing his job as a forklift operator on September 14, 2010, Petitioner's left foot was run over by a forklift. After his accident, he was taken by ambulance to the emergency room at Loyola University Hospital, where he was admitted through September 17, 2010. Petitioner's Exhibit ("Px") 1; Px 2: 54. At the time of his admission, his left forefoot and the foot's first three toes were bruised, swollen, cold to the touch, and bloody. Px 2: 63-65. X-

rays ultimately revealed multiple fractures in the first two toes. Px 2: 65-6, 72. Upon his discharge he was given dressings and instructed to follow up with a physician at Loyola Hospital, Dr. Francis Rottier. Px 2: 54.

Petitioner continued to follow up with Dr. Rottier through October 19, 2010. Px 2: 35. At that visit, his third toe showed some improvement but his first two toes had become gangrenous. As a result, Dr. Rottier recommended surgery to amputate Petitioner's left great and second toes. Px 2: 35. This procedure was performed on October 22, 2010. Px 2: 42.

In following months, Dr. Rottier prescribed and Petitioner attended a regimen of physical therapy and work conditioning at Industrial Rehab Allies. Px 4. After completing this treatment, he returned to see Dr. Rottier on May 23, 2011, at which time Dr. Rottier prescribed a pair of custom steel toed boots for Petitioner to wear in advance of an attempt to return to work. Px 2: 22. These boots were provided by Scheck & Siress Prostethics, Inc. and included custom arch support and toe filler orthotics. Px 4: A2

After receiving this custom footwear, Petitioner followed up with Dr. Rottier on June 27, 2011. At that visit, Petitioner described difficulty with the custom footwear including painful rubbing from the toe-filler orthotic and difficulty with the width of the boot. Dr. Rottier ordered held Petitioner off work and ordered modifications to the footwear. Px 2: 21.

Petitioner again returned to see Dr. Rottier on August 5, 2011, when he again reported that the custom footwear continued to cause him discomfort. Again, the orthotic was modified. Px 2: 20. At this visit, Dr. Rottier allowed Petitioner to return to modified duty, which Petitioner began on August 8, 2011. *Id.*

On August 22, 2011, Petitioner saw Dr. Rottier following his attempt to return to work. Px 2: 19. At this visit, he described blistering on his third toe and pain in his left foot from walking, standing, and using the foot to enter, exit, and accelerate his forklift. Based on these increased complaints, Dr. Rottier again modified Petitioner's orthotic and recommended a functional capacity exam ("FCE") to determine appropriate permanent restrictions. *Id.*

On October 17 and 21, Petitioner underwent the prescribed FCE with Industrial Rehab Allies. The exam placed Petitioner at a medium physical demand level, with an ability to walk or stand limited to up to 45 minutes and a limited ability to enter and exit a forklift. Px 4: 64. The exam further established that Petitioner's left third toe was unstable, causing it to flex and rub within his custom boot, which produced painful blistering. Px 4: 58-59. Given his limitations, the examiner recommended that Petitioner not return to his prior position as a forklift operator performing picker duties – a position which demanded that he frequently enter and exit his forklift with his left foot, then stand for an extended period while using his left foot to accelerate the forklift, thereby aggravating and worsening his symptoms. Px 4: 59. Based on the results of the FCE, Dr. Rottier has continued to allow Petitioner to work for Respondent in a modified capacity, with a permanent and specific prohibition against operating a forklift to "pick" or gather orders. Px 2: 16-17; Px 3 (final page).

Since returning to work with permanent restrictions, Petitioner has continued to follow up with Dr. Rottier to manage the pain and swelling in his left foot. At his June 4, 2013 visit, Dr. Rottier prescribed Naprosyn and Lidoderm to manage Petitioner's persistent swelling and pain and recommended that he continue to follow up should his symptoms flare up or should he need new orthotics. Px 3 (June 4, 2013 Progress Note). Petitioner testified that

he most recently saw Dr. Rottier on September 4, 2014, due to pain and swelling in his left foot. At this visit, Dr. Rottier noted that Petitioner's left third toe remained unstable and "floppy." To treat Petitioner's persistent pain, he refilled Petitioner's medication and maintained his permanent work restrictions. Px 3 (September 4, 2014 Progress Note and Work Release).

Petitioner confirmed that Respondent has accommodated Dr. Rottier's restrictions since his return to work on August 8, 2011. Petitioner's current job duties deal with product inventory. In this new capacity, he works for approximately three hours per ten hour shift in front of a computer, checking the system to see what inventory is listed. Based on this review of the digital inventory, he spends approximately one hour per day walking the warehouse aisles, confirming that the inventory listed in the computer is accurate. The remaining six hours of his day are spent operating a forklift "putting stuff away." Petitioner confirmed that he is no longer picking or gathering orders and, as a result, he gets in and out of his forklift less often than was required by his prior position – approximately 25 to 35 times per day. While working, Petitioner wears his custom made steel toed boots and orthotics.

Petitioner testified that prior to his assuming this inventory position, the work he performs on the computer was done by Mark Merrali, who worked out of Respondent's offices and did not drive a forklift.

Despite receiving pain medication from Dr. Rottier as well as multiple orthotic devices, Petitioner continues to experience painful blistering on his third toe and the underside of his foot, pain on the top of his foot, pain at the amputation sites, pain on the left or outside

portion of the base of his left foot, and swelling on the left side and top of his foot, which extends up into his left ankle.

Specifically, while working, Petitioner testified that walking the aisles to check on inventory produces pain on the outside of his left foot. He explained that his left foot feels unbalanced and, as a result, he leans away from his amputated first two toes towards the outside of his foot. Petitioner estimated that he is able to walk about one block before feeling this pain. Moreover, while working, Petitioner is required to stand in his forklift and use his left foot to operate it. He testified that this causes painful blistering to his third toe and underside of his foot as well as pain to the top and outside of his left foot. Additionally, Petitioner continues to use the same type of forklift as he did when he was a forklift operator, which requires him to get in and out of the forklift using his left foot first. In so doing, Petitioner's entire body weight is put onto his injured left foot and, when doing this, he experiences pain throughout his left foot particularly on the top and outside of the foot. When he is in need of a break from this discomfort, Petitioner testified that he sits down and checks inventory on a computer.

After work, Petitioner continues to experience pain in his left foot. Moreover, Petitioner testified that after a full day of work, his left foot is particularly swollen on its outer side and on the top of his foot, running up into his ankle. To manage his symptoms, he takes off his custom made boots and orthotics, applies a topical pain medication and asks his girlfriend to rub his swollen foot.

Prior to the accident, Petitioner testified that he enjoyed playing basketball approximately three times per week, including playing in a league on Sundays. He stated that this was his primary form of exercise before the accident. Since the accident, Petitioner no longer

plays basketball or exercises as it causes his left foot to hurt within a couple of minutes. Petitioner testified that he also enjoyed picking his two children up from school prior to the accident. While he continues to walk the two blocks required to pick up his children, he explained that after approximately one block, his left foot becomes painful.

Petitioner's highest level of education is high school and after graduating, his only work experience had been driving a forklift for Respondent and another candy company. He has no technical training or expertise other than operating a forklift and he has no computer abilities other than those required to monitor inventory for Respondent.

At the conclusion of Petitioner's testimony, the Arbitrator viewed his feet. The Arbitrator noted that Petitioner was not wearing an orthotic device during the arbitration. Petitioner testified that he routinely wears the orthotic while working in his custom steel toed boots, but occasionally does not wear the orthotic outside of work as it rubs and irritates the underside of his third toe and the amputation sites. The Arbitrator's observation of Petitioner's foot was consistent with Petitioner's testimony: His left third toe appears to have bone loss and is floppy [*Indeed, the Arbitrator described the toe as "like a flaccid piece of meat"*], likely causing it to drag under his left foot producing a severe blister; the left great and second toes are completely removed at the base of the toe; his left foot is swollen up to his ankle; there is discoloration around the amputation sites; and the entire left foot appears darker and veinier than his right foot. Petitioner testified that Dr. Rotier advised the change in color was likely due to a nerve injury.

Respondent's first and only witness was Rudolpho Cornejo, an employee of Respondent's and Petitioner's supervisor. Mr. Cornejo, who started with Respondent approximately a year and a half before the date of arbitration, testified that Petitioner had once complained

to him about painful blisters on his foot, but that he has not complained since. Mr. Cornejo opined that Petitioner's position would be permanent, that he is doing an excellent job, and that Respondent is currently looking to hire a similar employee to work the second shift.

II. Conclusions of Law

The sole issue to be determined is the nature and extent of Petitioner's undisputed work accident.

(i) Nature and Extent

Petitioner contends that he has sustained a substantial impairment to his earning capacity as a result of the injury to his left foot. For this reason, he seeks recovery under Section 8(d)2 of the Illinois Workers' Compensation Act ("the Act") rather than a specific loss award under Section 8(e). Novak v. Leigh Press, 13 IWCC 1072 (Petitioner is precluded from receiving a permanent partial disability award under both Sections 8(d)2 and 8(e) for the same accidental injury to the same body part); *cf.* Mitchell v. Industrial Commission, 148 Ill. App. 3d 690; 499 N.E.2d 999 (1986) (permitting an 8(e) and 8(d)2 awards for multiple injuries to multiple body parts).

The remedy sought by Petitioner is warranted by law. The fundamental purpose underlying workers' compensation in Illinois is the replacement of lost earning capacity resulting from industrial accidents. Larson's Workers' Compensation Law, 80.05 ("the award of compensation is not for the disability as such, but for the impaired earning capacity which results from that disability"); E.R. Moore Co. v. Industrial Commission, 71 Ill.2d.353, 360, 376 N.E.2d 206, 209 (1978). As such, it is now well settled that an employee may seek an award under Section 8(d)2 of the Act despite the fact that the injury is scheduled under Section 8(e):

> Schedule allowances were originally exclusive. A strong trend, however, now views schedule allowances as nonexclusive. Instead of simple losses compensated strictly on the schedule value of the listed members, the loss of impairment could be compensated on the percentage disability of the body as a whole, or of a general disability. A claimant may have an option, therefore, which will result in an award more favorable than a schedule award. Lusietto v. Industrial Commission, 174 Ill. App. 3d 121, 129, 528 N.E.2d 18, 23 (1988) (citations omitted).

The Illinois Workers' Compensation Commission ("the Commission") has frequently rendered awards under Section 8(d)2 of the Act to claimants who, like Petitioner, have returned to work for their employers without a current reduction in wages following injuries that are otherwise compensable under Section 8(e). The factors having the greatest impact on the Commission's award in these cases are whether the claimant has permanent restrictions and the likelihood that he would suffer lost earnings if he was no longer employed at the same job. *See, e.g.,* Rankin v. Hoyne Industries, 84 IIC 196 (where the Commission affirmed the arbitrator's award of 40% permanent partial disability under Section 8(d)2 because the "(p)etitioner would be seriously...hindered in his efforts to find other work...in the event he were terminated...or decided...that he wished to try working in another field of endeavor or for a different employer...;" *See also,* Cook v. Mid-Illinois Companies, 06 IWCC 64; Winfrey v. Wagner Casings, 05 IWCC 726; Donato v. City of Chicago, 05 IWCC 462; Turney v. City of Waukegan, 04 IIC 17; Range v. City of Chicago, 03 IIC 891; Ott v. Highland Park Hospital, 02 IIC 970; Carlson v. Sessler Ford, 01 IIC 312; Funes v. Block Steel Corp., 00 IIC 866; and L.D. Glass v. Tremont Auto Park, 90 IIC 1959.

In Ryan McKinney v. Westmont Engineering, 02 IIC 361, Petitioner's right foot became wedged between a forklift and a bumper guard, causing a crushing injury to the foot and ultimately requiring amputation of his first and second toes. The petitioner was released with permanent restrictions, which the respondent was willing to accommodate. As the petitioner elected to return to school instead of accepting the light duty job offer, there was

no evidence of lost wages. In awarding a 40% loss of the person as a whole under Section 8(d)2, the Commission emphasized the petitioner's young age; the aching and pain near his amputation sites; his limited ability to be on his feet past 30 to 60 minutes; an inability to climb; a requirement to wear an orthotic device; an inability to play sports; and the potential need for future medical care. *See also* James McCarthy v. Material Handling Services, 08 IWCC 0377; Michael Novak v. Leigh Press, 13 IWCC 1072; Juan L. Luna v. Pactiv, 09 IWCC 0058; and The Jewel Food Companies v. Industrial Commission, 265 Ill. App. 3d 525, 630 N.E.2d 865 (1993) *[These cases are summarized in a chart attached hereto as Exhibit A].*

Similarly, the facts of this case justify an award under Section 8(d)2 of the Act. Petitioner is a young man, 37, who is now burdened with permanent physical restrictions that prevent him from returning to his prior position for Respondent as a forklift operator picking orders. Px 3 (final page). Furthermore, since his accident, his ability to drive a forklift in any manner has been significantly compromised by the ongoing symptoms in his left foot. These symptoms include difficulty and pain with walking, standing, getting in and out of the forklift, and using his left foot to accelerate the forklift.

After his work day has concluded, Petitioner continues to experience pain and swelling throughout his left foot, which prevent him from playing basketball or taking up other types of exercise, and make simple familial tasks like picking up his children from school painful and difficult. In an effort to seek relief from these symptoms, under the ongoing care of Dr. Rottier, Petitioner continues to apply topical pain medication to his foot at night.

Having viewed Petitioner's feet, the Arbitrator confirms that Petitioner's testimony regarding his left foot was accurate in that the Arbitrator observed swelling and

discoloration throughout the foot into his ankle and a weak or floppy third toe with a large blister on the underside.

Petitioner's highest level of education is high school. Since graduating, he has only worked as a forklift operator and has no other specialized training. He is unfamiliar with computers other than the inventory work he currently performs for Respondent in his modified position. In light of his permanent restrictions, his ongoing symptoms, and his educational and employment background, it is clear that if Petitioner is no longer able to work through the persistent symptoms his job duties aggravate or if Respondent is no longer willing to accommodate his permanent restrictions, he will suffer a significant loss of earnings.

Although Petitioner is currently employed by Respondent in an inventory capacity, it is uncertain whether he will be able to continue in that job. That is, the weight of the evidence suggests that the physical demands required of him in this capacity, particularly the operation of a forklift, continue to aggravate his injury, causing him pain and swelling in his left foot. The Arbitrator finds it notable that Petitioner has continued to follow up with Dr. Rotier for management of these symptoms and that he continues to require pain medication. It is, therefore, reasonable to conclude that over the course of his future working life, Petitioner may desire to seek employment that does not consistently cause him pain and discomfort.

It is also uncertain whether Respondent will continue to employ Petitioner in his current capacity. While Respondent has provided Petitioner with suitable work, his current position was not previously performed by a forklift operator. That is, Petitioner's uncontroverted testimony is that prior to him taking on computerized inventory duties, this task was

handled by another employee who worked solely in an office in front of a computer. The Arbitrator recognizes that Respondent's witness, Mr. Cornejo, opined that Petitioner's position would be permanent. However, he was not employed by Respondent at the time the position was created for Petitioner and it is reasonable to conclude that Respondent may in the future return to having an office worker – not a forklift operator – manage their inventory on a computer.

Therefore, in view of Petitioner's age, educational background, limited occupational experience, physical limitations, and the uncertainty of continued employment with Respondent, the Arbitrator finds that Petitioner has sustained permanent partial disability to the person as a whole to the extent of 12.5% thereof. The Arbitrator emphasizes that in the event Petitioner is unable for any reason to continue working for Respondent, he will have difficulty finding employment due to his disability and may not be able to find a job paying competitive wages. Additionally, the Petitioner is awarded 70% loss of use of the right middle toe and 25% loss of the right foot.

By stipulation of the parties, the Arbitrator finds that Respondent paid $19,057.68 in benefits for the statutory Section 8(e) losses of Petitioner's left great toe and left second toe. Arbitrator's Exhibit 1. Respondent is entitled to a credit in this amount. Guzman v. Edward Hines Precision Components, 8 IWCC 1004, citing Payetta v. Industrial Commission, 339 Ill. App. 3d 718m 791 N.E.2d 862 (2003).

STATE OF ILLINOIS)
) SS.
COUNTY OF ST CLAIR)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEANIE FASSERO,

Petitioner,

16IWCC0094

vs.

NO: 10 WC 46867

BI-STATE REPORTING, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of procedural grounds and medical expenses and being advised of the facts and law, reverses and vacates the Decision of the Arbitrator as stated below and remands the matter for reassignment and a new trial.

Following the May 30, 2014, arbitration hearing but before the issuance of the Decision of the Arbitrator, the presiding arbitrator, then-Arbitrator Brandon Zanotti, resigned. Arbitrator Stephen Fruth was then assigned to author the Decision of the Arbitrator. Prior to writing the decision, on December 9, 2014, Arbitrator Fruth, via e-mail, contacted the attorneys representing both parties and requested they send him their proposed decisions. Respondent's attorney, Sarah Tripp, then commented to Petitioner's attorney, Doug Mendenhall, via e-mail, "I'm guessing there is no option to re-try the case." On December 11, 2011, Mr. Mendenhall e-mailed Arbitrator Fruth and asked if Arbitrator Fruth would like to have a "brief telephone conference to allow [the parties' attorneys] to summarize [their] positions and clarify the format of the proposed decisions." By all indications, Arbitrator Fruth did not respond to Mr. Mendenhall's December 11, 2011, e-mail. There is also no indication that either party requested of Arbitrator Fruth, formally or informally, to re-try the case. On May 30, 2014, the Decision of the Arbitrator was issued and, in said decision, Arbitrator Fruth indicated that he relied on the transcript of the May 30, 2014, proceedings and the evidence submitted by both parties to arrive at the Decision of the Arbitrator.

The Decision of the Arbitrator was issued on March 16, 2015, and in said decision, Arbitrator Fruth found Petitioner failed to prove her current condition of ill-being to be causally

16IWCC0094

related to her undisputed compensable accident. On that basis, Arbitrator Fruth denied Petitioner the prospective medical treatment she was prescribed. Arbitrator Fruth, however, found Petitioner entitled to 183-4/7 weeks of temporary total disability benefits and awarded the same accordingly. As noted above, Petitioner took timely appeal of the Decision of the Arbitrator and specifically challenged its findings as it pertained to causal connection, prospective medical treatment, temporary total disability as well as the issuance of a decision without the parties being afforded the opportunity to have re-try or discuss the claim with Arbitrator Fruth in light of then-Arbitrator Zanotti's resignation.

"[D]ue process of law contemplated that all evidence should be submitted before a single judge or master who may see the witnesses, weigh their testimony and determine their credibility." *Trzebiatowksi v. Jerome*, 24 Ill. 2d 24, 25-26, 179 N.E.2d 622 (1962). In this instance, the evidence was elicited before one arbitrator but interpreted by another.

Having a successor trier of fact conduct a new trial may "be warranted where critical determinations necessarily hinge upon the credibility of one witness or set of witnesses over another." *In re Marriage of Sorenson*, 127 Ill. App. 3d 967, 969, 469 N.E.2d 440, 82 Ill. Dec. 906 (5th Dist 1984). In the present matter, Arbitrator Fruth, on the basis of the transcripts of the proceedings, deemed Petitioner to be "prone to exaggeration and magnification of her symptoms." In light of the preference under Illinois case law for the trier of fact to personally determine the credibility of a witness, the Commission finds it appropriate to reverse the findings of the Decision of the Arbitrator and remand this matter for reassignment and a new trial so that Petitioner's credibility, and those of any other witnesses, may be ascertained by one in their presence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator be vacated in its entirety.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter is to be remanded for reassignment and a new trial be conducted.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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.

DATED: FEB 3 - 2016
KWL/mav
O: 11/09/26
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
CORRECTED

16IWCC0094

FASSERO, JEANINE
Employee/Petitioner

Case# 10WC046867

BI-STATE REPORTING
Employer/Respondent

On 3/16/2015, 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 0.09% 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:

0487 SMITH ALLEN MENDENHALL ET AL
DOUG MENDENHALL
510 E 6TH ST PO BOX 8248
ALTON, IL 62002

2027 RUSIN & MACIOROWSKI LTD
SARAH TRIPP
231 W MAIN ST SUITE 2E
CARBONDALE, IL 62901

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED §19(b) ARBITRATION DECISION

16IWCC0094

Jeanine Fassero
Employee/Petitioner

Case # 10 WC 046867

v.

Bi-State Reporting
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 **Brandon Zanotti**, Arbitrator of the Commission, in the city of **Belleville**, on **5/30/14**. After reviewing all of the evidence presented, Arbitrator **Steven Fruth** 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

16IWCC0094

FINDINGS

On the date of accident, 3/16/09, 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 of chronic and debilitating headaches ***is not*** causally related to the accident.

Petitioner ***is not*** entitled to the prospective decompression surgery of the right occipital nerve recommended by Dr. Richard Hagan.

In the year preceding the injury, Petitioner earned $**81,594.24**; the average weekly wage was $**1,569.12**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**160,965.60** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,046.09/week for 183 4/7 weeks, commencing 3/17/2009 through 9/21/2012, as provided in Section 8(b) of the Act. Respondent shall have credit for TTD to date.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

3/13/15
Date

MAR 16 2015

Jeanine Fassero v. Bi-State Reporting, Inc.
10 WC 46867
CORRECTED March 13, 2015

INTRODUCTION

This matter proceeded to hearing on May 30, 2014, before Arbitrator Brandon Zanotti pursuant to Petitioner's § 19(b) Request for Hearing. The disputed issues were: **F)** Is Pettioner's current condition of ill-being causally related to the work injury? **K)** Is petitioner entitled to any prospective medical care? **L)** What TTD benefits are in dispute?

By agreement of the parties this matter was randomly assigned to Arbitrator Steven Fruth to prepare a decision based on review of the transcript of hearing on May 30, 2014, and the documentary evidence submitted by the parties.

FACTS

On March 16, 2009, Petitioner was employed as a court reporter with Respondent. She was involved in an undisputed motor vehicle accident while returning from a deposition. Following the accident Petitioner was initially transported to Alton Memorial Hospital. Due to the severity of her injuries Petitioner was transferred to Barnes Jewish Hospital (Barnes) in St. Louis. On admission to Barnes Petitioner presented with a history of loss of consciousness and extrication in excess of 20 minutes. She was alert and oriented x 3 but seemed confused. Petitioner was lethargic and lapsed into situationally inappropriate speech. She had a poor memory of her accident.

Petitioner was diagnosed with a right acetabular fracture, a grade III laceration of the spleen, a pulmonary embolism, and a laceration of the right wrist. Petitioner also sustained right-sided facial trauma including a laceration about the eye. Petitioner underwent an open reduction with internal fixation for her acetabular fracture. On March 24, 2009, Petitioner was transferred to St. Anthony's Health Center (St. Anthony's) in Alton for further care closer to her home in Bunker Hill.

Petitioner's Barnes records had nursing notes that recorded Petitioner's disclosure that her motor vehicle accident had not in fact been accidental. It was further noted that friends of Petitioner reported that she had been withdrawn over the last few weeks and had not engaged in her routine activities. In addition, an attending physician's note on March 16, 2009, recorded the report from Petitioner's husband that she had a 30-pound weight loss over the prior 6 weeks, and had been sleeping up to 16 hours a day and had been "not right". Petitioner had a psychological consultation at St. Anthony's where it was noted she was taking anti-depressant medication. Petitioner would not comply with a formal evaluation but denied mood problems and suicidal

ideation. The psychologist found no indication of depression but recommended continuation of anti-depressants.

At trial Petitioner testified that following the accident she developed headaches across her eyebrows, the sides of her cheekbones down to her chin, across her eyes from her eyebrows to the base of her skull, and up across the back of her head. Petitioner testified that her head pain was 6/10 on the pain scale, worse of the right side. She denied any prior history of headaches of this nature. The headaches are debilitating and prevent her from engaging in her profession as a court reporter. The headaches have also adversely affected activities of daily living as well as recreational activities such as gardening. Petitioner testified that she is now sensitive to bright lights and loud sounds. She often wears sound suppressant earwear. Petitioner further testified that since the accident she has experienced issues with her memory, attention, and mumbling speech. Her medical records also reflect complaints of word finding difficulty.

She has headache pain continuously. Her pain medications include Naproxen and Hydrocodone. She lies down during the day. She stays quiet and uses a heating pad in bed. She stays in bed for up to 12 hours though her sleep is interrupted. She slept only four to six hours before the accident. As a court reporter she might travel to Springfield in the morning and St. Louis in the afternoon. She would take several depositions in a day, working 80 to 100 hours per week. She typed, proof read and edited transcripts. She did all the billing and binding. She handled all the work without difficulty before the accident. She cannot perform that work now.

After release from hospital Petitioner sought treatment with Dr. Joseph Dooley on July 6, 2009. He found no lasting alteration in memory or intellectual abilities. There was no difficulty in language functioning. Petitioner's mental status appeared to be normal. Dr. Dooley assessed Petitioner with post-concussion headaches but noted she was functioning well mentally. Petitioner returned on August 24, 2009, with complaints of persistent headache along the hairline. On exam Dr. Dooley noted a flat affect and drowsiness. When he touched Petitioner's left face and forehead she complained of tingling, although pinprick was normal over the same areas. Dr. Dooley last saw Petitioner on December 11, 2009. At that time her mental status was normal and her neurological exam was also normal. He ordered an MRI of the brain, which was done December 29, 2009. The MRI was essentially normal although showing mild volume loss. In January 2010 Dr. Dooley discussed the normal MRI but advised her in that he had nothing further to offer since she had not responded to medication.

Petitioner came under the care of Dr. Richard Hagan on April 19, 2010. Dr. Hagan testified by evidence deposition on February 25, 2011. He testified that Petitioner was tender over the supraorbital nerves, right greater than left, tender over the zygomatic nerves, and tender over the right posterior occiput. He stated that it would be difficult for Petitioner to concentrate on her work with her headaches, based

on the level of pain she was describing. As of his first consultation with Petitioner he felt it was appropriate for her to remain off work pending the proposed surgeries (Stage I and Stage II). He also opined that it was very possible that the vehicle trauma Petitioner suffered caused the posttraumatic headache he diagnosed. On cross examination he described the mechanism of her injury as "one would probably be a blunt force component and the other is a shear and/or traction-type injury." He went on to describe soft tissue swelling and compression on the nerves; as the swelling resolves there can be hardening and scarring of the tissues around the nerve.

Dr. Hagan stated Petitioner's disability was severe and considered the severity to include effects on activities of daily living. He acknowledged there was no objective or standardized method to measure headache severity. Dr. Hagan's diagnoses were post traumatic supraorbital rim syndrome and occipital neuralgia with overlying compression neuropathy. He gave her nerve block injections on April 19 and August 24, 2010. Petitioner had only temporary relief from the nerve blocks. He recommended a two stage procedure: Stage I being a frontal nerve decompression and Stage II being occipital nerve decompression surgery. Dr. Hagan testified that it was "very possible" that the accident could have caused or aggravated her headache condition.

Dr. Hagan's recommended Stage I and Stage II procedures was initially not approved. On December 12, 2011, he noted that he had reviewed the notes form Dr. MacKinnon (*sic*), Dr. Ducic, Dr. Peeples, and Dr. Guarino. He confirmed his diagnoses and recommendation for surgery. He administered diagnostic nerve blocks in January 2012 which provided only temporary relief. Approval for decompression surgery was finally given and Dr. Hagan performed the Stage I surgery on February 22, 2012, and the Stage II procedure on May 23, 2012. Petitioner had limited relief, so Dr. Hagan did another diagnostic nerve block on July 17, 2012, which again provided temporary relief. On July 17, Dr. Hagan opined in his report that he then recommended a 3rd surgery, involving excision and burial of the right occipital nerve. His opinions and the bases for the opinions regarding the 3rd recommended surgery were not tested by sworn testimony at deposition. The 3rd surgery has not yet been approved. Petitioner testified that she want the 3rd surgery recommended by Dr. Hagan.

Petitioner testified at hearing that following the 1st surgery her forehead and eyebrow pain was gone, but returned approximately "a year ago". She testified that following the 2nd surgery the pain on the left side was gone but the right sided pain remained. She had a good result from the surgeries. She had decreased eyebrow pain but it has returned now. The pain on the sides of her face is gone.

Alan Fassero, Petitioner's husband of 34 years, testified at trial. He has noticed changes in her since the accident. He noticed that she will forget things. Her discomfort causes mood changes. Her energy level is less. As to Petitioner's sleeping before the accident, he told someone he was concerned about her hours; that she was wearing out,

that she was just over doing it. The psychiatrist at the hospital put a sitter with her in intensive care because she said she didn't feel like she wanted to live anymore while in the hospital. He told the psychiatrist that he was worried about the long working hours, 16 hours a day. He did not know what was meant by the note that Petitioner was "withdrawn" before the accident. If she wasn't engaging, it was because she was busy and tired.

According to her husband Petitioner now sleeps every bit of 12 hours a day, 7 days a week. Examples of memory problems include failing to return phone calls, and not remembering where she put her phone. She left her keys in a restroom recently and had to go back and ask where her keys were. Her memory before the accident was fantastic. She used to work 60 hours plus a week typing and transcribing 1000 plus pages, but can longer do that.

Petitioner was seen for a § 12 exam with Dr. David Peeples on June 14, 2010. She reported that her injuries other than headaches had improved over time. Her benefits were cut off at that point. She did not feel she could do her job at that time. She could not concentrate or focus on what people are saying. The job requires hearing and typing what people are saying and she just can't do it. Petitioner reported "24/7 headache pain that is worse than labor and childbirth". She reported her pain as 10/10. Dr. Peeples noted that Petitioner sat comfortably while giving the history of her complaints. When he pointed this out Petitioner revised the level of her complaints, indicating a hyperbolic component to her subjective complaints. On exam, Dr. Peeples found no reproducible tenderness over occipital, trigeminal, or supraorbital nerves. He found no impairment in concentration, flow of thought, language function, or other aspects of higher cortical function.

He stated that she had sustained a head injury and concussion as a result of the accident. He noted that the accident appeared to be the prevailing factor with regards to her ongoing headache complaints. He did not feel she was at MMI. Petitioner reported that Dr. Hagan had recommended decompression surgery of various nerves. Dr. Peeples could not enthusiastically recommend that surgery in that he was not familiar the procedures or with good outcomes in this particular presentation. Even so, he thought decompressive surgery may not be unreasonable if medication trials fail. He opined that the only factor limiting Petitioner's work capabilities were subjective symptoms and that there were no objective findings preventing her from working. He found no objective findings to indicate that she could not attempt to work if so inclined.

Petitioner applied for Social Security Disability in October 2010. Her Function Report to Social Security was consistent with her trial testimony. Petitioner was examined by Dr. Raymond Leung in furtherance of her disability application. Dr. Leung recorded that Petitioner complained of migraines all over her head with constant 10/10 pain. She also stated that she was sleepy. On exam Dr. Leung found Petitioner had

intact memory and normal fund of knowledge. He did note a flat affect. Dr. Leung's impression was a compressed cranial nerve, but did not specify which one.

Petitioner was also examined by Dr. Susan Mackinnon on May 3, 2011. Dr. Mackinnon had reviewed Petitioner's records from Barnes, Dr. Dooley and Dr. Hagan. She also reviewed Dr. Hagan's deposition. She noted Petitioner's history of her accident as travelling at 55 mph when she crossed into the opposing lane and collided head-on with a truck, although Petitioner said she had no recollection of the accident. Dr. Mackinnon

On exam, Dr. Mackinnon noted there was no Tinel's sign over any nerve in the head and no tenderness over cranial nerves, including those contemplated for decompression by Dr. Hagan. She took note that her exam findings were unlike Dr. Hagan's findings. Dr. Mackinnon opined that Petitioner's symptoms were unusual for headaches that would respond to nerve decompressions. She recommended either referral to the Ryan Headache Clinic or a second opinion with Dr. Ivica Ducic, who Dr. Mackinnon felt had the greatest experience and had actually published on nerve decompression for headaches.

Dr. Ivica Ducic of Georgetown University Hospital conducted a records review on August 8, 2011. Dr. Ducic stated that if both nerve tenderness on exam and positive effect of nerve blocks are observed, a patient can be considered for surgery. Dr. Ducic noted that while Petitioner did have tenderness over the examined nerves during Dr. Hagan's exam, Dr. McKinnon failed to note any nerve tenderness. Dr. Ducic stated that "absence of tenderness over examined nerves significantly increases risk of surgery failure". Dr. Ducic recommended medical management with headache specialists prior to surgical intervention. Petitioner testified that she was referred to the Ryan Headache Clinic; however, that facility did not accept workers' comp patients.

Petitioner was examined by Dr. Anthony Guarino, a pain management specialist at Washington University School of Medicine, St. Louis, on October 24, 2011. Petitioner complained of pain in her whole head except for her nose and chin. He noted Petitioner's history of the accident and the onset of headaches along with treatment by Dr. Dooley. Petitioner reported significant, but temporary, relief from Dr. Hagan's nerve block injections. He noted the proposed surgery by Dr. Hagan. Petitioner reported that she sleeps "1.5 days at a time". On examination he noted that cranial nerves were normal and that there were "no Tinel's detected at supraorbital or GON bilaterally." His assessment was chronic daily headache and that she was not at MMI until the issue of whether decompressive surgery will work was addressed. If there was a question he recommended that nerve injections be repeated. In his letter of October 28, 2011 to the case manager he stated that he was unclear whether Petitioner could return to work as a court reporter based on her clinical presentation. He deferred an

opinion on MMI until determination of whether decompressive surgery would work. He thought nerve injections should be repeated.

Petitioner was seen for another § 12 exam with neurologist Dr. Karen Levin on September 21, 2012. Dr. Levin testified by evidence deposition on April 30, 2013. Dr. Levin testified that Petitioner reported frontal headaches. On exam, Petitioner did not exhibit any specific pain behaviors or pain reactions, and did not have any increased tenderness to touch throughout her head. There was no tenderness to palpation over any specific nerve in Petitioner's head. She noted inconsistencies between Petitioner's subjective complaints of light and noise sensitivity and her behavior in the doctor's office. Dr. Levin further testified that Petitioner had generalized headaches that were not referable to any one nerve and did not fit any clinical headache pattern. She did not believe Petitioner had occipital neuralgia or pain related to any facial nerve. Dr. Levin felt it was an unusual examination and recommended a neuropsychological evaluation for possible malingering or other symptom magnification. She testified that Petitioner did not have a neurological condition related to the work accident and that she felt that further surgical intervention was not medically necessary. She opined that Petitioner was capable of working her regular duties and that she had reached maximum medical improvement.

Petitioner was examined by board certified neuropsychologist, Dr. Robert Fucetola on December 12, 2012. Dr. Fucetola testified by evidence deposition on May 15, 2014. Dr. Fucetola testified that based on interviews with Petitioner and her husband, his examination, and the neuropsychological testing there was no evidence of cognitive or psychological deficit as a result of the work accident. Further, he testified that Petitioner was over-reporting her physical symptoms. He testified that from a neuropsychological standpoint there was nothing preventing her from returning to work as a court reporter and that Petitioner had reached MMI.

Dr. Fucetola concluded that Petitioner had a pain disorder associated with both psychological factors and a general medical condition which were chronic. He felt psychological factors were playing "a very important role in the severity and maintenance of the pain." He did not feel Petitioner needed any additional testing or treatment. He did not think there was objective evidence supporting her reports of memory problems. He could not identify any residual cognitive symptoms related to the 2009 trauma. He found no frank fabrication of symptoms but did note a strong style of somatization.

Dr. Fucetola agreed that there was no compromise of the testing if Petitioner had no knowledge of the specific tests being given and had done no research as to this type testing. He acknowledged that Petitioner reported a level of pain typical of age-matched individuals with chronic pain and she reported memory interference from pain that was typical of populations with chronic pain. He agreed that interpreting

neuropsychological tests involves complex statistical analysis, which is subject to differing interpretations from one neuropsychologist to another.

On February 7, 2013 Dr. Hagan provided a disability statement indicating Petitioner was unable to work pending the final surgery needed for the right occipital nerve.

At the request of Petitioner's counsel, Petitioner was examined by licensed clinical psychologist Dr. Beverly Matthews on July 22, 2013. She had reviewed Petitioner's records of various physicians who treated or examined Petitioner, records provided by Petitioner's attorney. Dr. Matthews performed a wide variety of psychological testing. Dr. Matthews testified by evidence deposition on February 4, 2014. Dr. Matthews testified that she felt Petitioner had a traumatic brain injury as a result of the work injury and was in need of cognitive rehabilitation.

Dr. Matthews was critical of Dr. Fucetola, for example, indicating an interpretation of significant weakness for Petitioner in the area of processing speed. She felt additional testing was necessary and recommended various tests and estimated the costs of those tests.

Dr. Matthews tested Petitioner July 22, 2013. The results of that testing and details of her evaluation were reported to Petitioner's attorney. Dr. Matthews summarized her impressions, reviewing the injuries to Petitioner and her desire to have surgery to alleviate pain. She did not feel there was any malingering on the testing. Petitioner showed significant difficulty on measures that were timed. There were impairments in general memory performance. The scores on one of the tests for Petitioner's presentation were similar to those for individuals with traumatic brain injury. Dr. Matthews did not believe Petitioner was feigning and felt that Petitioner has chronic pain behaviors. Petitioner's functioning on various timed tests was impaired. Her life has been affected and she has deficits in memory, speed of processing, and right hemisphere functioning. Dr. Matthews did not address the evidence of Petitioner's behavioral changes before the accident. She did not address the absence of pain behavior noted in the records of Petitioner. She did not address the suicidal ideation noted in records. Dr. Matthews recommended pain management and further treatment to help with Petitioner's condition. Dr. Matthews felt that Petitioner's ongoing complaints are related to the accident and traumatic brain injury. Petitioner was not at MMI and could benefit from rehabilitation services. Based on this Petitioner would not likely be able to return to her employment as a court reporter.

On cross examination Dr. Matthews admitted she is not a board diplomat neuropsychologist. She does have a certificate in clinical neuropsychology allowing her to do that testing.

CONCLUSIONS

Issue (F): Is Petitioner's current condition of ill-being causally related to the work injury ?

The Arbitrator finds Petitioner's claimed condition of ill-being, namely ongoing complaints of chronic and debilitating headaches, is not causally related to the alleged work injury of March 16, 2009.

Petitioner presented evidence in support of her claim that her current condition of ill-being is causally related to her work-related motor vehicle accident on March 16, 2009. That evidence included Petitioner's testimony at hearing May 30, 2104, before Arbitrator Brandon Zanotti. Petitioner's husband Alan Fassero also testified at hearing. In addition, Petitioner also presented documentary evidence in the form of medical records and evidence depositions. In rebuttal Respondent also presented documentary evidence in the form of medical records and evidence depositions.

Taken as a whole the Arbitrator finds that Petitioner has been prone to exaggeration and magnification of her symptoms. She often complained of 10/10 pain, the worst she ever had. However, there was no evidence that in response to such severe pain that she sought immediate care at a hospital emergency department or from her treating physician. One would expect someone experiencing the worst pain they ever had to seek some sort of immediate relief. Also, Petitioner claims that her chronic headaches have caused significant behavioral changes due to the chronic and severe nature of her pain. Petitioner's medical chart from Barnes-Jewish Hospital documents reports from Petitioner's husband and friends that some of the behavioral changes claimed by Petitioner to be the result of her accident injuries were present for some time before the accident.

Much of the evidence presented by the parties came from retained expert witnesses. The Arbitrator takes note that retained experts may have a bias in favor of the party who retained them. This is accepted advocacy. On the other hand, a treating physician may also have a bias in order to bolster a diagnosis or course of treatment. Therefore, in weighing the reliability and credibility of competing opinions the record must be examined for consistency or inconsistency.

As noted above the Arbitrator found that Petitioner's evidence regarding behavioral changes was inconsistent with other evidence, notably records from Barnes. Respondent's § 12 experts, Dr. Peeples and Dr. Levin, noted a lack of pain behavior when they examined Petitioner. When Petitioner was challenged with that contradiction by Dr. Peeples she revised her 10/10 pain complaint. The Arbitrator also notes that despite possible bias the exams by Dr. Peeples and Dr. Levin were more

thorough and comprehensive than exams documented by physicians Petitioner relies on to support her claim.

Clinical examinations by Dr. Dooley, Dr. Peeples, Dr. Mackinnon, Dr. Guarino, and Dr. Levin all note observations that demonstrated inconsistencies between Pettioner's subjective complaints and objective findings. The Arbitrator takes note that Dr. Hagan seemed to be the only physician of all examining physicians who found tenderness on palpation of various nerves about Petitioner's head. Due to this discrepancy, Dr. Hagan's opinions are not persuasive in comparison to others, in particular Dr. Levin.

Dr. Fucetola, Respondent's retained neuropsychologist, found no evidence of cognitive or psychological deficit. He opined that Petitioner had reached MMI, as did Dr. Levin. They also opined that Petitioner was able to return to work as a court reporter. Petitioner's expert, Dr. Matthews, came to opposite opinions. However, the Arbitrator takes note that Dr. Matthews did not address the documentation of suicidal ideation or pre-existent behavioral changes in clinical records. Dr. Matthews did not address Petitioner's tendency to exaggerate or magnify subjective complaints or the clinical notes of the absence of pain behavior observed by Dr. Peeples and Dr. Levin. These factors are a significant component of Petitioner's claim. Dr. Matthews' opinions are seriously undermined by these omissions. In this light the Arbitrator finds Dr. Fucetola's opinions more persuasive that those of Dr. Matthews.

Because of the inconsistencies and contradictions stated above the Arbitrator concludes that Petitioner did not sustain her burden of proof that her claimed condition of ill-being, namely chronic and debilitating headaches, was causally related to the work-relate motor vehicle accident on March 16, 2009. The Arbitrator concludes, based on the evidence taken as a whole, that Petitioner was at MMI as of Dr. Levin's examination on September 21, 2012.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Hagan, Petitioner's surgeon, has performed 2 decompression surgeries to nerves about Pettioner's head in order to alleviate Pettioner's complaints of headache. The prior surgeries provided only temporary or limited relief of Petitioner's complaints. Some of Petitioner's pre-surgical complaints have returned. Dr. Hagan's opinion for the necessity of a 3rd nerve decompression surgery is based on clinical findings not observed by other physicians who examined Petitioner. Dr. Hagan's recommendation has not tested by sworn testimony and cross-examination. In light of the Arbitrator's conclusions stated above regarding causation and the questionable efficacy of the proposed 3rd surgery, the Arbitrator finds that Petitioner is not entitled to the requested prospective nerve decompression surgery.

Issue (L): What TTD benefits are in dispute?

The Arbitrator finds that, based on the evidence, Petitioner is entitled to TTD benefits from March 17, 2009, through September 21, 2012, a total of 183 4/7 weeks. Respondent shall receive a credit for all TTD previously paid. Petitioner failed to meet her burden of proof by a preponderance of the evidence that she is entitled to further TTD benefits after attaining MMI September 21, 2012.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rex Kieffer,
Petitioner,
vs. NO: 10 WC 48889

Beelman Truck Company,
Respondent.

ORDER

This cause comes before the Commission pursuant to October 2, 2014 Order of the Circuit Court of The Seventh Judicial Circuit, Sangamon County.

In the October 2, 2014 Order, the Circuit Court stated the appeal to the Circuit Court was premature, based on Supreme Catering vs. Industrial Commission, 2012 Ill.App.1st 1-11-1220WC, and the matter was remanded back to the Commission to finalize this case.

Pursuant to the Appellate Court's instructions, and upon receipt of the record of proceedings in this matter, the Commission hereby remands this matter back to the Arbitrator assigned to the Springfield venue for disposition, and consistent with Commission's prior Decision and Opinion On Review entered on September 17, 2103.

IT IS THEREFORE ORDERED BY THE COMMISSION that this matter is remanded back to the Arbitrator assigned to the Springfield venue.

DATED: JAN 2 8 2016
KWL/kmt

42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carlos Jimenez,
Petitioner,

vs.

NO: 11 WC 09238

16IWCC0093

Village of Brookfield,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with corrections, said decision attached hereto and made a part hereof.

The Commission hereby corrects several clerical errors in the Arbitrator's decision to show the following: (a) Petitioner was 38 years old, married with two dependent children at the time of the accident, (b) Respondent is entitled to a credit for TTD paid in the amount of $80,084.00, and (c) Petitioner's request for additional compensation pursuant to §19(k) and attorneys' fees pursuant to §16 of the Act is denied (deleting the reference to §19(l)). Furthermore, the Commission corrects the Arbitrator's decision by replacing all references to "Dr. Endara" with "Dr. Alan Chen". Finally, the Commission clarifies the basis for the denial of Dr. Chen's medical bills by finding that the visit was essentially a §12 examination requested by Petitioner and as such Respondent is not liable for same.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,243.00 per week for a period of 64-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

16IWCC0093

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 61.5 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 30% of the left hand.

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.

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.

DATED: FEB 3 - 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-01/20/16
jdl/pmo
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السعد ما للاستثمار

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

JIMENEZ, CARLOS
Employee/Petitioner

Case# 11WC009238

VILLAGE OF BROOKFIELD
Employer/Respondent

16IWCC0093

On 8/4/2015, 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 0.16% 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:

0728 THOMAS W DUDA
CRAIG MILLMAN
330 W COLFAX ST SUITE A
PALATINE, IL 60067

0507 RUSIN & MACIOROWSKI LTD
DANIEL W ARKIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Carlos Jiminez
Employee/Petitioner

v.

Village of Brookfield
Employer/Respondent

Case # 11 WC 09238

Consolidated cases: _____

16IWCC0093

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 **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **12-10-14**. 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 **Referral to the Comission pursuant to Section 4(c) of the Act.**

FINDINGS

On **10-5-10**, 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 $**95,954.00**; the average weekly wage was $**1,864.50**.

On the date of accident, Petitioner was years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**N/A** for TTD, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

Respondent is entitled to a credit of $**N/A** under Section 8(j) of the Act.

ORDER

Nature & Extent of the Injury
The Arbitrator finds that Petitioner has suffered a 30% loss of use of his left hand.

Medical Bill(s)
The Arbitrator finds that the Respondent is not liable for Dr. Endara's bill.

Penalties/Fees
The Arbitrator declines to award Petitioner fees/penalties under Section 16, 19(k) and/or 19(l) of the Act. The Arbitrator further declines to refer the matter to the Commission pursuant to Section 4(c) 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

7/30/15
Date

AUG 4 - 2015

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

CARLOS JIMENEZ, Petitioner,	)	
v.	)	Case No: **11 WC 09238**
VILLAGE OF BROOKFIELD Respondent.	)	

16IWCC0093

CORRECTED ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

On December 10, 2014, this matter proceeded to hearing before Arbitrator Jessica A. Hegarty in the City of Chicago, County of Cook. The parties stipulated to all issues except:

- The nature and extent of Petitioner's injury;
- Medical expenses;
- Penalties/attorney's fees

Petitioner is and has been employed by Respondent since 2005 as a firefighter and paramedic.

On October 5, 2010, Petitioner was involved in an undisputed accident when he responded to a warehouse fire in a neighboring town. (T. 12) Petitioner, who is right hand dominant, was wearing gloves at the time his left finger was lacerated on some sheet metal. (T. 13-14)

Petitioner was initially treated at Loyola University Medical Center whose corresponding records reflect a deep laceration to Petitioner's left index finger. The laceration was stitched up and Petitioner was placed in an L-shaped cast/sling from mid-forearm to the tip of his left index finger. (T. 15; PX 1)

On October 11, 2010, Sai Ramasastry, M.D., a plastic/hand surgeon, repaired Petitioner's flexor digitorium sublimis and profundus tendons as well as the radial digitial nerve. (PX 1 & PX 2)

Follow-up care was administered at Loyola Medical Center from October 13, 2010, through December 15, 2010. Petitioner engaged in physical therapy at ATI beginning on October 22, 2010. (T. 20-21; PX 4)

On January 14, 2011, Petitioner consulted with hand specialist Paul Lamberti, M.D., who recommended a second surgery to improve range of motion in Petitioner's left hand. (T. 22-23)

The proposed surgery was subject to an IME exam performed at Respondent's request by Thomas Kieseler, M.D., after which, the treatment plan outlined by Dr. Lamberti was approved. (PX 8, p. 4-5; PX 5-6)

On March 21, 2011, Dr. Lamberti performed the surgery on Petitioner's left hand. The doctor initially noted adhesions and scar tissue on two tendons and the radial digital nerve with a lack of substance and continuity of the A4 annular pulley. A dissection extending from the tip of the left index finger down the carpal canal and into the left forearm was made. Dr. Lamberti indicated the necessity to re-route two tendons, excise significant scar tissue and "debulk" the FDP tendon. (PX 6)

Physical therapy began the day after surgery.

On April 5, 2011, Dr. Lamberti noted that Petitioner was slowly regaining motion. The doctor further noted that Petitioner was at a high risk of a rupture because of the biology of the tendon.

On April 6, 2010, Dr. Lamberti noted a re-rupture of Petitioner's tendon. The doctor outlined two options to deal with the issue either the removal of the index finger at the knuckle in the palm area, or a two stage reconstruction. Petitioner opted for the reconstruction surgery. (T. 26-28)

On April 25, 2011, the first stage of the reconstruction surgery began at Good Samaritan Hospital. The surgical procedure, performed by Dr. Lamberti, required a zigzag incision to free up the A4 pulley. Proximal to the wound, an incision was opened well into the distal palm with some maneuvers and light tenolysis. A track was found through the carpal canal and a four millimeter Hunter rod was placed from the tip of the left index finger down the carpal canal and into the forearm. (PX 6)

On August 19, 2011, Dr. Lamberti performed the second stage of the reconstruction procedure. The surgical records indicate that the doctor took a tendon from Petitioner's wrist and grafted it to the left index finger. (PX 6) Petitioner began physical therapy the next day which continued through December 29, 2011.

From the date of the accident through the fourth surgery and the periodic therapy that followed, Petitioner was off of work. (T. 29-30)

On December 29, 2011, Petitioner was released, full duty with no restrictions, by Dr. Lamberti. Petitioner returned to work on January 2, 2012, in his pre-injury capacity for the Respondent and continued in that capacity through the date of the hearing.

With respect to permanency, Petitioner testified to atrophy, cramping, a lack of mobility and a loss of dexterity in his left index finger and left hand. Petitioner further testified to discoloration, sensitivity and numbness in his left index finger that radiates into his left palm. Petitioner testified that he has had to adjust the way in which he works due to the loss of mobility and dexterity in his left digit and left hand. He testified that when he is working with IV's, he uses only part of his left hand, relying more on his right. Petitioner testified that he works without complaining to Respondent and that he has not had any performance or disciplinary problems as a result of the work accident at issue.

The Arbitrator inspected Petitioner's left hand and noticed an apparent lack of mobility in the left index finger. The Arbitrator noted that the surgical scarring extends from the left wrist to the beginning of the left forearm.

Petitioner's co-worker, Michael Teska, testified that he was hired by the Respondent on October 14, 2012, and has worked alongside the Petitioner both before and after the accident. Mr. Teska testified that Petitioner has adjusted how he physically performs some job duties since returning to work. According to Mr. Teska, Petitioner now has difficulty typing information on the computer used to generate reports of medical calls because he only uses a couple of fingers to type. With respect to IV's and drawing medication, Mr. Teska testified that the Petitioner has difficulty handling small vials and has to rest the object within the palm of his left hand and manipulate his fingers in a certain way in order to insert the syringe.

CONCLUSIONS OF LAW

The foregoing Findings of Fact are incorporated into the following Conclusions of Law.

L. Nature and Extent of the Injury

Petitioner is a 42-year-old firefighter/paramedic who is right hand dominant. Before his October 5, 2009, work accident, he had no injuries or systemic problems with his left hand. On the accident date, Petitioner suffered a deep, severe laceration to his left index finger severing two tendons as well as a laceration to his radial digital nerve. On October 11, 2010, Sai Ramasastry, M.D., a plastic/hand surgeon, repaired Petitioner's flexor digitorium sublimis and profundus tendons as well as the radial digitial nerve.

Due to his lack of progress in recovery, Petitioner consulted with hand specialist, Paul Lamberti, M.D., who performed three additional surgeries that involved Petitioner's left index finger, left palm as well as the left forearm. After therapy, Petitioner was able to return to his regular employment, full duty with no restrictions.

The Arbitrator found Petitioner to be a very credible witness. Petitioner presented at the hearing as open and honest. His testimony with respect to his medical treatment and complaints are corroborated by the medical records in evidence. With respect to permanency, the Arbitrator credits the Petitioner's testimony as to the significant interference with his work that the injury and multiple surgeries have caused. The Arbitrator also credits his complaints of sensitivity to cold and cramping that he now experiences. The loss of dexterity in his left hand is confirmed by Petitioner's Exhibit 8, and Dr. Lamberti's medical records (PX 5 & PX 6). Petitioner is a relatively young man who will have to suffer the loss of dexterity and mobility in his left hand throughout his career.

The Arbitrator observed the Petitioner's left hand and noted an obvious range of motion deficit of that extremity.

The treatment and recovery kept Petitioner off of work for over one year. The physical limitations that Petitioner now experiences at work are found to be significant.

After careful consideration of the evidence contained in the record, the Arbitrator finds that Petitioner has sustained a 30% loss of use of his left hand.

J. Medical Services

The only disputed medical bill is from Dr. Endara whom Petitioner consulted with on September 23, 2014. Dr. Endara's office visit occurred after the case was pre-tried on August 15, 2014, during which time the Arbitrator provided the parties with settlement recommendations. Petitioner testified that his consult with Dr. Endara was necessitated by increased deformity and cramping in his hand and because he "knew the case was coming to a close."

Based upon the timing of this consult, which occurred after the case was pre-tried and while settlement negotiations were ongoing and based upon Petitioner's testimony that he sought the consult, in part, because the case was coming to an end, the Arbitrator finds this office visit was in preparation for litigation and not for medical treatment. Accordingly, the Respondent is not liable for the bill.

At the time of trial, Respondent objected to Dr. Endara's report based on hearsay. The Arbitrator deferred ruling on this objection, indicating she would address the issue in her written findings. The Arbitrator finds the report inadmissible and sustains Respondent's objection.

M. Petitioner's Motion for Penalties & O. 4(c) Referral

The Petitioner, through his counsel, filed a Petition for Penalties pursuant to Sections 19(k) and 16 of the Act, and has requested that this matter be referred to the Illinois Workers' Compensation Commission for hearing pursuant to Section 4(c) of the Act.

Petitioner alleges that Respondent engaged in unreasonable and vexatious conduct and utilized frivolous defenses that did not present a real controversy within the meaning of Section 19(k).

In April of 2014, Respondent requested a pre-trial conference which the Petitioner's counsel objected to until certain issues were resolved. Petitioner wanted the deposition of his treating doctor to proceed and the exam by the Respondent's IME doctor to be scheduled before engaging in a pre-trial conference. The Petitioner memorialized his objections in a letter to Respondent dated April 17, 2014. (Petition for Penalties, Exhibit 2)

The Respondent agreed to waive any hearsay objection to the admission of Petitioner's Section 12 report, and declined the opportunity to have Petitioner examined by an IME doctor of their choosing. The Petitioner then agreed to a pretrial conference. (Petition for Penalties, Exhibit 2 & 3) The Respondent acknowledged this agreement in correspondent dated July 14, 2014. (Pet. For Penalties, Ex. 4)

A pre-trial conference was conducted and the Respondent presented settlement contracts. The Petitioner found certain language within the proposed contract objectionable. This particular contract language was the subject of another dispute, between the same law firms, in another case and was referenced by Petitioner's attorney's letter to Respondent dated August 9, 2014.

Respondent's attorney withdrew their previous agreement to waive their hearsay objection to Dr. Cronin's Section 12 report and indicated the case would proceed to trial.

Respondent asserted that the objectionable language contained in the settlement contract was contained in past settlement contracts executed by the respective law firms without objection.

Attorney Craig Millman was questioned at the hearing regarding past acceptance of settlement contracts, specifically the case of *Julie Clark v. Bartlett Firefighters Pension Fund*. Mr. Millman noted in his testimony that the Clark case was different than the case at bar in that the Clark case was a pension case and that the two respective law firms engaged in extensive discussions regarding the language to be contained within the settlement contract. Mr. Millman further testified that it was only with respect to settlement contracts with the Insurance entity of IRMA, that the refusal to negotiate the objectionable settlement language arose.

The Arbitrator notes that this case had previously been set for trial on November 13, 2014. Petitioner was in court and ready to proceed. Respondent requested a continuance as their witness was unavailable. The Arbitrator granted Respondents request and the case was set for trial on December 10, 2014.

Between November 13, 2014 and December 10, 2014, Respondent presented an amended settlement contract to Petitioner. Petitioner found the amended contract failed to address his concerns with respect to Sections 4 and 19. Petitioner drafted a letter to Respondent on August 14, 2014, memorializing his objections to the amended contract.

The Arbitrator notes that the Respondent requested and obtained two, pre-trial conference dates and obtained settlement authority consistent with the pre-trial recommendations of the Arbitrator. The fact that the attorneys could not negotiate certain terms within the settlement contract seems to boil down to basic philosophical difference between the respective attorneys and/or law firms.

The evidence submitted by the Petitioner demonstrated the breakdown in communication and civility between the respective attorneys but does not rise to the threshold level required by the Act.

Based on a careful review of the evidence contained in the record, the Arbitrator declines to find in favor of the Petitioner pursuant to Sections 19(k) and 16 of the Act. Petitioner's request this matter be referred to the Commission for hearing pursuant to Section 4(c) is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PHILLIP COX,

Petitioner,

vs. NO: 11 WC 9956

FORD MOTOR COMPANY,

16IWCC0048

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, and "vocational rehabilitation," 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. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms the finding that prospective medical treatment including implantation of a permanent spinal cord stimulator is reasonable, necessary, and causally related to Petitioner's work injury. However, since Petitioner has not reached maximum medical improvement, the issue of vocational rehabilitation is premature. Therefore, the award for vocational rehabilitation is vacated at this time.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $909.62 per week for a period of 61-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this 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.

16IWCC0048

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $37,324.52 for medical expenses 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 shall authorize and pay for the prospective medical treatment recommended by Dr. Kondamuri and Dr. Levin including the implantation of a permanent spinal cord stimulator 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 this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $60,500.00. 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.

DATED: JAN 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/15/15
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

COX, PHILLIP
Employee/Petitioner

Case# **11WC009956**

FORD MOTOR COMPANY
Employer/Respondent

16IWCC0048

On 10/30/2014, 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 0.05% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
JASON CARROLL
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0075 POWER & CRONIN LTD
BRIAN RUDD
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

PHILLIP COX
Employee/Petitioner

v.

FORD MOTOR COMPANY
Employer/Respondent

Case # 11 WC 9956

Consolidated cases: _____

16IWCC0048

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **August 14, 2014**. 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **February 19, 2011**, 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 $**70,950.36**; the average weekly wage was $**1,364.43**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**29,887.54** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**29,887.54**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $909.62/week for 61 1/7 weeks, commencing February 25, 2011 through December 14, 2011 and commencing April 3, 2014 through August 14, 2014, as provided in Section 8(b) of the Act.

- The Respondent shall authorize the treatment that has been recommended by Drs. Kondamuri and Levin, which includes implantation of a permanent spinal cord stimulator.

- Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $32.494.62 to Porter Memorial Hospital, $212.00 to St. Mary Medical Center, $200.00 to Pain Management Specialists, and $4,417.90 to Injured Workers' Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

- Respondent shall authorize vocational rehabilitation services as recommended by Julie Bose.

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

10.30.14
Date

ICArbDec19(b)

OCT 30 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PHILLIP COX,	)	
	)	
Petitioner,	)	
	)	
v.	)	11 WC 9956
	)	
FORD MOTOR COMPANY,	)	
	)	16IWCC0048
Respondent.	)	
	)	

ADDENDUM TO ARBITRATOR'S DECISION

FINDINGS OF FACT

Petitioner, Phillip Cox, testified he began working for Respondent, Ford Motor Company, on January 6, 1995. He testified he worked at Respondent's plant in St. Louis, Missouri until he was transferred to their Chicago plant in approximately July of 2008. Petitioner testified he was working for Respondent in February of 2011 and that his position was that of "market manager." As a market manager, he explained his job duties were to drive a fork lift and stock parts throughout the plant. He testified his shift normally began at 6:00 p.m. and would end the following day at approximately 4:30 a.m.

The parties stipulated that on February 19, 2011, Petitioner sustained an accident that arose out of and in the scope of his employment by Respondent and that Respondent was given proper notice of the accident within the time limits stated in the Act. (See Arb. Ex.1). Petitioner was injured when a pallet fell onto his right leg causing a scrape on his right lower leg. Petitioner did not immediately seek medical treatment as he did not believe the injury was serious. However, he testified that over the next several days, the area around his wound became puffy and red.

At approximately 8:54 p.m. on February 23, 2011, Petitioner presented himself to Respondent's plant medical seeking treatment for his right leg injury. (PX1, p. 137 of 171). Kesha Love, RN, BSN, examined Petitioner at his initial visit. (Id.). Nurse Love's clinical observation included lower leg with redness and mild swelling. (Id. at p. 138 of 171). Petitioner complained of shooting pain from below his knee into his ankle and foot. (Id.). Nurse Love instructed Petitioner to ice the abrasion for

twenty minutes, return to work, and return to plant medical to see the doctor at the end of Petitioner's shift. (Id.).

As instructed, Petitioner testified he returned to plant medical when his shift ended at 4:30 a.m. on February 24, 2011. He testified he waited approximately one hour to see a doctor, which is corroborated by the plant medical records that indicate he was seen at 5:22 a.m. by Dr. Winston Khin. (PX1 p. 139 of 171). Dr. Khin noted that the abrasion was infected and cellulitis had formed. (Id. at 140 of 171). Dr. Khim provided Petitioner with Augmentin 500 mg, advised him to return to work, and stated that no revisit was required. (Id.).

Emergency Treatment at Porter Memorial Hospital

On February 25, 2011, Petitioner testified he presented to the emergency room at Porter Memorial Hospital due to increased swelling, redness, and pain around his wound. He was discharged by Porter Memorial Hospital that same day with a diagnosis of right leg cellulitis and abscess and was advised to follow-up with his private physician within two days. (PX2).

Petitioner testified he went to the emergency room again at Porter Memorial Hospital the following day, February 26, 2011, because his wound had worsened. Petitioner was admitted to the hospital at this second visit. (PX2). His February 19, 2011 work accident was noted, and he was diagnosed with right leg abscess, cellulitis, and a MRSA infection. (Id.). While in the hospital, he came under the care of Dr. Adam Conn, who performed a surgical debridement of his right leg wound on February 28, 2011. (Id.). He was discharged from the hospital after several days on March 3, 2011.

Medical Treatment Following Petitioner's Hospital Discharge

Following his discharge, Petitioner testified he was provided with a home health care nurse who came to his home to assist with his wound care. Petitioner treated with Dr. Erika Young of Infectious Disease Specialists in Valparaiso, Indiana. (See PX8). By his March 30, 2011 and April 13, 2011 dates of services it was noted that his right leg wound was healing well. (Id.).

During this same time period, Petitioner testified he continued treating with Dr. Conn of Associates in Surgery, whom had performed his surgery while in the hospital. At a follow up visit on March 28, 2011, Dr. Conn noted Petitioner was complaining of neuropathic type pain while riding in a car or any time he

increased mobility over his anterior compartment. (PX9). Dr. Conn referred Petitioner to Dr. Richard Silberman, a neurologist, for an examination. (Id.).

Section 12 Examination by Jeffrey Coe, M.D., Ph.D.

Following his March 28, 2011 appointment with Dr. Conn, Petitioner was evaluated at the request of Respondent pursuant to Section 12 of the Act by Dr. Jeffrey Coe on April 12, 2011. (PX1). Dr. Coe examined Petitioner and noted he walked with difficulty using two crutches avoiding any right foot weight bearing or contact. (Id.). Dr. Coe concluded that Petitioner's right leg wound was healing but he had developed post-traumatic and post-operative nerve pain. (Id.). He recommended ongoing treatment that included evaluation by a pain management specialist or neurologist. (Id.).

Medical Treatment with Dr. Richard H. Silberman

Following his Section 12 examination with Dr. Coe, Petitioner returned to Dr. Conn's office on April 18, 2011. (PX9). At that visit. Dr. Conn reiterated his recommendation to see Dr. Silberman. (Id.). On April 22, 2011, Petitioner had his initial visit with Dr. Silberman of Neurology Associates of Northwest Indiana. (PX4). Dr. Silberman noted Petitioner's work accident of February 19, 2011 and subsequent complications and treatment. (Id.). After his examination, Dr. Silberman noted that Petitioner had suffered a traumatic injury to the distal aspect of his right leg complicated by a MRSA infection and right foot pain and swelling. (Id.). He indicated the possibility of complex regional pain syndrome or compartment syndrome had to be considered. (Id.). He recommended Petitioner undergo an MRI scan of the right leg from the knee through the foot, an EMG of the right foot, a trial of Neurontin 300 mg, and to remain off work. (Id.).

On May 2, 2011, Petitioner had another follow up visit with Dr. Conn. (PX9). Dr. Conn noted that the wound looked better and released Petitioner back to work in terms of the wound. (Id.). He released Petitioner to return as needed and noted Petitioner had now started treating with Dr. Silberman due to nerve impingement. (Id.).

Over Petitioner's foundation objection, Respondent entered eight photographs purporting to be of the Petitioner at a barbeque on or about May 2, 2011 that appear to be taken from the Facebook page of Gloria Cox-Harris, who was not identified by either party at trial. (RX4). Respondent did not identify where these photographs were taken nor was Petitioner asked. Petitioner testified he attended a barbecue on or about May 2, 2011 but did not testify that the eight photographs

were from that barbeque. In the photographs marked "a" and "e," which appear to be the same photograph with "e" being slightly zoomed in on, Petitioner is standing next to a tree. (PX4). In photograph "b," Petitioner is standing next to some poles with his arms crossed. (Id.). In photograph "c," Petitioner is sitting in a chair next to a woman who is sitting in another chair. (Id.). In photograph "d," Petitioner appears to be walking while carrying a foldable chair, which he indicated weighed approximately two pounds. (Id.). In photograph "f," Petitioner is standing and talking to another male individual. (Id.). In photograph "g," Petitioner is standing next to a pole talking to another male individual. (Id.). In photograph "h," Petitioner is standing and talking to another male individual. (Id.).

Although Petitioner testified he has used crutches since March of 2011, the Arbitrator notes he is not using crutches in any of these photographs that purport to have been taken three years and three months before the date of hearing. However, the Arbitrator also notes that as of the date of hearing, Petitioner had calluses on his bilateral wrists due to chronic use of his crutches, which were viewed by the Arbitrator, and he also testified to additional calluses under his arms due to the chronic use of crutches.

Pursuant to the recommendations made by Dr. Silberman, Petitioner underwent MRI scans of his right foot and right tibia/fibula on May 24, 2011. (PX10). He underwent a three phase bone scan on June 13, 2011. (Id.). Dr. Silberman provided Petitioner with a referral to Dr. Shanu Kondamuri at the Pain Center of St. Mary Medical Center on June 8, 2011. (Id.).

Section 12 Examination by Dr. Simon Lee

At the request of the Respondent, Petitioner was examined pursuant to Section 12 of the Act by Dr. Simon Lee of Midwest Orthpaedics at Rush on August 16, 2011. (PX4). Dr. Lee noted Petitioner had undergone reasonable treatment up to date that included MRIs, a bone scan, and an EMG/NCV, which was positive for tarsal tunnel syndrome. (Id.). He noted that the MRIs and bone scan were all essentially normal. (Id.). He indicated Petitioner was not using any assistive devices at that visit but was unable to completely place his right heel on the ground, mainly walking on the right forefoot. (Id.).

Dr. Lee concluded that medical treatment to date had been reasonable and necessary and related to the work accident of February 19, 2011. (PX4). He diagnosed Petitioner with post right tibial contusion with subsequent abscess and

neuritis with posttraumatic tarsal tunnel syndrome. (Id.). He stated Petitioner could work in a sedentary position but would be unable to drive himself. (Id.).

At the request of Respondent, Dr. Lee drafted an addendum report dated August 31, 2011. (PX4). He was provided with and reviewed additional medical records. (Id.). He concluded that the additional medical records supported and confirmed the contusion, abscess, and infection as well as the subsequent development of a tarsal tunnel syndrome in the right foot. (Id.). He noted that a formal tarsal tunnel release may be needed if physical therapy and medication management did not alleviate the condition. (Id.).

Medical Treatment with Dr. Shanu Kondamuri

Following his examination by Dr. Lee and pursuant to the referral of Dr. Silberman, Petitioner testified he first treated with Dr. Shanu Kondamuri on November 1, 2011. (PX15 Dep. Ex.2). Dr. Kondamuri noted Petitioner's work accident of February 19, 2011 wherein a pallet shifted and fell down his right leg onto his shin. (Id.). After taking Petitioner's history and a physical examination, Dr. Kondamuri noted it was likely that Petitioner had developed complex regional pain syndrome ("CRPS") in his right leg as well as tarsal tunnel syndrome. (Id.). He further indicated that this diagnosis was secondary to cellulitis due to the work-related injury. (Id.). He indicated Petitioner had a "...reddish-blue discoloration of the right foot, heel, sole of the foot, and distal lower leg." (Id.). He also noted evidence of allydonia, hyperalgesia, and increased local temperature change, which he indicated all strongly suggested CRPS. (Id.).

Dr. Kondamuri advised Petitioner to being a physical therapy program and that he would likely need to undergo multiple lumbar sympathetic block injections. (PX15 Dep. Ex.2). He advised Petitioner if this treatment was not successful, he may need to be considered for spinal cord stimulation. (Id.). At this visit, Dr. Kondamuri provided Petitioner with his first sympathetic block injection. (Id.). He concluded that Petitioner was unable to work his regular job but may work in a modified position with no standing and no driving more than ten minutes due to his difficulties with weight bearing. (Id.).

Petitioner returned to Dr. Kondamuri for his first follow-up visit on November 15, 2011. (PX15 Dep. Ex.2). He advised Petitioner that the likelihood of successfully treating his CRPS was minimized based on the fact that his disease had been present for roughly six to ninth months. (Id.). Petitioner continued to follow-up with Dr. Kondamuri and underwent additional lumbar sympathetic block

injections on November 29, 2011; December 13, 2011; January 10, 2012; January 24, 2012; and February 7, 2012. (Id.).

Petitioner's Return to Light Duty Work for Respondent

During the time period in which he was undergoing a series of sympathetic block injections, Petitioner testified that he returned to work in a light duty capacity for the Respondent on December 15, 2011. Because he was still unable to drive due to the work-related CRPS in his right leg, Petitioner was provided a taxi cab by the Respondent to take him from home to work and back each day. While performing this light duty job, Petitioner was living at his home in Wheatfield, Indiana. Petitioner explained that each day upon arriving to Respondent, he performed his light duty job in a small room with no windows.

On occasion, he was instructed to sort bolts. If there were no bolts to sort, he sat in the room with no other work to perform. He testified he performed this job for Respondent from December 15, 2011 through April 3, 2014 when he was advised that no light work was available. During this period of two years, three months, and nineteen days, Respondent provided a taxi cab to transport Petitioner.

Dr. Kondamuri and Spinal Cord Stimulator Recommendation

Petitioner testified that he continued to treat with Dr. Kondamuri after he returned to work in a light duty capacity. On February 21, 2012, he followed up with Dr. Kondamuri after completing the series of six lumbar sympathetic block injections. (PX15 Dep. Ex.2). Dr. Kondamuri noted Petitioner only attained about a twenty-percent reduction in his pain compared to when he was first treated three months earlier. (Id.). He stated, "At this point, the only treatment option that I have for him that has a high likelihood of success in controlling his pain and returning him back to his premorbid state would be to provide him with a trial of spinal cord stimulation." (Id.). He stated that the trial would be performed for several days and if he had greater than fifty-percent relief of pain, he may be considered for a permanent stimulator. (Id.).

First Section 12 Examination by Dr. Richard Noren

On April 12, 2012, at the request of the Respondent, Petitioner was evaluated by Dr. Richard Noren of Pain Care Consultants pursuant to Section 12 of the Act. (RX1 Dep. Ex.1). Dr. Noren noted Petitioner was using crutches constantly at that time and he was unable to place weight on his foot. (Id.). He stated Petitioner

uses his right shoe as a slipper with the heel portion of the sneaker rolled up, keeping his heel off the ground. (Id.). Petitioner had a seat in his shower for bathing purposes. (Id.).

Dr. Noren physically examined Petitioner as well. (RX1 Dep. Ex.1). He noted the right foot was cool to the touch compared to the left. (Id.). There were hair changes in the right foot with absent hair and slight hair pattern on the left. (Id.). He noted a red/purple discoloration of the right foot as well as a shiny discoloration to the skin. (Id.).

Dr. Noren agreed that a trial spinal cord stimulator was reasonable. (RX1 Dep. Ex.1). He opined that the trial should be at least five to seven days and that one of the goals would be to allow Petitioner to ambulate with placement of his right foot and heel on the ground. (Id.). He further concluded that Petitioner was not capable of driving at that time. (Id.).

Implantation of the Trial Spinal Cord Stimulator

Following his examination by Dr. Noren, Petitioner returned to Dr. Kondamuri on May 1, 2012. (PX15 Dep. Ex.2). Dr. Kondamuri noted they were still awaiting a decision from Respondent regarding authorization to proceed with the trial stimulator. (Id.).

During the cross examination of Petitioner, Respondent produced a speeding ticket dated May 28, 2012 given at 6:15 p.m. (RX3). Respondent's Exhibit 3 also included a guilty plea dated June 1, 2012 and signed by "Phillip Cox." Petitioner confirmed that the 2008 black Lincoln and driver's license number listed on the speeding ticket belonged to him. The ticket indicated the driver was going 83 miles per hour in a 65 mile per hour zone in Macon County, Illinois. (RX3).

Petitioner testified that he was not the person driving his car with his driver's license on May 28, 2012 when an individual received this speeding ticket. He testified that the signature appearing on the June 1, 2012 guilty plea was not his signature. He testified that when signing legal documents, he always uses his middle initial, which is J. The Arbitrator notes that Petitioner's Exhibit 10 includes a copy of his driver's license that expired on August 9, 2012 and his signature includes the middle initial J Petitioner's exhibit 19, a copy of the attorney representation agreement he signed for this claim, also includes his signature with the middle initial J. Petitioner's exhibit 20, a copy of his current driver's license, also includes his signature with the middle initial J. Petitioner testified that the two driver's license signatures and the attorney representation

agreement contained his actual signature. The Arbitrator notes that the signature on the guilty plea appears similar to the confirmed signatures of the Petitioner but no handwriting opinion was entered by either party to confirm or deny the authenticity of the signature in question.

Petitioner admitted that he had given his brother his driver's license to use as well as his black Lincoln. He testified that his brother did not have a valid license due to having been arrested for driving under the influence. He testified he allowed his brother to do this in exchange for periodic rides back to his home in Godfrey, Illinois, where his wife continued to live while he worked for Respondent in Chicago. Petitioner believes that his brother was the driver ticketed for speeding on May 28, 2012. He indicated he had gotten tickets using his identity previously and had to hire an attorney to clear up some legal matters caused by his brother's actions. Petitioner moved for a bifurcation of the trial in order to subpoena Petitioner's brother to testify but the Arbitrator denied this motion. Petitioner testified he has not been able to and has not driven a vehicle since approximately the date of his work accident.

The day after the speeding ticket was given to an individual using Petitioner's vehicle and driver's license, Petitioner had a follow-up visit with Dr. Kondamuri. (PX15 Dep. Ex.2). Dr. Kondamuri noted that Petitioner complained of aching, sharp, throbbing, tingling, numbness, and burning pain to the right leg from the knee down. (Id.). Petitioner stated his average pain since his last visit was eight on a scale of one to ten. (Id.). Dr. Kondamuri noted Petitioner would be scheduled for implantation of the trial spinal cord stimulator as soon as they received approval. (Id.).

Petitioner followed up again with Dr. Kondamuri's office on June 26, 2012 and July 17, 2012 while they continued to wait for approval from Respondent to proceed with the trial stimulator. (PX15 Dep. Ex.2). At the July 17 visit, Mary Malick, N.P. noted, "He will be evaluated by a psychiatrist per workmen's compensation request." (Id.). On July 30, 2012, Daniel L. Schultz, PhD, HSPP, evaluated Petitioner and concluded Petitioner was emotionally stable enough to undergo the trial stimulator and recommended that he be allowed to have the planned surgery. (Id.). At his August 7, 2012 visit, Dr. Kondamuri noted they had obtained approval to proceed with the trial stimulator. (Id.). The trial stimulator was surgically implanted by Dr. Kondamuri on August 21, 2012. (Id.).

Two days later on August 23, 2012, Petitioner returned to Dr. Kondamuri and the stimulator was removed. (PX15 Dep. Ex.2). Petitioner testified that he normally goes to bed each night at 9:00 p.m. He testified that it takes him around twenty

to thirty minutes to fall asleep and that he is in a lot of pain while he tries to sleep. He explained that his leg and back is in significant pain while attempting to sleep. He testified that for the two days that he had the spinal cord stimulator implanted, he was able to fall asleep in about five or ten minutes. He testified he was more relaxed, did not feel stressed, and had significantly less pain. Currently, Petitioner testified he wakes up at least three to four times per night due to his pain. He testified that while he had the trial stimulator, he may have woken up one time and had much less pain. At his August 23, 2012 visit, Petitioner stated he was able to sleep for the first time in greater than six months and attributed that to the spinal cord stimulator. (PX15 Dep. Ex.2).

Petitioner testified that while he had the trial stimulator implanted, he had significant reductions in his pain. He testified he was able to put some weight on his right foot while walking with his crutches. He testified that his pain was reduced more when he turned the machine up but this also caused an electric like shocking charge from his back down into his right leg. At his August 23, 2012 visit, Petitioner advised Dr. Kondamuri that his pain was sixty to seventy-percent improved while using the stimulator. (PX15 Dep. Ex.2). Dr. Kondamuri noted Petitioner was able to walk more efficiently with less use of his crutches when the stimulator was functioning. (Id.). Dr. Kondamuri concluded Petitioner was an, "...excellent candidate for spinal cord stimulation..." (Id.). He did, however, recommend an MRI scan of Petitioner's thoracic spine due to some difficulty they had in placing the leads in the lower thoracic spine. (Id.). Dr. Kondamuri further indicated this could be due to a narrowed spinal canal and they may need to consider implantation of surgical paddle leads in the percutaneous stimulators. (Id.).

Second Section 12 Examination by Dr. Richard Noren

Following the spinal cord stimulator trial, Respondent requested and obtained an addendum report from Dr. Noren dated November 8, 2012. (RX1 Dep. Ex.5). After reviewing the operative report dated August 21, 2012, Dr. Noren questioned why two of the stimulator electrodes were placed at the cervical level. (RX1 Dep. Ex.5). He noted in his addendum report that this would not have been indicated, warranted, or necessary medical care. (Id. at 1.). He concluded that the two day stimulator trial was inadequate, that the cervical leads were placed incorrectly, and that surgical implantation of a permanent spinal cord stimulator was not indicated. (Id. at 2.). Following receipt of this second report, Respondent obtained a second Section 12 examination of Petitioner performed by Dr. Noren on January 10, 2013. (RX1 Dep. Ex.7).

After having the opportunity to examine Petitioner a second time, Dr. Noren reached some additional conclusions regarding the permanent stimulator. (RX1 Dep. Ex.7). First, he was provided and reviewed an amended surgical report dated December 17, 2012 noting placement of the leads at the approximate level overlying the T8 and T9 vertebral bodies rather than at the cervical level. (Id. at 3.). He indicated that this would have been the correct level for stimulation of the right lower extremity. (Id.).

Dr. Noren noted that Petitioner advised him that placement of the trial stimulator made his pain "tolerable." (RX1 Dep. Ex.7 p. 2.). He also noted that the electrodes would cause shocking pain and severe shocking sensation with ambulation, which the arbitrator notes is similar as to what Petitioner testified to during the hearing. (Id. at 2.). Dr. Noren indicated that Petitioner had "no relief of pain with walking, sitting, or standing." (Id.).

Dr. Noren also indicated he reviewed the initial follow up notes of Dr. Kondamuri dated September 18, 2012 but stated there was no recording of any success or failure of the trial. (RX1 Dep. Ex.7). He noted there was no review of the specific side effects within that report and that the history of present illness recorded in each of the office notes dated September 18, October 9, and December 18, 2012 were all identical. (Id. at 3-4.). The Arbitrator notes that Dr. Noren did not review the actual initial office notes following the stimulator trial dated August 23, 2012 prior to drafting his January 10, 2013 report. Dr. Noren concluded that the trial stimulator did not provide an effective improvement in Petitioner's pain and that the potential success or failure in proceeding with a permanent stimulator could not be determined due to an inadequate trial. (RX1 Dep. Ex.7 p. 4). Instead, he recommended additional adjuvant medications or alternative medications. (Id.). He noted Petitioner had not reached maximum medical improvement and physical and desensitization therapy may be helpful in reducing his pain. (Id. at 4-5). Lastly, he concluded that Petitioner does have complex regional pain syndrome and his complaints are causally connected to his work accident of February 19, 2011. (Id.).

Testimony of Dr. Richard Noren

In addition to drafting his three reports, Dr. Noren was also called as a witness on behalf of Respondent and testified by way of evidence deposition on July 30, 2013. (RX1). Dr. Noren testified regarding his initial evaluation of Petitioner on April 12, 2012. (Id.). He summarized the findings contained with his report of the same date. (Id.). He testified there is not a minimum amount of time that a trial spinal cord stimulator should be used to determine whether to proceed with

permanent implantation but most believe it should last between three and ten days. (Id. at 14). He testified, "...there becomes a balance between appropriate length of time and risk of infection because it's going through the skin." (Id.).

Dr. Noren testified that when deciding whether to proceed with permanent implantation of a stimulator after a trial, he reviews a patient's functional improvements in his or her previous pain symptomatology. (RX1 p. 15). He testified a successful trial stimulator should produce at least fifty-percent relief. (Id. at 16). He testified that a two day trial would only be valid if the patient reported 100 percent of pain being gone during those two days. (Id.). During his deposition, Dr. Noren was provided with the August 23, 2012 office notes of Dr. Kondamuri for the first time. (Id. at 22). He noted that this office note indicated Petitioner had advised Dr. Kondamuri that he had sixty to seventy percent improvement with the trial stimulator, that he was sleeping better, and that he was able to walk more efficiently with less use of crutches. (Id.). Respondent's counsel asked Dr. Noren if reading these office notes changed his opinion regarding implantation of the permanent spinal cord stimulator. (Id. at 23). In response, Dr. Noren stated, "Based on this report that I'm reading from Dr. Kondamuri, he's reporting 60 to 70 percent improvement in function in a patient with CRPS with a trial. So yes, that would change my opinion." (Id. at 23-24). He further indicated that when he personally examined him on January 10, 2013, Petitioner stated he got fifty to seventy-five percent relief with the trial stimulator and that he had two nights of good sleep. (Id. at 27). He testified that Petitioner advised him that the electrodes were causing a shocking sensation when he stood up. (Id.). He agreed that Mr. Cox's reported relief was consistent with what was contained with Dr. Kondamuri's office notes of August 23, 2012. (Id. at 27-28).

Dr. Noren testified Petitioner stated he was unable to walk with the trial stimulator on because he would receive a painful shocking sensation in his spine. (Id. at 28.). He testified Petitioner told him he was only able to turn the stimulator on when he laid in bed because of a shocking sensation in his leg. (Id. at 28-29). Dr. Noren testified these complaints were significant in assessing the effectiveness of the stimulator. (Id. at 29.). He testified this told him the stimulator was not only not helping but it was probably causing some painful problems as well. (Id.). Dr. Noren stated he would have had a patient with these same complaints come in to reprogram the stimulator before deciding to proceed with permanent implantation. (Id. at 30). He testified that the August 23, 2012 office notes of Dr. Kondamuri did not mention any issues Petitioner had with ambulation while using the trial stimulator. (Id.). He concluded that these office notes, which he reviewed for the first time during his testimony, did not change

his opinion regarding whether to proceed with the permanent stimulator. (Id. at 34.).

On cross examination, Dr. Noren agreed that Petitioner's fifty to seventy-five percent pain relief with the trial stimulator met the criteria for pain relief he uses within his own practice when determining whether to proceed with a permanent stimulator. (RX1 p. 45.). Dr. Noren was asked the following hypothetical:

> *Hypothetically, Doctor, if Mr. Cox reported that he was able to walk more efficiently due to reduction in his pain with the stimulator on, that he was able to sleep for two nights for the first time in six months with the stimulator on, that he had pain relief while standing, sitting, and lying down with the stimulator on, and that he had only had shooting pain form his back to his leg when he leaned forward, would these facts in any way change your opinion that Mr. Cox was a candidate for a permanent spinal cord stimulator?*

In response, Dr. Noren testified that these facts would suggest that the trial may have been effective but attempts to reprogram the stimulator may have also been effective in helping clarify whether the trial was effective or not. (Id. at 54-55.).

Dr. Noren testified that ninety-five percent of independent medical examinations he performs are for workers' compensation cases. (RX1 p. 57.). He testified that one-hundred percent of the examinations he does in workers' compensation cases are for the respondents or insurance companies. (Id. at 57-58.). He testified he is board certified in anesthesia with a subspecialty in pain management. (Id. at 5.). He did one research trial related to spinal cord stimulators, which occurred in 2000. (Id. at 60.). He indicated this trial was for people with back pain who were implanted with a stimulator. (Id.).

Testimony of Dr. Shanu Kondamuri

Dr. Kondamuri was called as a witness at the request of Petitioner and testified by way of evidence deposition on June 7, 2013. (PX15). He testified he is board certified in internal medicine, anesthesiology, and pain medicine with a specialty certification in pain medicine from the American Board of Anesthesiology. (Id. at 7.). He testified regarding several publications he has had written, including "Impedance Variations in Spinal Cord Stimulation During Posture Change" in 2012; "Maintaining Spinal Cord Stimulation Therapy with Modern Programming Technology" in 2011; as well as five additional publications dated 2008 through 2010. (Id. at 10 and PX15 Dep. Ex.1 p. 3-4.). He further explained that he won

"Best Abstract Award" for his 2008 publication, "2-D Electronically Generated Lead (EGL) Scan: A Feasibility Study," which is an award given to the publication considered the best based on scientific merit. (Id. at 11.). He also explained several presentations he has recently given in 2011, 2012, and 2013 regarding spinal cord stimulators. (PX15 p. 12 and PX15 Dep. Ex.1 p. 5).

Dr. Kondamuri testified regarding his treatment of Petitioner dating back to November 1, 2011. (PX15 p. 14-15). He summarized his treatment of Petitioner since that time. (See PX15). He explained what a trial spinal cord stimulator is, how it works, and why they are used before determining whether to proceed with a permanent implant. (Id. at 27-28.). He testified that the standard protocol is a minimum fifty percent subjective pain relief with use of the trial stimulator. (Id. at 30.). He testified additional factors he uses to determine whether to proceed with a permanent implantation include a patient feeling "fabulously better," getting even higher than fifty percent pain relief, improved function, decreased medication usage, and an ability to walk. (Id. at 31.).

Dr. Kondamuri testified he implanted the trial stimulator into Petitioner on August 21, 2012 and he explained in detail exactly how this procedure was performed. (PX15 p. 32-38.). He testified that two days later, Petitioner returned to his office. (Id. at 38.). He testified Petitioner advised him of sixty to seventy percent relief of his right lower extremity pain, which he noted was clearly due to stimulation that he was receiving. (Id.). Petitioner advised him he was able to walk much more than he was prior to the stimulator. (Id. at 38-39.). He testified that one really important result was Petitioner was able to sleep those two nights whereas the last year prior he had not been able to sleep a full night because of his severe pain. (Id. at 39.). Dr. Kondamuri testified Petitioner was a good candidate for implantation of a permanent spinal cord stimulator based on this two day test. (Id. at 40.). However, he did indicate there was some difficulty inserting the stimulator in his spinal canal because the thoracic spine may have been somewhat narrowed. (Id.). He recommended an MRI of Petitioner's thoracic spine before doing a permanent implant to evaluate the diameter of his spine. (Id.).

Following the trial stimulator, Dr. Kondamuri testified he referred Petitioner to Dr. Levin, a neurosurgeon, to implant the permanent stimulator. (PX15 p. 42-43.). He testified he decided that paddle leads would be better for Petitioner than percutaneous stimulators, but he does not implant the paddle leads in his own practice. (Id. at 43.). He also testified that he reviewed the Section 12 report of Dr. Noren dated January 10, 2013. (Id. at 46.). He responded to this report in his own office notes dated March 26, 2013. (Id. at 47.). Dr. Kondamuri testified, "For

some reason Dr. Noren completely ignored those statements (of the Petitioner at his August 23, 2012 office visit) and incorrectly concluded – I quote from his IME report, that there was an absence of any recorded findings within his medical record, meaning my medical record, suggesting that the stimulator provided benefit. Clearly that's a wrong statement." (Id. at 51.). He further disagreed with Dr. Noren's conclusion that the two day trial was inadequate. (Id. at 52-53.). He explained, "Some spinal cord stimulator trials are performed literally on the table. The trial is basically the patient during the operating room phase. He may have stimulation for half of an hour and that may be enough to say, well, this patient is going to have a permanent implant. In other cases we may go seven days for the trial." (Id. at 53.). He continued, "...there is no clear cut criteria or protocol that must be followed by a physician like myself when they're performing a trial." (Id.). He testified that most physicians prefer to perform shorter trials to reduce the risk of infection and to reduce the amount of scar tissue formation. (Id. at 54-55.).

Petitioner's Medical Treatment Following the Trial Stimulator

Following the completion of the trial spinal cord stimulator, Dr. Kondamuri referred Petitioner to Dr. Marc Levin, a neurosurgeon, to perform the permanent spinal cord stimulator implantation. (PX15 Dep. Ex.2). At his first appointment on October 22, 2012, Dr. Levin noted Petitioner had undergone a stimulator trial and had done, "...quite well stating that he did get 50% improvement from the trial and he was especially able to sleep which is something he has not been able to do since the injury." (PX12). Dr. Levin recommended proceeding with the implantation of the permanent stimulator on November 30, 2012 with placement of the paddle leads in the T8 and T9 areas, "...because of the patient's successful trial." (Id.). The Arbitrator notes that Dr. Levin incorrectly noted Petitioner's injury was to his left ankle at this initial visit as well as at his follow up visit on December 6, 2012. (Id.). At that first follow visit, Dr. Levin indicated they did not proceed as they were waiting on authorization. (Id.). At the next visit on January 31, 2013, Dr. Levin correctly noted the injury was to Petitioner's right leg. (Id.). He continued to recommend implantation of the permanent spinal cord stimulator but they continued to wait for authorization. (Id.).

Petitioner testified that he agreed to undergo a therapy program at the Rehabilitation Institute of Chicago at Respondent's request, which was based upon the recommendations made by Respondent's Section 12 examiner, Dr. Noren. Petitioner testified that he completed this entire program. He testified that his pain had not changed compared to how he felt before beginning the program. During this same time period, Petitioner testified he continued to work

in the same light duty job at Respondent. He testified he was still using his crutches and received a ride back and forth to work each day by way of taxi cab. The parties stipulated that as of April 3, 2014, Petitioner was no longer offered light duty work and was entitled to temporary total disability benefits. (See Arb.Ex1). Petitioner testified that he has remained off work since April 3, 2014. He testified he has educated himself with the assistance of his wife as to the benefits and potential complications associated with the implantation of a permanent spinal cord stimulator and wants to proceed with this surgery.

Vocational Assessment by Susan Entenberg

At the request of his attorney, Petitioner underwent a vocational rehabilitation assessment with Susan Entenberg of Rehabilitation Services Associates on May 1, 2014. (See PX17). Ms. Entenberg drafted a four page report dated May 7, 2014. (Id.). She took a history from Petitioner and summarized her findings in her report. (Id.). At the time of her report, Petitioner was fifty-six years old. (Id. p. 1). Petitioner testified he completed school through the eighth grade but dropped out to work in ninth grade. (Id.). Petitioner testified he eventually obtained his GED in the 1980's.

Ms. Entenberg summarized medical records she was provided and noted that Petitioner's work restrictions are sedentary with use of crutches for all ambulation. (PX17 p. 3). She further noted Petitioner is unable to drive and was driven to Respondent by taxi cab while he was offered light duty work. (Id. at 2-3).

Ms. Entenberg concluded that Petitioner is not an appropriate candidate for vocational rehabilitation services and that he has no functional employability and access to a stable labor market. (PX17 p. 3). In reaching this conclusion, Ms. Entenberg further noted Petitioner's GED education, no computer skills, use of crutches, no transferable skills, limited physical tolerances, his need to lie down throughout the day, and that the activities given to him by Respondent for a light duty job was not gainful activity and cannot be considered gainful employment. (Id.). She further explained the basis for her conclusions by referring to the principles outlined in the Illinois Supreme Court case of *National Tea Co. v. Industrial Com.*, 73 Ill. Dec. 575 (Ill. 1983). (Id. at 3-4).

Vocational Assessment by Julie Bose

At the request of Respondent, Petitioner underwent another vocational rehabilitation assessment with Julie Bose of MedVoc Rehabilitation, Ltd. on May

23, 2014. (See RX2). Ms. Bose drafted a seven page report dated May 29, 2014. (Id.). She took a history from Petitioner and summarized her findings in her report. (Id.). The history contained in her report was similar to the findings contained within Ms. Entenberg's report as explained above.

After reviewing Petitioner's background and medical history, she concluded Petitioner is not medically able to return to his position with Respondent as a market manager. (PX2 p. 6). She further noted his sedentary work restrictions and that he has no transferrable skills from his work at Respondent allowing him to perform a sedentary position. (Id. at 6-7). She ultimately concluded Petitioner is capable of an entry-level sedentary unskilled position. (Id. at 7). She recommended proceeding with "...paper and pencil vocational testing..." (Id.).

Ms. Bose did not provide a labor market survey indicating what "entry-level sedentary unskilled" positions were currently available. She did not address his inability to drive to and from work and how that would affect his return to gainful employment. Petitioner testified that Ms. Bose also was retained by Respondent as a nurse case manager when he was originally injured and that she had attended his Section 12 examination with Dr. Simon Lee in August of 2011.

Petitioner's Ongoing Medical Treatment

Since he completed the therapy program at the Rehabilitation Institute of Chicago, Petitioner testified that he continues to treat with Dr. Kondamuri. He testified his most recent visits occurred on May 6 and July 29, 2014. He testified they are waiting to proceed with the permanent spinal cord stimulator. He noted that no other treatment, except medication management, is currently being recommended.

CONCLUSIONS OF LAW

F. WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL BEING IS CAUSALLY RELATED TO THE INJURY?

The Arbitrator finds that Petitioner's present condition of ill-being is causally related to his work accident of February 19, 2011 while working for Respondent.

The Petitioner testified credibly regarding his stipulated workplace accident of February 19, 2011. Although his credibility was minimally reduced on cross-examination when he admitted to providing a copy of his driver's license to his

brother to use, the Arbitrator does not find that this incident supplants the other overwhelming evidence that his condition is directly related to his accident. The history of accident is well documented within the treating medical records. Most importantly, every physician who either treated or examined Petitioner and provided an opinion agreed that his current condition of ill-being is causally related to his work accident, including but not limited to Drs. Lewis, Conn, Silberman, Kondamuri, Levin, Coe, Lee, and Noren.

For the foregoing reasons, the Arbitrator finds that Petitioner's current condition of ill-being, including complex regional pain syndrome, tarsal tunnel syndrome, as well as his associated hip, leg, and back pain, is causally related to his work-related accident of February 19, 2011.

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?

The Arbitrator finds that medical services provided to Petitioner have been reasonable and necessary. Respondent has not paid all appropriate charges.

Petitioner has undergone an aggressive treatment program aimed at slowing the effects of his complex regional pain syndrome. The treating physicians as well as the Respondent's experts have all agreed that treatment that has been provided has been both reasonable and necessary to address his condition. The only true dispute in this claim is the correct ongoing care.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $32.494.62 to Porter Memorial Hospital, $212.00 to St. Mary Medical Center, $200.00 to Pain Management Specialists, and $4,417.90 to Injured Workers' Pharmacy, as provided in Sections 8(a) and 8.2 of the Act.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

The Arbitrator finds that Respondent shall authorize the treatment that has been recommended by Drs. Kondamuri and Levin, which includes implantation of a permanent spinal cord stimulator.

The Arbitrator has already found that Petitioner's ongoing problems and symptoms are causally related to his injuries sustained on February 19, 2011. The main issue in this matter is the differing opinions of Respondent's Section 12 examiner, Dr. Noren, versus Petitioner's treating pain specialist, Dr. Kondamuri, and neurosurgeon, Dr. Levin.

Dr. Noren agreed that Petitioner was a candidate for the trial spinal cord stimulator but testified against a permanent implant due to the length and outcome of the trial. Using the same evidence gained during the trial, both Drs. Kondamuri and Levin recommended proceeding with the permanent implant. Both treating physicians noted Petitioner's fifty to seventy percent reduction in his pain complaints and ability to sleep for the two nights that he had the trial stimulator. Dr. Noren dismissed these results and pointed to Petitioner's inability to walk while using the stimulator and the electric like charges he felt while using the device. Dr. Kondamuri addressed these issues and the Arbitrator finds more credibility in the opinions of Dr. Kondamuri compared to Dr. Noren.

In essence, their differing opinions are seemingly based on differences in their own theories of practice rather than what is simply the correct procedure and what is not. The Arbitrator notes Dr. Kondamuri's significant experience in the area of spinal cord stimulators as evidenced by his testimony and C.V. Dr. Kondamuri explained that there is no protocol that must be followed when a physician is performing a trial stimulator. He indicated they can, in certain circumstances, last only an hour or less. Dr. Noren did not testify as to actual protocols but relied on his own theories used in his own practice.

Also not insignificant is that Petitioner agreed to and underwent the treatment suggested by Dr. Noren and it proved to be unsuccessful. The only other treatment being recommended, aside from medication, is the permanent spinal cord stimulator. Petitioner testified to, and it is also corroborated by the contemporaneous medical records, significant reductions in his pain and his ability to finally sleep at night while using the trial stimulator.

For these reasons, the Arbitrator finds that Respondent shall authorize the permanent spinal cord stimulator as recommended by Drs. Kondamuri and Nevin.

VOCATIONAL REHABILITATION SERVICES

Both Petitioner and Respondent entered into evidence vocational rehabilitation reports drafted by vocational rehabilitation counselors. Petitioner's counselor, Ms. Entenberg, concluded Petitioner is not a candidate for vocational rehabilitation services and that he has no functional employability or access to a stable labor market. She noted Petitioner's GED education, lack of computer skills, use of crutches, lack of transferable skills, limited physical tolerances, his need to lie down throughout the day, and that the activities given to him by Respondent for a light duty job were not gainful activity and cannot be considered gainful employment.

Ms. Bose confirmed Petitioner's sedentary work restrictions and that he has no transferrable skills from his work for Respondent. She, however, concluded Petitioner is capable of an entry-level sedentary unskilled position. She explained that with training, including but not limited to, basic classes and keyboarding skills, she may be able to assist him in finding a sedentary clerical position. Although not addressed in her report, the Arbitrator notes Petitioner is unable to drive using a traditional vehicle. Respondent would also need to provide transportation for Petitioner during the vocational rehabilitation process and if he ever secured a position.

For these reasons, the Arbitrator finds that Respondent shall provide Petitioner with vocational rehabilitation services as recommended by Julie Bose and as provided in Section 8(a) of the Act

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jack Hafliger,

Petitioner,

vs. NO: 11 WC 16170

16IWCC0076

State of Illinois Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 13, 2015, is hereby affirmed and adopted.

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

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

DATED: JAN 2 9 2016
TJT:yl
o 1/25/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAFLIGER, JACK
Employee/Petitioner

Case# 11WC016170

STATE OF ILLINOIS- DEPT OF CORRECTIONS
Employer/Respondent

16IWCC0076

On 5/13/2015, 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 0.08% 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:

1727 LEE, MARK N LAW OFFICE
KEVIN MORRISON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0514 ASSISTANT ATTORNEY GENERAL
RICK C GLISSON
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0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAY 13 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0076

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JACK HAFLIGER,
Employee/Petitioner

v.

STATE OF ILLINOIS-DEPARTMENT OF CORRECTIONS,
Employer/Respondent

Case # 11 WC 16170

Consolidated cases: _____

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/21/15**. 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 **11/13/10**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned **$55,810.00**; the average weekly wage was **$1,073.42**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent on 11/13/10. Petitioner's claim for compensation is denied.

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

5/7/15
Date

MAY 13 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 55 year old Corrections Officer, alleges he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent and manifested itself on 11/13/10. Petitioner has been a Corrections Officer at Taylorville Correctional Center since 1999, and was at Logan Correctional Center from 1995-1999. His duties in both facilities were the same. Petitioner is right hand dominant.

Petitioner currently works in the housing unit. On or about the date of the alleged injury petitioner testified that he was working in the healthcare unit and housing unit. Petitioner's assignments changed every so often. In 2010 petitioner testified that he worked overtime 2-3 days a week, usually on the day shift. The number of overtime hours he worked varied. This could be in the housing or healthcare unit. Petitioner's regularly assigned shift is the 11pm-7am shift.

When assigned to the healthcare unit petitioner was responsible for signing inmates in and out, and walking the wing and signing the log book every thirty minutes. Inmates would most often sign in and out of the healthcare unit during the day since they regularly went there for checks of their diabetes and blood draw 2-3 times a week. Not many inmates were signed in and out of the healthcare unit during the night shift.

When petitioner worked overtime he may work as a wing officer. In this capacity he would make wing checks every thirty minutes. This would entail walking to the end of the hallway of the wing, removing the padlock on the log box with a key, signing the log book, and replacing the padlock. Petitioner would write the time he signed in, if anything wrong, and his name or initials. (RX11)

As a wing officer he would also open the closet so employees could get cleaning supplies out of it. He would write down the supplies that were taken. The closet was usually opened for inmates no more than 2-3 times on evening and night shift, and 15-20 times on day shift. Respondent offered into evidence the equipment log for a three day period (4/12/15-4/15/15) that showed there were only 10 entries during this entire period. (RX5)

Although petitioner has worked every job on the midnight shift, which included the housing unit, the tower, and healthcare unit, he worked mostly in the housing unit. During the time he is alleging his injury petitioner testified that he was working in the healthcare unit and housing unit.

If petitioner was assigned to desk duty on the day shift he would be required to sign inmates in and out for jobs, call passes, and other papers. This required entering time in and out. (RX20) Inmates moved about more on the day shift. There was very minimal movement on his regular shift, which was nights. If petitioner was

assigned control officer on day shift he would be the one signing the passes. On the day shift he may issue 4-5 call passes. On the preprinted passes the officer would sign their name and time they signed the inmate out. (RX21-22) The officer in central control would also complete a log that listed the inmates name and number, destination, time out and officer signature. (RX24) Petitioner's regular shift was the night shift.

If petitioner was assigned the segregation unit he would use a Folger Adams key to open the chuck holes to pass food through and to open the door to let the nurse in. Petitioner did not work in this area in 2010, and does not work it now. If working in this area petitioner did wing checks every 30 minutes.

Petitioner testified that on a regular shift he may use a key 30-40 times. He testified that on the night shift the inmates were mostly in their cells. They were not allowed to use the laundry room or the day room on the night shift.

If petitioner was assigned the tower officer post he did not use any keys and did not do any writing. His primary job there was monitoring.

Dan Clark, Shift Supervisor at Taylorville Correction Center, was called as a witness on behalf of respondent. He is the one who assigns officers to their posts. He is familiar with all of petitioner's duties. Clark testified that there is less inmate movement and activity on the night shift. He testified that the officer would use a key 2 times to get in the day room for each wing check. He testified that at a minimum the officer would use a key 4 times each half hour. Officers on the night shift got 1/2 hour lunch break. Clark testified that day passes could be prewritten. If there is a last minute request the day officer would hand write the passes. He estimated that the call pass summaries have about 10 entries every 8 hours. He stated that day shift is much busier than the night shift. However, most movement during the day is line movement and there is no sign out.

Clark testified that the healthcare unit has one wing check log, and there are no keys to get at it. However, if someone needed to use the bathroom the officer would use a key to open and close it.

On 10/22/10 petitioner presented to Dr. Mark Greatting for right carpal tunnel syndrome and cubital tunnel syndrome. Petitioner gave a history of right hand numbness, tingling, and pain since August 2010. He denied any injury to his right hand. He reported intermittent numbness and tingling, that has been increasing in frequency as time goes on. He reported that all fingers in his right hand are involved, and it occasionally feels like it radiates up the medial or anterior arm. He denied any weakness. Petitioner reported that the numbness and tingling are usually intensified with computer activities, writing, brushing his teeth, and painting. He made no mention of turning keys at work. Dr. Greatting noted that petitioner works as a correctional officer and was not filing this as a workman's comp. Following an examination and review of the EMG Dr. Greatting assessed

carpal tunnel syndrome, and cubital tunnel syndrome on the right. Dr. Greatting was of the opinion that the findings at the elbow may have been incidental findings on the EMG. Dr. Greatting recommended a surgical release of the right carpal tunnel since conservative treatment had not worked.

On 11/17/10 petitioner returned to Dr. Greatting. At this visit he gave Dr. Greatting a history of being a correctional officer for 15 years. He stated that over time he had developed chronic numbness/tingling in his right hand. He reported that most of his symptoms are during the day. He stated that wearing a splint during the day helps with his work activities including turning keys, which he has to do frequently and repetitively at work, as well as writing. Based on this history Dr. Greatting was of the opinion that petitioner's work activities caused, contributed to, or aggravated his condition of right carpal tunnel syndrome.

On 11/30/10 petitioner would underwent a right carpal tunnel release. This procedure was performed by Dr. Mark Greatting. Petitioner followed up postoperatively with Dr. Greatting on 12/14/10 and 1/20/11. On 1/20/11 petitioner's numbness had resolved. He reported that the incision was still a little sensitive. He stated that his strength was good. He told Dr. Greatting that he was already working without restrictions. Dr. Greatting released petitioner from his care. He noted that petitioner was at maximum medical improvement and could continue to work without restrictions.

On 12/12/11 the evidence deposition of Dr. Greatting, an orthopedic surgeon, was taken on behalf of petitioner. Included as PX2 in Dr. Greatting's deposition is a job description that petitioner drafted before the deposition that stated:

> " When working most assignments as a correctional officer, I am regularly locking and relocking doors and padlocks. Everything is locked to keep inmates from getting things they are not supposed to have without authorization of going somewhere they are not allowed to go.
>
> On a housing unit, I have to walk the wing (area where inmates live) regularly & the book every half hour minimum. This book is in a locked box. There are two wings on each housing unit. The door going onto each wing is also locked which has to be unlocked upon entering and relocked when I exit the wing.
>
> When inmates are cleaning, I have to let them into a locked closet to get brooms and mops for them to clean with. Each time I enter the closet, I have to lock the door, get whatever is needed and resecure the door. This happened several times a shift. It happens even more when I worked overtime on day shift. Each time an inmate is finished with a broom or mop, they have to be returned to the locked closet. The brooms and mops cannot be left unattended.
>
> Another assignment I work regularly is the healthcare unit. It is set up similar to a housing unit only smaller with only one wing. At the healthcare unit the restroom is also locked so I have to unlock the door every time I use the restroom.

I have worked overtime many times on many different assignments. Almost all assignments require unlocking and relocking doors on a regular basis. From May 1, 2008 to June 30, 2009 alone, I was offered over 750 hours of overtime. I worked approximately 90 to 95% of that offering."

Based on the job description and the history that petitioner provided him, Dr. Greatting opined that petitioner's work activities were a contributing factor to the development of carpal tunnel syndrome. On cross-examination Dr. Greatting was of the opinion that petitioner had essentially a normal result from the surgery, and he did not expect him to have any further problems. Dr. Greatting noted that petitioner did not tell him the number of times that he turns keys during the course of a shift. Dr. Greatting was unaware that petitioner also worked in the tower. He testified that if most of petitioner's time before the alleged injury was spent working in the tower that could cause him to change his opinion. Dr. Greatting did not know how much time petitioner spent in the healthcare unit, housing unit, or control tower. Dr. Greatting stated that if petitioner uses a house key as opposed to the Folger Adams key, it could change some of his opinions that he rendered about the key turning. Dr. Greatting was of the opinion that some medical conditions such as thyroid problems, rheumatoid arthritis, obesity, and diabetes can make someone more likely to develop carpal tunnel problems. Dr. Greatting was of the opinion that it's not completely proven the amount of repetitive activity that it takes to cause carpal tunnel syndrome. Dr. Greatting admitted that when he examined petitioner he did not have petitioner's detailed analysis of his job duties that he was given before the deposition. Dr. Greatting agreed that some causes of carpal tunnel are idiopathic.

On 1/18/12 petitioner underwent a Section 12 by Dr. James Williams, at the request of the respondent. Petitioner gave a history of working for the Correctional Department since May 1995. He stated that he worked at the Logan Correctional Center from May 1995 until September 1999. From September 1999 until the present time he has worked at the Taylorville Correctional Center. Petitioner reported that he works the 11 PM to 7 AM shift. He stated that his job involves the following:

" His job involves walking and keeping an eye on stuff. He said the workers come out and clean. He said they take care of cleaning the floors, mopping and buffing for which he said the prisoners do. He said the inmates go to dietary for breakfast about 4:45 a.m. and at about 2:00 a.m. they clean. He said he does work some overtime and when he does that he goes onto the day shift or 1st shift. He said the environment there is a dorm type environment. There are 6 housing units. Each house has 2 wings that are 5 rooms per wing and there are 10 bunk beds per room, so each wing has 10 bunk beds per room, so each wing has 10 bunk beds with 20 people so there are approximately 100 inmates per wing or 200 inmates per house so that are approximately 6 houses with approximately 1200 inmates secured at Taylorville Correctional Center. He said when you walk into the house there is a

control room, on each side there is a wing with a locked door. He said at 9:30 p.m. it stays locked until the 4:00 a.m. count. He said he uses a regular key to unlock the lock, not a large Folger Adams key. He said there is a dayroom with T.V., showers and bathrooms. He said the only time they are in cuffs is when they leave the institution to go either to court or to the doctor. He said he goes down into a wing every 30 minutes, at the end of the wing there is a box that is locked with a padlock where you have to sign that you entered the wing. He said there is a count at 11:00 p.m. as well as 4:00 a.m. where you mark a count slip where you make known how many inmates are in or out, sign and verify where the inmates are if they are out. He said there is a closet with brooms which is locked on the day shift and they have to let them in there. In segregation there are large Folger Adams keys. In the healthcare unit you do use large Folger Adams keys as there are 2 segregation cells. He said over 1 year he worked off and on and then he worked half a shift. He said the first half of the shift was in the tower viewing the monitors. He said he does do firearms certification which is when the carpal tunnel started bothering him. He has to do that one time per year which is the only gun firing he ever does."

Petitioner gave a history of hypothyroidism, hypercholesterolemia, and rheumatoid arthritis. Petitioner reported that he has had rheumatoid arthritis for at least 3 to 4 years, and has had hypothyroidism for at least 48 years. Dr. Williams reviewed the Illinois Form 45, Employer's First Report of Injury or Illness, and the Supervisor's Report of Injury or Illness. He also reviewed a Demands of the Job Description filled out by Penny Pavloka, the shift supervisor. Dr. Williams also reviewed medical records of Dr. Western, Dr. Becker, and Dr. Greatting. Following his examination and record review, Dr. Williams' impression was that petitioner had right carpal tunnel release which appeared to have been successfully treated. He did not feel that petitioner's right carpal tunnel syndrome was either related or aggravated by his job duties based on the job description he reviewed, and based upon the description petitioner gave him of his job, which he did not feel was highly repetitive or involved any forceful repetitive gripping, vibration, or impact. Dr. Williams was of the opinion that petitioner's rather significant medical history of rheumatoid arthritis, hypothyroidism, as well as increased body mass index would more likely be the causative or aggravating factor in the development of his carpal tunnel, then would be his job duties. He was of the opinion that petitioner had reached maximum medical improvement and was capable of working his regular duty job without restrictions.

On 10/24/13 the evidence deposition of Dr. Williams, an orthopedic surgeon, was taken on behalf of respondent. Dr. Williams testified that Section 12 examinations comprises only 5% of his practice. Dr. Williams opined that petitioner's work did not cause, aggravate, or contribute to the development of his right carpal tunnel syndrome. Dr. Williams based his opinion on what petitioner told him about his job, the job description, and the activities petitioner told him he was engaged in at work. Dr. Williams opined that petitioner's work activities did not cause his right carpal tunnel syndrome. He opined that petitioner's other

medical co-morbidities such as his rheumatoid arthritis, hypothyroidism, and increased body mass index were likely the causative factors of his carpal tunnel. Dr. Williams was of the opinion that rheumatoid arthritis is an inflammatory arthropathy, a systemic type condition, which involves inflammation of surrounding tissues and leads to an increased predisposition to one developing carpal tunnel syndrome. With respect to hypothyroidism, Dr. Williams was of the opinion that the hormonal changes involved with thyroid dysfunction leads one to an increased predisposition of the nerve being more susceptible to developing carpal tunnel. Dr. Williams was of the opinion that the greater the body mass index, the greater the risk for developing carpal tunnel syndrome.

Dr. Williams testified that he has had the opportunity to be in four different correctional facilities, and perform many of the activities of which a correctional officer would perform at the correctional facility. One of these correctional facilities was the Jacksonville Correctional Center, where petitioner works. He testified that he has turned keys, cuffed and uncuffed an officer, open and closed the chuck holes, and open and close doors in the normal wings, as well as in segregation. Based on petitioner's history, Dr. Williams did not find any significant repetitive, or ongoing use of the keys. Dr. Williams noted that petitioner told him he spent some time in the control tower, and did not use any keys while working in the control tower. With respect to petitioner's extracurricular activities Dr. Williams noted that petitioner stated that he likes to work on cars and used to ride his motorcycle. Dr. Williams noted that riding a motorcycle involves vibration, and that is something that can obviously develop and/or lead to the symptoms of carpal tunnel. He was further of the opinion that working on cars, involves a lot of gripping, forceful gripping, which also can be significant. With respect to locking and re-locking the doors, and padlocks, Dr. Williams was of the opinion that this activity was intermittent, and not continuous. He was of the opinion there is sufficient rest in between this activity being performed. Dr. Williams testified that more than 50% of his patients with carpal tunnel are of an idiopathic nature. Dr. Williams was of the opinion that petitioner did not have any significant amount of writing and his job. He noted that petitioner had the sign the log every 30 minutes.

On cross-examination Dr. Williams testified that he charges $2,000 for a deposition, and $2,500 for a Section 12 examination. Dr. Williams testified that he saw 5500 patients in the past year . Dr. Williams opined that petitioner's work activities were not an aggravating factor or contributing factor to his carpal tunnel based on the fact that petitioner only used his hands for gross manipulation, grasping, twisting, handling 0 to 2 hours a day.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers' Compensation Act is best serviced by allowing compensation in a case ... where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to his right hand, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself".

Petitioner works as a Correctional Officer at Taylorville Correctional Center. He has been a corrections officer since 1995, and at Taylorville Correctional Center since 1999. Petitioner's regular shift is the night shift, 11 pm to 7 am. On or about the alleged date of accident, 11/13/10 petitioner testified that he worked in the housing unit and healthcare unit. During this same period petitioner worked overtime 2-3 times a week, usually on the day shift. The hours he worked overtime varied.

Petitioner's primary task each night was walking the wings and signing the log book. In the housing unit he was responsible for doing this on 2 wings, and in the healthcare unit doing it for one wing. Every half hour he would walk the wing, use a key to open the padlock, sign the log book, and replace the log book. In the housing unit petitioner would open the closet so that inmates could get cleaning supplies out. He would write down what supplies were taken and when they were returned. On the night shift petitioner may open the closet 2-3 times, and on the day shift it may be 15-20 times. However, respondent offered the log for a three day period and it only showed 10 entries for the entire 3 day period. In the housing unit petitioner would sign out inmates only 2-3 times a week so that they could go to the healthcare unit. If petitioner was working in the healthcare unit he did not have to remove a padlock to sign the log book. Petitioner would have to lock and

unlock the bathroom if he needed to use it. Clark testified that officers on the night shift would use a key at least 4 times a half an hour. Petitioner testified that he used a key 30-40 times a shift when working the housing unit. It would be less in the healthcare unit, and not at all in the tower. There was minimal movement of inmates on the night shift.

On the 2-3 days petitioner would work overtime he may work in the housing unit, healthcare unit or tower. If assigned to desk duty he would sign inmates in and out for jobs, call passes and other paper. He may issue 4-5 call passes a day. On a preprinted call pass he would sign his name and enter the time they signed the inmate in and/or out. Most movement of inmates on the day shift was mass movement and did not require any signing in or out. If assigned to central control petitioner would complete a log that listed the inmates name, number, destination, time out and officer signature. Petitioner did not state the frequency with which he worked central control.

In addition to placing into evidence specific and detailed information concerning his work activities, including the frequency, duration, manner of performing, etc., it is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities. When petitioner first presented to Dr. Greatting on 10/22/10 he specifically stated that he was not filing this as a worker's comp claim, and did not mention his work activities as the cause of his right hand symptoms. In fact, he specifically stated that his symptoms intensified with computer activities, writing, brushing his teeth, and painting. Additionally, he told Dr. Greatting on 11/17/10 that most of his symptoms were during the day. The arbitrator notes that petitioner regularly works on nights, and only 2-3 day shifts on or about the alleged accident date. On 11/17/10, all petitioner told Dr. Greatting was that he was a correctional officer for 15 years. He did not provide any specifics regarding his job duties. Based solely on petitioner's history as a correctional officer for 15 years, Dr. Greatting was of the opinion that petitioner's work activities caused, contributed to, or aggravated his condition of right carpal tunnel syndrome. Dr. Greatting admitted that when he examined petitioner he did not have a detailed analysis of his job duties. Given the fact that Dr. Greatting did not have a detailed and accurate understanding of petitioner's duties when he rendered his causal connection opinion, the arbitrator gives lesser weight to the opinions of Dr. Greatting.

After releasing petitioner from his care, and before his deposition, Dr. Greatting reviewed a job description drafted by petitioner. Although this job description listed more specifics of petitioner's job duties, it does not include the frequency with which he performed these duties or the manner in which he performed these duties. During his deposition Dr. Greatting noted that petitioner did not tell him the number of times he turned the keys during the course of a shift. He was also unaware that petitioner would work in the tower. Dr. Greatting opined

that if petitioner was using house-like keys, as opposed to Folger Adams keys, which he was, that could change some of his opinions that he rendered with respect to key turning.

Dr. Greatting also opined that some medical conditions such as thyroid problems, rheumatoid arthritis, obesity and diabetes, all which petitioner has, can make someone more likely to develop carpal tunnel syndrome.

Dr. Williams also examined petitioner, and performed a record review that included a Job Description by history from petitioner, as well as Job Description filled out by Penny Pavloka, the shift supervisor. Based on this information, which included a detailed and accurate understanding of petitioner's job duties, Dr. Williams opined that petitioner's right carpal tunnel syndrome was not related to, or aggravated by his job duties. Dr. Williams did not feel petitioner's job duties were highly repetitive or involved any forceful repetitive gripping, vibration or impact. He opined petitioner's rheumatoid arthritis, hypothyroidism, as well as his increased body mass index were more likely the causative or aggravating factor in the development of his carpal tunnel syndrome. Dr. Williams was of the opinion that petitioner's job duties did not require any significant, repetitive or ongoing use of keys. He believed petitioner had sufficient rest between the times he had to use keys to open locks. Dr. Williams noted that petitioner's own job description showed that petitioner only used his hands for gross manipulation, grasping, twisting, and handling 0 to 2 hours a day. He was further of the opinion that petitioner's extracurricular activities of riding a motorcycle and working on cars involve vibration, a lot of gripping and forceful gripping, which are activities that can obviously develop and/or lead to the symptoms of carpal tunnel.

Based on the above, as well as the credible evidence, the arbitrator adopts the findings and opinions of Dr. Williams, given the fact that he had an accurate and detailed understanding of petitioner's job duties. The arbitrator gives less weight to Dr. Greatting's opinions based on the fact that he did not have an accurate and detailed understanding of petitioner's work duties. The arbitrator finds the petitioner's use of keys was not repetitive, and the amount of writing he performed daily was minimum and limited to a few words each half hour. Based on the admission of respondent's exhibits relative to the various forms the correctional officers entered data on each day, the arbitrator finds the officer's writing was most frequently limited to times, initials or signature, and a few other words. It was not performed on a repetitive basis, especially on the night shift, which petitioner worked. Additionally, any writing or key use petitioner did on the day shift was no more than 2-3 days a week when he worked overtime. However, the amount of overtime petitioner worked each of these days is unknown.

The arbitrator finds the petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent on 11/13/10.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
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?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the evidence that he sustained an accidental injury to his right hand due to repetitive work activities that arose out of and in the course of his employment by respondent on 11/13/10, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephany Holder,
Petitioner,

v. Case No. 11 WC 24571

Carso, Inc.,
Respondent.

ORDER

Petition for Additional Compensation Pursuant to §§19(l) and 19(k) and Attorneys' Fees Pursuant to §16 of the Illinois Workers' Compensation Act having been filed by attorney Patrick J. Hanlon, of the law firm of Frederick & Hagle, and due notice having been given, this cause came before Commissioner Mario Basurto for hearing on January 7, 2016 in Springfield, Illinois. The Commission having jurisdiction over the persons and subject matter and after being advised in the premises, finds:

1. The record shows that the parties entered into a settlement agreement which was approved by Arbitrator Molly Dearing on September 24, 2015.

2. On November 3, 2015, Petitioner filed a Petition for Additional Compensation Pursuant to §§19(l) and 19(k) and Attorneys' Fees Pursuant to §16 of the Act alleging Respondent's willful refusal to pay past pharmacy bills and to authorize new pharmacy expenses as set forth in the settlement agreement.

3. At the hearing held before Commissioner Basurto on January 7, 2016, the parties appeared and announced that they had reached agreement and resolved Petitioner's Petition for Penalties and Fees, but that they wished to memorialize their agreement on the record. To wit, Respondent agreed to pay the medical expenses outlined in Petitioner's Petition pursuant to the fee schedule and to henceforth authorize and pay the continuing prescriptions pursuant to the fee schedule regarding Ms. Holder's condition of complex regional pain syndrome of her left foot. This ongoing need for prescriptions includes the following medications: Baclofen 20 milligrams 4 times a day; Cymbalta 30 milligrams

twice a day; Zoloft 100 milligrams twice a day; Ativan 1 milligram at bedtime; Katamine/Baclofen/ketoprofen/Cyclobenzaprin/Lidocaine/Gabapentin topical cream 4 times a day; and Norflex 100 milligrams twice a day. The parties also agreed that Petitioner would attend a regular six (6) month check up with her treating physician and supply Respondent with regular proof and documentation from said doctor of the necessity and relationship for the continued medical necessity for the refill of said medications, particularly with respect to the need for the topical compound medication previously described.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Additional Compensation Pursuant to §§19(l) and 19(k) and Attorneys' Fees Pursuant to §16 of the Act is hereby dismissed and Respondent is hereby ordered to comply with the agreement of the parties as to the payment of past and future medical expenses, as outlined, pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner attend a regular six (6) month check up with her treating physician and supply Respondent with regular proof and documentation from said doctor of the necessity and relationship for the continued medical necessity for the refill of the aforementioned medications, particularly with respect to the need for the topical compound medication previously described .

DATED: JAN 2 8 2016

Thomas J. Tyrrell

r-01/07/16
TJT/pmo
51

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANGELINA VALLADARES,

Petitioner,

vs. NO: 11 WC 30709

FEDERAL MOGUL CORP., **16IWCC0101**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability (TTD), medical evidence and penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's decision with regard to the issues of causation, medical expenses, TTD and penalties and attorney fees.

Petitioner takes issue with the Arbitrator's admission of the records of St. Francis Hospital (Rx6), based on the argument that the records were uncertified, unauthenticated, incomplete and admitted without adequate foundation.

Pursuant to Section 16 of the Act:

> "The records, reports, and bills kept by a treating hospital, treating physician, or other treating healthcare provider that renders treatment to the employee as a result of accidental injuries in question, certified to as true and correct by the hospital, physician, or other healthcare provider or by designated agents of the hospital, physician, or other healthcare provider, showing the medical and surgical treatment given an injured employee by such hospital, physician, or other healthcare provider, shall be admissible without any further proof as evidence of the medical and surgical matters stated therein, but shall not be conclusive proof of such matters. There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct. This paragraph does not restrict, limit or prevent the admissibility of records, reports, or bills that are otherwise admissible. This provision does not apply to reports prepared by the treating providers for use in litigation."

Section 16, while allowing for automatic admissibility in the case of treating medical records that are certified as true and correct, does not bar the admission of medical records that are not so certified.

Here, the records themselves support the finding that they are related to this particular Petitioner. The Petitioner's Application for Adjustment of Claim reflects that her address was 6120 North Oakley in Chicago. The records contained in Rx6 reflect the name of Angelina Valladares residing at 6120 North Oakley in Chicago. Petitioner also testified that she used to reside on Oakley. (Tr. 59-60). The records also reflect that Elizabeth Brito is Petitioner's daughter. Petitioner testified that she has a daughter named Elizabeth Brito. (Tr. 60-61).

Additionally, the Commission notes that, in reviewing the records submitted as Rx6, that they are typical hospital treatment records, and not records that were in any way prepared in anticipation of litigation, but rather were created during the course of Petitioner's prior treatment.

Given the proof in evidence that the records in Rx6 relate to this Petitioner, and that they were not prepared in anticipation of litigation, we find, pursuant to the reasoning in *Fencl-Tufo Chevrolet, Inc. v. Industrial Commission*, 169 Ill.App.3d 510, 523 N.E.2d 926 (1988), that the records were sufficiently accurate and trustworthy to be admitted into evidence.

In her statement of exceptions on review, Petitioner states that the Arbitrator awarded 10% of the person as a whole under Section 8(d)(2) of the Act for her left shoulder injury, and argues that not only was this award low for the shoulder injury, but also that the Arbitrator erred in finding that the Petitioner's cervical condition was not causally related to her July 12, 2011 accident, and that she is also entitled to permanency for the cervical condition.

This matter was tried pursuant to Section 19(b) of the Act. Pursuant to the stipulations of the parties per the Request for Hearing form (Arbx1), permanency was not at issue at the November 12, 2014 hearing. Additionally, we have reviewed the Arbitrator's decision in detail and note that nowhere in the decision does the Commission find any indication that permanency

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was awarded. It is unclear how the Petitioner came to the conclusion that permanency had been awarded by the Arbitrator. The Arbitrator properly awarded no permanency in this case, and for the same reason the Commission will not do so. Any permanency can be determined at a hearing following remand. Additionally, based our affirmance of the Arbitrator's decision regarding Petitioner's failure to prove a causal connection of her cervical condition to the accident, the Petitioner is not entitled to a permanent disability award for that condition.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is affirmed and adopted, as indicated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $309.00 per week for a period of 56-1/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical expenses totaling $12,330.67 pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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, including $9,845.39 in previously paid TTD, and any and all awarded medical expenses that were previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $32,051.21 under §8(j) of the Act, based on previous payments of non-occupational indemnity disability benefits; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order. As noted by the Arbitrator, because this credit appears to include non-occupational benefits paid for a period in excess of the period of unpaid lost time claimed by Petitioner, this §8(j) credit is limited to the TTD awarded between February 8, 2012 and August 9, 2012

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $12,400.00. 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.

DATED: FEB 4 - 2016
TJT: pvc
O 12/08/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

VALLADARES, ANGELINA
Employee/Petitioner

Case# **11WC030709**

FEDERAL MOGUL CORP
Employer/Respondent

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On 12/15/2014, 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 0.09% 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:

2512 THE ROMAKER LAW FIRM
PATRICK SEROWKA
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

0532 HOLECEK & ASSOCIATES
STUART PELLISH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

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STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Angelina Valladares
Employee/Petitioner

v.

Federal Mogul Corp.
Employer/Respondent

Case # **11** WC **30709**

Consolidated cases: **N/A**

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 **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **November 12, 2014**. 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

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FINDINGS

On the date of accident, **July 12, 2011**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$24,102.00**; the average weekly wage was **$463.50**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$9,845.39** for TTD and up to **$32,051.21** for other benefits, for a total credit of up to **$41,896.60**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $309.00/week for 56 1/7 weeks, commencing July 13, 2011 through August 9, 2012, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$9,845.39** for TTD. Respondent shall also receive credit for non-occupational benefits paid for the period of lost time from February 8, 2012 through August 9, 2012.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3250.00 to Advanced Diagnostics and $9,080.67 to Lakeshore Surgery Center, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for payments made to these providers and adjustments to the balances appropriate pursuant to the provisions of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

December 15, 2014
Date

ICArbDec19(b)

DEC 15 2014

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Statement of Facts

On July 12, 2011, Petitioner Angelina Valladares was employed by Respondent Federal Mogul as a picker-assembly packer. Petitioner testified that she had been employed by Respondent for five years. Petitioner testified that her job duties included packing parts into boxes, closing the boxes, putting the boxes on a cart and moving the cart to another department. Petitioner testified that the boxes weighed 45 pounds and that she put 20 boxes on the cart. On cross examination, Petitioner testified that she moved the cart with another worker. One would push and the other would pull the cart. The cart had three levels. The cart had wheels. The boxes would be packed with different parts. The smaller parts, such as gaskets would weigh less that the larger parts.

Petitioner testified that on July 12, 2011, she was closing boxes to put on the cart and push the cart when she heard a sound. Petitioner testified that a shelf with parts on it fell on the cart and pushed her on top of a machine. Petitioner testified that she fell to the ground and hit her head on the machine. When she fell she landed on her whole left side. Her arm and head hurt a lot.

Petitioner testified that she was taken by ambulance to St. Francis. The records of St. Francis Hospital were admitted as Petitioner's Exhibit 4. She provided a consistent history of the accident stating she struck her head and shoulder off a metal edge. She denied any loss of consciousness. She complained of pain in the left shoulder and in the neck. She was taken off work for two days.

She was sent by Respondent to Advocate Occupational Health on July 14, 2011. Their records were admitted as Petitioner's Exhibit 7. She complained of pain in her left shoulder, neck and left hip and complained of lightheadedness for the last couple of days, but no longer on the date of the examination. She did complain of a mild frontal headache. Petitioner had an MRI of the left shoulder at Lutheran General Hospital on July 14, 2011 which showed a full thickness tear of the supraspinatus tendon and tendinosis. She remained off work.

Petitioner testified that she saw Dr. Sclamberg for further treatment of her left shoulder. Dr. Sclamberg's records were admitted as Petitioner's Exhibit 1. The records reflect an initial visit on July 25, 2011. Dr. Sclamberg diagnosed an acute supraspinatus tendon tear and recommended an arthroscopy. Surgery was performed on her left shoulder on August 12, 2011 consisting of a rotator cuff repair, subacromial decompression, synovectomy, debridement and distal clavicle resection. Dr. Sclamberg kept her off work. During her post operative care, petitioner was diagnosed with adhesive capsulitis on November 14, 2011. She underwent a manipulation under anesthetic on November 18, 2011. Petitioner continued with post operative care with physical therapy and was kept off work by Dr. Sclamberg. He released her to light duty on February 6, 2012 with no lifting over 5 pounds and no overhead lifting. Her restrictions were modified on May 17, 2012 to allow 10 pounds lifting, no overhead work and no repetitive duty. She was released from care on August 9, 2012 to full duty with respect to her shoulder. Dr. Sclamberg on August 9, 2012 notes current light duty restrictions from Dr. Malek.

Petitioner testified that she saw Dr. Castellanos for her neck on September 19, 2011 The records of Diversey Medical Center were admitted as Petitioner's Exhibit 2. Petitioner's history at that time included the accident on July 12, 2011. She indicated a loss of consciousness. She also describes initial symptoms of headache, dizziness, tinnitus in addition to left shoulder pain. She was complaining of headaches. Physical examination notes tenderness of the parietal and temporal regions of the scalp and the frontal region on the left side. She also had tenderness of her neck and limited motion of the cervical spine secondary to tenderness and pain. Dr. Castellanos' assessment was post concussion syndrome and a neuralgia or causalgia of the left side of the head. Limited cervical range of motion was also noted in the October 3, 2011 notes. An MRI of the cervical spine performed October 15, 2011 was read by Dr. Safvi was showing mild disc bulges at C4-5 and C5-6 with findings suggestive of a C5-6

cord contusion. No significant spinal stenosis was noted. Dr. Castellanos referred the Petitioner to Dr. Malek for her cervical spine on October 24, 2011.

Petitioner testified that she saw Dr. Malek on October 25, 2011. Dr. Malek's records were admitted as Petitioner's Exhibit 8. On October 25, 2011, Dr. Malek takes a history of accident on July 12, 2011 including a loss of consciousness. There is no history of a previous similar injury. Physical examination finds Petitioner is in no acute distress. She has negative Waddell's signs. Dr. Malek finds unrestricted range of motion in the neck. She has significant weakness in grip and elbow extension on the left side. Dr. Malek states that the MRI done on October 15, 2011 shows evidence of spinal stenosis at C4-5 and C5-6 with a lesser degree at C6-7 with evidence of annular tear at C4-5. Dr. Malek's impression is a cervical musculoligamentous sprain, post-concussive syndrome, left shoulder injury and left cervical radiculopathy. He recommends an epidural steroid injection, physical therapy and an EMG.

The EMG was performed by Chiropractic & Neurology Center on December 5, 2011. The impression was that the study was compatible with C5-6 cervical radiculopathy (Px 2). Dr. Malek performed the initial ESI on November 3, 2011 with a reported 50% improvement. Dr. Malek reviewed the EMG/NCV report and opined that Petitioner will likely require surgical intervention, but recommended a second and third injection.

Respondent sent Petitioner to be seen by Dr. Jerry Bauer for an independent medical examination with respect to her cervical condition on December 19, 2011. Dr. Bauer testified by deposition (Rx 11). Dr. Bauer testified as a board certified neurosurgeon. Dr. Bauer reviewed the October 15, 2011 MRI films and testified that there was no evidence of cervical stenosis or any narrowing or pressure on the spinal cord. There was mild degenerative disk disease at C4-5 and C5-6 without evidence of spinal cord compression or nerve root compression. Based upon his examination, Dr. Bauer opined that Petitioner had subjective neck pain without nerve root compression. He opined her decreased sensation may be related to underlying carpal tunnel syndrome that would not be accident related. There is no damage to the cervical spine. Dr. Bauer testified that Petitioner did not suffer any neurologic problems as a result of the July, 2011 accident. Dr. Bauer opined that Petitioner did not need any further treatment, including injections or surgery to her neck. Dr. Bauer opined that Petitioner was capable of working full-time without restrictions with respect to her neck. Dr. Bauer opined that Petitioner was at maximum medical improvement. Dr. Bauer testified that he reviewed the December 5, 2011 EMG report but did not comment on the report because it was performed by a chiropractor and he did not think there was a great deal of validity in the EMG.

Petitioner continued under the care of Dr. Malek (Px 8). Dr. Malek saw Petitioner on an approximately monthly basis awaiting approval for additional injections. Dr. Malek recommended that therapy be shifted to conditioning on May 17, 2012. Throughout his notes, Dr. Malek notes no change in symptoms and finds the physical exam unchanged.

In his December 20, 2012 note, Dr. Malek references an MRI performed on December 15, 2012. No report of this MRI is in his notes nor was it offered into evidence. Dr. Malek records that the MRI showed some bulging at C5-6 but no distinct herniation. Dr. Malek continued medications as needed and continued Petitioner off work. He discussed a shift to a four week conditioning program at the time of the third injection.

Petitioner underwent a second epidural injection on January 10, 2013 with a 50% response reported in Dr. Malek's January 17, 2013 note. He finds her physical exam unchanged. A third epidural injection was performed on February 7, 2013 without any significant improvement per Dr. Malek's February 13, 2013 note. The note states there is no distinct disc herniation. Dr. Malek recommends four weeks conditioning followed by a functional capacity evaluation He would at that time consider intervention versus maximum medical improvement. On March 14, 2013, Dr. Malek states Petitioner's symptoms are significant and recommended a repeat MRI. He notes that Petitioner did not tolerate modified duty. On

April 10, 2013, Dr. Malek states that the repeat MRI was not authorized and recommend a functional capacity evaluation and declares the patient is at MMI. He notes a work status of light duty with a 20 pound weight limit. Dr. Malek's record on May 20, 2013 records that an FCE was done on April 23, 2013 and that the FCE placed Petitioner in the light physical demand level. The FCE report is not in evidence. Petitioner was placed on permanent restrictions of 20 pound lifting. Petitioner continued to see Dr. Malek through a visit on August 26, 2013. He continued to note the symptoms remain unchanged. He placed Petitioner at MMI since further MRI has not been authorized. Work status is unchanged. Petitioner is to take over the counter medication as needed.

Petitioner testified that she did not recall an injury in July, 2010. Records from St. Francis for an admission on July 11, 2010 were admitted as Respondent's Exhibit 6. The record is for Angelina Valladares at Petitioner's address, listing the same social security number, date of birth and telephone number as listed in Petitioner's Exhibit 4. It lists the relative as Elizabeth Brito, daughter. Petitioner testified that she lives with her daughter Elizabeth Brito. The signature on the consent form signed July 11, 2010 appears to match Petitioner's signature on the Application for Adjustment of Claim and the authorization for medical records included in Petitioner's Exhibit 4. The records state the patient suffered a slip and fall the day before admission, hitting the side of her head and complaining of pain in the right shoulder radiating to her neck and left hip. The patient was discharged to follow up with her personal doctor. Petitioner testified that she was working for Respondent in July, 2010. She denied missing any work or having any further treatment at that time.

Petitioner testified that she has not worked since the date of the accident. Petitioner testified that she was told in February, 2012 that Respondent did not have a job for her. She did look for a job at one location. She did not get hired.

Petitioner testified that she can do about 40% of what she did before. Her arm and neck hurt a lot. She has no strength in her arm and hand. Petitioner identified Respondent's Exhibit 8 as photos of her taken July 26, 2012 while walking and carrying a shopping bag, pushing a shopping cart, and lifting and carrying her granddaughter. She is carrying her granddaughter on the right shoulder. Petitioner testified her granddaughter was one year old in July, 2012. She denied every carrying her before the date of the photographs in Rx 8. She testified she goes shopping once or twice a month, but never carries a lot. She does drive but only to take her son to school two times per week.

Conclusions of Law

In support of the Arbitrators Decision with respect to F (Causal Connection), the Arbitrator finds as follows:

Petitioner testified to the accident on July 12, 2011 and being pushed into a machine and striking the ground. The ambulance report confirms statements that she hit her head and had complaints in her left shoulder. There is no dispute that Petitioner's condition of ill being in the left shoulder is causally connected to the accident arising out of and in the course of her employment on July 12, 2011.

Based upon the medical records it is also undisputed that Petitioner suffered a head injury causally connected to the injury sustained on July 12, 2011. She was diagnoses with a post concussion syndrome. There is no evidence submitted that the head injury required additional treatment or that that condition was or is disabling.

With respect to Petitioner's claim that she also suffered an injury to the neck, the Arbitrator notes that the initial ambulance report does not record neck complaints but that, at the St. Francis Emergency

Room on the date of the injury, she advanced complaints of pain into her neck. She advanced complaints of left neck pain as well at Advocate Occupational Health on July 14, 2011 and was also diagnosed with a cervical sprain/strain. The mechanism of injury described by Petitioner's testimony and the medical histories is consistent with an injury to the neck as well as the head and shoulder.

Although Petitioner may have had a July, 2010 injury with complaints in the neck and right shoulder, there is no medical evidence of a continuing condition or treatment to the neck as a result of the condition treated in the Emergency record admitted as Respondent's Exhibit 6. Following the July 12, 2011 accident, Petitioner began a consistent course of treatment. Based upon the testimony and the review of the medical evidence submitted the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that she sustained an sprain injury to the cervical spine as a result of the accidental injuries arising out of and in the course of her employment on July 12, 2011.

The extent of the cervical injury is also in dispute. Petitioner has had continued treatment with Dr. Malek. Dr. Bauer evaluated Petitioner at Respondent's request on December 19, 2011. Dr. Bauer opined that Petitioner had subjective neck pain. He opined that Petitioner did not sustain any neurological problems as a result of the injury on July 12, 2011. She had no nerve root compression or spinal cord compression. She had no neurologic deficit related to any pinched nerve in her neck or spinal cord injury or compression. Dr. Bauer opined that at the time of his examination on December 19, 2011, Petitioner was not in need of any further medical treatment to her neck and opined that Petitioner could return to work full duty.

Based upon the totality of the medical evidence submitted, the Arbitrator finds the opinions of Dr. Bauer more persuasive that those of Dr. Malek. The Arbitrator notes that Dr. Malek's reading of the October 15, 2011 MRI is not in agreement with either Dr. Bauer or the radiologist. Dr. Malek does agree that there is no disc herniation noted on MRI performed in December, 2012. The Arbitrator also notes that Dr. Malek's records do not contain any detailed physical examinations to correlate his opinions with specific clinical findings. The Arbitrator also notes that despite his treatment, Dr. Malek records that Petitioner's complaints remain unchanged. The Arbitrator finds that Petitioner's testimony concerning prior injuries, changed statements with respect to a loss of consciousness at the time of the accident, and her activities as shown in the photographs contained in Respondent's Exhibit 8 raise questions as to her subjective complaints advanced.

Based upon the testimony and exhibits submitted in this matter, the Arbitrator finds that the medical treatment rendered for Petitioner's cervical spine after December 19, 2011, the date of Dr. Bauer's examination, is not causally connected to the accidental injuries sustained on July 12, 2011.

In support of the Arbitrators Decision with respect to J (Medical), the Arbitrator finds as follows:

Based upon the Arbitrator's decision with respect to causal connection, medical bills for treatment to the cervical spine after December 19, 2011 are not causally connected to Petitioner's injury sustained July 12, 2011. Dr. Bauer's persuasive opinion was that further treatment was not reasonable or necessary. With respect to the bills listed in Petitioner's Exhibit 9, the Arbitrator makes the following findings:

Advanced Diagnostics: The charges for the October 15, 2011 MRI of $3,250 are for treatment reasonable, necessary and causally connected to the accident on July 12, 2011. Respondent's Exhibit 9, documents a payment for this bill of $1100.85. Respondent is responsible for the October 15, 2011 charges pursuant to the terms of Sections 8(a) and 8.2 of the Act. Respondent is entitled to credit for all payments made and reductions allowed pursuant to the Act. Based upon the Arbitrator's decision on causal connection, the charges for the December 12, 2012 MRI are denied as not reasonable, necessary or causally connected to the accidental injuries sustained. These charges are further denied

for failure to document the treatment noted. While Dr. Malek refers to this MRI, no record of the MRI or report of this test was submitted into evidence.

Peterson Surgicenter Anesthesia: The unpaid charges are for the epidural injections performed on January 10, 2013 and February 7, 2013 for the cervical spine. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained.

Peterson Medical Surgicenter: The unpaid charges are for the epidural injections performed on January 10, 2013 and February 7, 2013. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained.

EqMd (2 bills submitted): The bills submitted appear to be for prescription medication. The unpaid portion of the bills is for prescriptions filled beginning in February, 2012. The first bill for $9,020.72 does not specify what doctor prescribed the medications. The second bill for $9,477.46 lists Dr. Malek. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained. The Arbitrator notes further that there is no medical record which documents the prescription of the medications listed and therefore further denies these bills for lack of foundation.

Elite Physical Therapy: This bill is for a functional capacity evaluation performed on April 23, 2013. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained. The Arbitrator also finds that there were no records of this provider offered into evidence. While Dr. Malek refers to an FCE, no report was offered into evidence. The Arbitrator further denies these charges for lack of foundation.

Lakeshore Surgery Center: The bill submitted shows an unpaid balance of $9,176.92 for a portion of the charges incurred for the August 12, 2011 left shoulder surgery and non emergency transportation. Respondent's Exhibit 14 includes an EOB challenging the unpaid charges, stating the procedure is considered integral to the primary procedure. The Arbitrator finds that the charges for transportation are not reasonable or necessary. The Arbitrator finds that the surgical charge of $9,080.67 is for treatment that was reasonable, necessary and causally connected to the accidental injuries sustained on July 12, 2011. Respondent shall make payment for the charges pursuant to the provisions of Sections 8(a) and 8.2 of the Act. Respondent shall have credit for the payments made to Lakeshore Surgery Center and appropriate reductions pursuant to the Act.

Western Touhy Anesthesia: Although Petitioner's Exhibit 9 includes an alleged bill of $450.00 to this facility, there is no bill included in the exhibit. There were no records of this provider offered into evidence. The Arbitrator denies these charges for lack of evidence and foundation.

Dr. Malek: The bills submitted document that the unpaid charges are for serviced rendered after December 19, 2011. Based upon the Arbitrator's decision on causal connection, these charges are denied as not reasonable, necessary or causally connected to the accidental injuries sustained.

Grey Medical: The bills submitted are for game ready cold therapy rental, CPM plus initial education and interface material. The dates of rental are from August 12, 2011 December 30, 2011. Payments were made and adjustments taken. A balance is noted of $34,066.63. A review of the medical exhibits submitted fails to disclose a prescription for these devices from Dr. Sclamberg or any other treating doctor or facility. The Arbitrator finds that Petitioner failed to prove the reasonableness, necessity or causal connection for the bill and denies that balance claimed.

In support of the Arbitrators Decision with respect to L (Temporary Compensation), the Arbitrator finds as follows:

The undisputed evidence is that Petitioner was disabled from the date of the accident on July 12, 2011 for her injuries to the cervical spine and left shoulder. As more fully addressed above concerning causal connection, the Arbitrator finds the opinions of Dr. Bauer more persuasive that those of Dr. Malek with

respect to the cervical spine injury. Based upon Dr. Bauer's opinions, Petitioner was at MMI and able to return to work with respect to the cervical spine on December 19, 2011.

Dr. Bauer's opinions are limited to the cervical spine injury. He advanced no opinions with respect to the left shoulder injury. As of December 19, 2011, Petitioner was still under active treatment for the left shoulder by Dr. Sclamberg and still disabled. Although Petitioner was released to restricted duty on February 6, 2012, no light duty was offered and Petitioner was not yet at maximum medical improvement with respect to the left shoulder. Dr. Sclamberg released Petitioner to full duty and at maximum medical improvement on August 9, 2012 with respect to the injury to the left shoulder.

Based upon the Petitioner's testimony and the medical evidence submitted, the Arbitrator finds that the petitioner was temporarily totally disabled from July 13, 2011 through August 9, 2012, a period of 56 1/7 weeks. As of August 9, 2012, based upon the opinions of Dr. Bauer and Dr. Sclamberg, Petitioner had been released to return to full duty both the cervical spine and left shoulder conditions.

Respondent shall have credit for the stipulated amount of temporary total disability payments made of $9,845.39. Respondent's Exhibit 10 documents that this amount was for benefits paid from July 13, 2011 through February 7, 2012. The parties have also stipulated that Petitioner has received non occupational disability benefits of $32,051.21, but based upon the claimed period of lost time in Arbitrator's Exhibit 1, it appears that these benefits have been paid for a period in excess of the period of temporary total disability awarded. The Arbitrator awards further credit for the non occupational disability paid to Petitioner, but only to the extent that those benefits cover the remaining period of TTD awarded from February 8, 2012 through August 9, 2012.

In support of the Arbitrators Decision with respect to M (Penalties), the Arbitrator finds as follows:

Based upon the Arbitrator's findings on Causal Connection, Temporary Compensation and Medical, the Arbitrator finds that Respondent's denials were in good faith and based upon competent evidence. Respondent was not unreasonable or vexatious in advancing defenses in this matter. The Arbitrator also recognizes that Petitioner was provided non occupational disability benefits during the disputed lost time. Petitioner's requests for penalties and attorneys' fees are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Franciszek Filipkowski,

Petitioner,

vs. NO: 11 WC 32009

16IWCC0043

True Vue,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, wages, rate, notice, penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 15, 2014, is hereby affirmed and adopted.

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

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

16IWCC0043

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.

DATED: JAN 2 0 2016
TJT:yl
o: 1/12/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FILIPKOWSKI, FRANCISZEK
Employee/Petitioner

Case# **11WC032009**

TRUE VUE
Employer/Respondent

16IWCC0043

On 9/15/2014, 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 0.04% 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:

MARIYA ZAYATS
6300 N SHERIDAN RD
APT 109
CHICAGO, IL 60660

1120 BRADY CONNOLLY & MASUDA PC
DANIEL CODY
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

16IWCC0043

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

FRANCISZEK FILIPKOWSKI
Employee/Petitioner

v.

TRU VUE
Employer/Respondent

Case # 11 WC 32009

Consolidated cases: _____

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **August 12, 2014**. 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. [x] 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. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
   [ ] TPD [x] Maintenance [x] TTD
L. [x] 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 **August 21, 2009**, 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 not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**9,066.40**; the average weekly wage was $**456.27**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**19,805.33** for other benefits, for a total credit of $**19,805.33**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

No benefits awarded.

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

09-15-14
Date

SEP 15 2014

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

16IWCC0043

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANCISZEK FILIPKOWSKI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11 WC 32009
	)	
TRU VUE,	)	
	)	
Respondent.	)	

ARBITRATOR'S DECISION

STATEMENT OF FACTS

The petitioner testified that he is currently 62 years old and had completed grammar school. He has worked as a laborer and a welder and other jobs. The petitioner testified that he was with the respondent for eight years until he had been laid off. He denied that there was much overtime and said that his position was that of an employee, which included sometimes packing glass with the weight dependent on the size of the glass. He testified that pieces could be quite small, but also could be 48 inches by 48 inches, but he did not know their weight. The petitioner testified that he was pushing glass into a boat of glass when he felt a strong pain in his back. He testified that this took place about 10 minutes before the end of the shift when he had pushed an empty boat one meter forward and felt a strong pain on his back that was more to the left. Petitioner used a translator during the trial but responded in English to that question. He admitted on cross examination that he spoke English at work and was part of the Union negotiating team and the negotiations took place in English.

The petitioner testified that no one was around to report the incident and he thought it would get better the next day. He did testify that it really hurt and it was almost unbearable at the time, but admitted that he left work without advising anyone on the date of the alleged event. The petitioner went to the doctor the following day and saw his family doctor, Dr. Stec. He admits having treated with Dr. Stec before and testified that the doctor was a general practitioner. He testified that he was examined and was given pain medications, an off work slip, and x-rays were ordered.

He testified that his daughter took the off work slip to his employer on that Monday and he has never returned to work since that time. He also testified that he had no improvement in his condition since that day. He testified that Dr. Stec said the only solution was surgery and he went to physical therapy for three to four months but that it was not helpful. The petitioner denied that he had any prior back problems. He said that Dr. Stec sent him to the hospital because his veins were clogged and they had to be opened up, but he denied he underwent surgery for the heart, indicating instead that they put a catheter up from his inside thigh up into his heart. He testified that the doctors recommended a pacemaker, but that he refused that surgery. He also testified that Dr. Stec recommended back surgery on three different times, but he would not agree to the surgery because he was afraid due to his heart problems. He later testified that he was afraid that he would wind up in a wheelchair and offered that he did not think that physical therapy would help, as it hadn't helped previously.

When asked about his job duties, the petitioner simply testified that he would go where his supervisor sent him. He denied again any prior injuries and admitted that he had a car accident, but denied any pain in his back. He also testified that he did not miss any work as a result of any prior injuries. He testified that he currently takes pain medication when he is

hurting and that he can only stand or walk for a half an hour at a time, and that his left leg was totally numb. He testified that he felt he couldn't work because he couldn't sustain an eight-hour work day.

On cross-examination the petitioner admitted that he had worked for TruVue for eight years and that he had been laid off in March of 2008 and re-hired in March of 2009. He further admitted that he had gone through many safety programs and was advised that he was to immediately report all injuries, no matter how minor. He admitted that he knew Mr. Robert Kozak and that if a work injury was alleged, an employee would speak to Mr. Kozak about the work injury. He admitted that he did not speak to Mr. Kozak about the back injury that he is now alleging. He further testified that despite his testimony on direct that he was in almost unbearable pain, he admitted that he did not report that to his supervisor because he didn't see him around. He denied that he did not tell Dr. Stec about the incident on the 21st of August.

The petitioner did admit that he had other problems including cervical problems, wheezing, and abnormal heart beat and some knee problems, but could not remember any abdominal pain, emphysema or originally any left elbow or shoulder issues. He later testified on cross-examination that he felt that the left elbow and shoulder issues were caused because of the low back problem. He felt that the low back problem was affecting his entire left side. The petitioner denied any treatment to his low back in 2005 at Union Health Services or that he saw Dr. Stec in 2007 as a result of the automobile accident of December of 2006 for treatment to his low back.

Further, the petitioner admitted that he did not see a spine specialist and when asked if he was referred to one, he simply indicated that he went and had an MRI at the hospital. He admitted that he refused injections, despite having pain so severe that he didn't believe he could

work. The petitioner also admitted that he had been approved for Social Security Disability at the beginning of 2011. The medical records admitted of Dr. Stec note that the last visit to Dr. Stec was on December 30, 2010, just before the petitioner was approved for disability. No medical records were submitted to support any care once the petitioner had been approved for Social Security Disability. On re-direct the petitioner testified that he had never been sent back to work by Dr. Stec and that he requires regular medical care. He indicated he would do surgery only if it was the last straw.

Respondent submitted the testimony of Robert Kozak. Mr. Kozak is the Safety Manager at TruVue and his responsibilities include safety and handling workers' compensation injuries. He testified regarding the petitioner's job duties and requirements and identified the job descriptions and requirements which were admitted into evidence. Mr. Kozak testified that a boxer stacker would take pieces of glass called lites coming off the line and place them into a box that was on a stacking table. The stacking table was adjustable so that the height was comfortable for each boxer or stacker as they set it themselves. This prevented the need for the employees to bend to move the lite from the conveyor belt to the box. Mr. Kozak testified that the weights would vary from as little as a pound to up to the maximum of 12 pounds.

Mr. Kozak also provided testimony that workers were all advised in various orientations, as well as monthly safety meetings, of the need to immediately report any incidents, regardless of how minor. He testified that the petitioner would have had a re-orientation when he was called back from the layoff in March of 2008 as if he was a new employee. Part of that training included reporting of injuries, regardless of how minor. Additionally, the supervisor would hold a daily safety briefing before each shift, which would go over any incidents. He testified that Mr. Filipkowski never advised him of any work injury and that he first learned that Mr.

Filipkowski was claiming a work injury when he was notified from a medical provider that they were requesting authorization for a work-related injury some time near the end of January of 2010. At that time he investigated the claim and reported it to his insurance carrier, as his requirements through his parent company were that those be reported within 24 hours. Mr. Kozak testified that the incident claimed by Mr. Filipkowski was not called to the insurance company in August of 2009 because Mr. Filipkowski had not claimed his back problems were due to a work injury.

Mr. Kozak also testified regarding the attendance of the petitioner and identified the punch list which showed which days and the times worked by the petitioner. He further identified the wage history of the petitioner from the time of layoff through the time of payment of short-term disability.

Mr. Kozak testified on cross-examination that to date there were approximately 11 first aid incidents where someone would have needed the first aid facility to bandage a finger cut or something to that degree. He testified that a safety program can help prevent the degree of the accidents. He further testified that a supervisor would have to be in the building any time other employees would be there. He testified that the building was approximately two-and-a-half acres but was one big open room. He further testified that the employees were all given an emergency page number and also instructed on how to use the pager system. He noted that the training had taken place in English and pictorials and that he would always communicate with the petitioner in English. He testified that a forklift would be used to move any racks and that if an individual boxer or stacker would need to move a pallet, then they would have to use a pallet jack to do so. An employee would not be moving these pallets manually and he noted that a forklift operator

was assigned to the etch department and that the employee would be able to page a forklift driver. Mr. Kozak testified that he had heard the petitioner using the system on occasion.

The respondent also submitted the testimony of Alonzo Fairchild. Mr. Fairchild testified that he is a supervisor at TruVue and has been with the company for 42 years. He testified that he knew Frank Filipkowski and had been his supervisor since 2006. He testified that the petitioner was a boxer and stacker and described that the petitioner would move glass along an air lift conveyor belt and would snap the glass where scored and place it into a box. He testified that the boxer and stacker would never have to move a box and they would not move any pallets. He testified that pallets were moved by the forklift operator and that the boxer and stacker would call for a forklift operator when the pallet was full. He testified that if a forklift driver did not respond, the boxer stacker could call the supervisor to have the full pallet removed. He testified that he is not aware of any employees having any need to move a pallet.

Mr. Fairchild testified that the petitioner was aware that he was going to be laid off prior to August 21, 2009 when he alleged his injury. He denied that Mr. Filipkowski ever approached him about any work injury that he had or any low back complaints he had that he related to his job.

On rebuttal the petitioner testified that he rarely used the pager, but admitted that he knew how and would use it to call the jeep driver to get the material. He testified that he didn't see anyone around at the time he alleged his injury and thought he would go home and it would pass. He testified that if he knew how bad it was, he would have called his supervisor. Upon questioning from the arbitrator, the petitioner testified that he wasn't sure if he was going to be laid off. He testified he did not receive a written notice prior to his alleged injury and wasn't sure of when his last day would have been under the layoff.

The respondent also submitted the evidence deposition testimony of Dr. Jerry Bauer. Dr. Bauer is a board certified neurosurgeon that specializes in spinal treatment. 100% of Dr. Bauer's cases are spinal cases. He also testified that he was honored by Chicago Magazine as one of the top doctors in Chicago since 2002 for neurosurgery (RE 8, pg 5-6). Dr. Bauer testified that he reviewed records from various sources, as well as the job descriptions for the UV line stacker and boxer responsibilities. He also reviewed radiographic films in conjunction with the case (RE 8, pg 8). He testified that the medical records showed that the petitioner had a history of degenerative changes in his lumbar spine without any evidence of an acute injury occurring on August 21, 2009 based upon his imaging studies. He noted that Dr. Stec's records failed to report any acute injury to the lumbar spine and it was not until April 23, 2010 that a physical therapy note indicated that the petitioner's back pain began on August 1, 2009 after pushing a big boat. Dr. Bauer noted the two prior significant auto accidents on December 4, 2003 and December 28, 2006 which allowed identification of the degenerative changes in his spine. He further noted that the petitioner was a tobacco smoker, which leads to premature degeneration of discs, both in the cervical and lumbar spine (RE 8, pg 9).

Dr. Bauer testified that the MRI that was taken on September 25, 2009 showed degenerative changes and bilateral pars defects which are fractures generally that occur in teenage years, but are not the result of any adult type injury and not related to an acute injury of the spine. He felt that Mr. Filipkowski had degenerative changes, including spondylolisthesis related to the pars defect with no evidence of an acute injury as a result of an episode on August 21, 2009 (RE 8, pg 10).

Dr. Bauer also testified that he reviewed the boxer and stacker job descriptions with photographs depicting how the petitioner's job was performed. He testified that it did not seem

that any job would require any significant lifting or bending to stress one's spine. He felt that Mr. Filipkowski had degenerative changes in his lumbar spine with degenerative disc disease at L4-5 and facet degenerative changes, but all the changes were degenerative in nature that were also identified on the x-rays taken on September 1, 2009. He further noted that x-rays of the cervical spine from December of 2006 showed instability and degenerative changes which were also demonstrated on the CT scan of December 27, 2006, but no acute injury to a cervical spine (RE 8, pg 12). Dr. Bauer felt that the records from 2004, 2005 and 2006 with respect to his spine showed the petitioner had degenerative changes which he felt would continue to go forward and probably get worse over time. He felt that those degenerative changes were consistent with the MRI from September of 2009, but that the condition was not in any way caused or aggravated by the work activity that the petitioner performed (RE 8, pg 13). Dr. Bauer testified that there was no evidence of any nerve root entrapment ever identified on any of the imaging studies, so he was unable to explain the physical finding of a positive straight leg raise which is generally related to nerve root entrapment in a herniated disc. He further noted that the examination right at the time of the event showed decreased muscle bulk in the left thigh and leg and moderate weakness of the leg, but that no cause was explained. He noted that Dr. Stec made a diagnosis of cervicalgia of unknown etiology and didn't specify the cause. He agreed with Dr. Stec that there was no explanation for the sciatic pain that was being reported, which is a subjective complaint (RE 8, pg 14-15). Dr. Bauer testified that it would be a little bit peculiar for a neurologist not to insist on a patient seeing a spine specialist when the pain continues over a period of a couple years (RE 8, pg 16) or that he would not prescribe injections (RE 8, pg 17). Dr. Bauer further testified that it is his opinion, regardless of the treatment that was rendered, that the back condition had nothing to do with the petitioner's work or that he needed any additional care as a

result of any event of August 21, 2009 or any repetitive trauma arising out of the work (RE 8, pg 19). He further did not feel that there was any need to consider any work restrictions, that the petitioner was as capable of working after August 21st as he was before August 21st (RE 8, pg 20).

On cross-examination the doctor testified that his review of the job descriptions would place it in the light to medium level work and it would not be considered heavy work. We believe that the heaviest glass would not be more than 10 to 20 pounds maximum (RE 8, pg 21). Dr. Bauer testified that the two most important factors that cause a degenerative spine are genetics and smoking (RE 8, pg 23-25). Further on cross, Dr. Bauer testified that the largest number of patients that he sees with degenerative spondylitic spondylolisthesis are female, which is more common than in men. Dr. Bauer testified that the degenerative changes in the lumbar spine related to the degenerative disc disease and the bilateral pars defects at L5 could explain this chronic back pain (RE 8, pg 22). Prior x-rays showing degenerative changes in the thoracic spine would be consistent with Mr. Filipkowski's diffuse degenerative changes in the cervical, thoracic and lumbar areas (RE 8, pg 30). The doctor further discussed the reference he saw in April of 2010. The petitioner was moving a big boat on August 1st when he first felt back pain. He testified that that was one issue, but also that the imaging studies failed to show any acute injury occurring on August 21, 2009 (RE 8, pg 33-34). Dr. Bauer felt that Dr. Stec's diagnoses were more Mr. Filipkowski's subjective complaints, such as low back pain and neck pain of unknown etiology. He also noted the conclusion of sciatica of unknown etiology by Dr. Stec, but did not necessarily agree with that diagnosis. Dr. Bauer further described spondylolisthesis as a stress fracture through the pars which almost always occurs in teenage years (RE 8, pg 38).

Dr. Bauer felt that the treating doctor, Dr. Stec, had improperly diagnosed degenerative spondylolisthesis which was not evident from Mr. Filipkowski. Instead he had spondylitic spondylolisthesis and there was no evidence for a disc herniation. There was facet joint degenerative osteoarthritis, but not severe, and he wasn't sure to what Dr. Stec was referring when he diagnosed mechanical abnormalities (RE 8, pg. 41). It was not possible that the slip at the L5 area was related to anything that happened on August 21st. Dr. Bauer testified that there was less than a grade 1 slip, so it was very minimal, and with the underlying pars fractures which could not have happened on August 21st, people can and do have slips. When questioned about whether or not heavy duty work would have an impact on the petitioner's condition, Dr. Bauer testified that work may have an effect, but to what extent he could not determine (RE 8, pg 45). The evidence shows that the petitioner only had to lift up to 12 pounds in this case and would not be considered a heavy job.

Dr. Bauer testified that there could be several levels of treatment other than surgery, including physical therapy, which was tried and failed, possible epidural injections and possible facet injections and then possibly surgery. Because there were too many steps not taken in this case, it is impossible to determine if there should be a recommendation for surgery (RE 8, pg 49). Dr. Bauer testified that the injections were basically safe and some are therapeutic and some are diagnostic (RE 8, pg 51).

The petitioner submitted the medical records of Dr. Augustyn Stec. The submitted medical records began on August 22, 2009 and indicated that the petitioner gave a history of doing heavy lifting and other activities on the job involving strains of the cervical and lumbar spine. He reported noting an increase in his low back pain after work and also recently nagging and aching in the cervical spine, radiating to both of his shoulders and his low back pain

radiating to both extremities, especially on the left. It indicated that for the last week the patient could barely work and by today he could barely walk because of low back pain. Already at that time the examination showed that the muscle bulk on the left thigh and leg had decreased. He had moderate weakness in his left lower extremity. The diagnosis was cervicalgia with etiology to be determined and low back pain syndrome with sciatica, etiology to be determined. There was no mention in the record of any specific work event and in fact, the medical records are inconsistent with a reported event of the day before (PE 1).

When the petitioner next saw Dr. Stec on September 8, 2009, Dr. Stec noted specifically "no history of recent low back injury." He further indicated that the low back pain was getting worse gradually and became very severe, interfering with ambulation and living daily activities. Dr. Stec noted multiple problems that the petitioner had and noted that the lumbar spine x-rays showed sacralization of the L5 vertebrae and degenerative changes of the discs and bones and an MRI was requested. An addendum on September 18th to that note further noted left shoulder and elbow pain and both left and right knee problems that compromised his walking and functional capacity. When he saw the patient on September 22, 2009, Dr. Stec noted diffuse arthritis and multiple joint pain. He noted that there was "not herniated acute disc which could be treated surgically" with respect to his low back. He noted that there was a complex etiology for the low back pain, including mechanical low back pain of multiple factors, degenerative disc disease and lumbar spine spondylosis with foraminal narrowing. The petitioner continued to follow up for multiple problems with Dr. Stec, including his low back, and on November 20, 2009, Dr. Stec noted that the petitioner could be evaluated by a low back surgeon if he would consider low back surgery, but the patient would not consider such an option.

When Dr. Stec saw the petitioner on December 10, 2009, the petitioner reported an increase in his low back pain without any apparent precipitating factor and was reporting unremitting low back pain. Now Dr. Stec was diagnosing spondylolisthesis, disc herniation, facet joint degenerative osteoarthritis and other mechanical abnormalities of the spine. He felt the petitioner was unable to do any labor type job and he was likely to go on a disability pension. When he was seen on December 28, 2009, the petitioner reported increased pain when turning at home. Dr. Stec felt the petitioner needed low back surgery for the lumbar spondylolisthesis and disc problems, but the petitioner was against surgery. When seen on January 12, 2010, the petitioner reported to Dr. Stec that he was against any surgical treatment or epidural steroid injections despite reporting pain most of the time. Dr. Stec felt the petitioner was incapacitated to work and the prognosis was poor. He specifically noted that the petitioner wouldn't even go for treatment at the pain clinic and so his chances for improvement were nil. The petitioner reported being afraid of surgery, epidural steroid injections or other pain clinic procedures for pain treatment.

The petitioner continued to treat with Dr. Stec throughout 2010. On August 26, 2010 the assessment from Dr. Stec was that the petitioner continued to have frequent low back exacerbations though he was not working. It noted that the petitioner was on a disability pension at the time and was still afraid of low back surgery. When he saw Dr. Stec on October 12th, Dr. Stec noted the petitioner continued to smoke and that was not good for the intervertebral discs. He was advised to quit smoking and prescribed Chantix. Dr. Stec saw the patient on November 12th and the assessment was chronic low back pain due to mechanical abnormalities, including slippage of one vertebrae in relation to another, causing spine joint stretching and nerve root stretching and pinching of nerve roots in the spine in the areas of the intervertebral foramina. He

noted that surgery would be extensive to stabilize the spine but could not guarantee freedom from pain and the patient has decided to not undergo surgery.

The records reflect that Dr. Stec last saw the patient on December 30, 2010 with increased pain with the cold weather. At this time the doctor indicated that the petitioner had chronic low back syndrome caused by his injury on the job, but does not indicate what that injury was. It was the first mention in any of Dr. Stec's medical records that the low back pain was related to a job injury.

The petitioner also submitted the records of St. Mary of Nazareth Hospital with the x-ray and MRI reports. The MRI was read to reveal a sacralization of L5 and bilateral pars defects at the L5 level with mild retrolisthesis of L4 on L5 with disc bulging and spurring and bilateral facet degenerative changes (PE 2). The petitioner also submitted the physical therapy records at Novacare (PE 3), the St. John Heart Clinic (PE 4) and Resurrection Healthcare (PE 5).

The respondent submitted the physical requirements and work instructions for the boxer stacker position and cut down boxer stacker positions, noting the physical requirements of the job (RE 1-4). The attendance records of the petitioner were also submitted which showed the petitioner was re-called on March 9, 2009 and worked from three to five days a week through August 21, 2009. Many weeks the petitioner did not work a full 40 hours and some weeks he did not work at all.

The respondent further submitted the medical records of Accelerated Rehab. It noted that the petitioner had a motor vehicle accident one month prior to the initial evaluation of December 4, 2003. He reported hurting his back which had increased pain with sitting and the pain was on the left. The petitioner was seen four times and was still reporting pain at 8 out of 10 in his back and both legs, but the records indicate no further care after December 16, 2003 (RE 9).

Respondent further submitted the medical records of Northwestern Memorial Hospital which noted that petitioner was involved in a motor vehicle accident with heavy front end damage and he was unrestrained with an unknown loss of consciousness on December 26, 2006. CT scans of the head, chest, abdomen and pelvis were requested and he was admitted for observation. The CT scans were negative and the petitioner was discharged the following day (RE 11). The admitted, subpoenaed medical records of State Farm Insurance Company for the automobile accident of December 26, 2006 noted that the petitioner saw Dr. Stec seven times during 2007 for cervical and low back pain arising out of the December 26, 2006 accident (RE 12, pg. 103-109).

The medical records of Union Health Services submitted by the respondent show that the petitioner had treated for low back pain and osteoarthritis on August 18, 2005, April 11, 2006 and August 15, 2006 (RE 10). The submitted medical records of Resurrection Healthcare note that petitioner did undergo surgery for his heart, including a right and left catheterization on November 25, 2009 (RE 13).

Conclusions

With respect to Issue D - Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the arbitrator finds as follows:

The arbitrator finds persuasive the contemporaneous medical records from Dr. Stec that there was no work injury on August 21, 2009. Dr. Stec's note of August 22 refers to increasing pain over a week and failed to mention any specific event. Although the petitioner reported heavy lifting at work to Dr. Stec, the only evidence of what was required was that he had to lift up to 12 pounds. Dr. Bauer classified the petitioner's work as light to medium and no evidence

was submitted that Dr. Stec knew what job the petitioner performed. On September 9, Dr. Stec specifically indicates that there was "no history of recent low back injury."

Although the petitioner testified he was pushing a "boat" on August 21 and had unbearable pain, he did not report that to any one at work or to Dr. Stec. He admitted he had been trained to report any injury no matter how minor on numerous occasions. He claimed the injury was near the end of the day and the supervisor wasn't around and that is why he didn't report it. Evidence showed, however, the petitioner knew how to use the pager system and had been trained on it. His testimony that he rarely used it is not credible given his own admission he would use it to call the "jeep" to come get the material when his pallets were full. Given the petitioner's testimony that the pain was unbearable, it is not credible that he would ignore work rules regarding reporting of the injury and fail to report the injury to anyone including his own doctor. Mr. Kozak and Mr. Fairchild both agreed that the petitioner never said anything to them about his back condition being related to work.

The arbitrator further finds that the evidence shows the petitioner's work was light. The most he had to lift was 12 pounds. The unrebutted testimony is that a boxer stacker would have no reason to try to move a pallet. The petitioner admitted he would call a forklift operator on the pager system when the pallet had to be switched out because it was full. The arbitrator finds persuasive the unrebutted testimony of Mr. Fairchild that the boxer stackers would not be moving pallets. The lift tables were adjustable so little bending was required of the boxer stacker. The petitioner's description to Dr. Stec of heavy lifting at work over the prior week is not supported by the evidence of what the work required.

The arbitrator also notes the evidence supports a finding that the petitioner knew he was to be laid off prior to him seeing his doctor about a back problem. Although the petitioner

testified he wasn't sure if he knew it or not, the testimony of both Mr. Kozak and Mr. Fairchild was clear that the employees were aware that they were being laid off prior to the petitioner last working there.

The arbitrator finds persuasive the testimony of Dr. Bauer who had the opportunity to review the job descriptions and work instructions of the petitioner's job. Dr. Bauer is a Board Certified Neurosurgeon who specializes only in back treatment. Dr. Bauer noted the petitioner had a degenerative condition that was not aggravated or accelerated by work. There was no disk herniation nor compressive pathology to indicate an acute injury. The petitioner provided no causal opinion from any doctor that his degenerative condition was caused or aggravated by work. The petitioner's only medical evidence that work had anything to do with his back condition was the last office note of Dr. Stec more than a year after the alleged event that said the petitioner's back problem was related to his work injury. Dr. Stec did not say what that work injury was and this statement is inconsistent with Dr. Stec's earlier notes specifically stating that there was no history of recent back injury.

Based on all the evidence, the arbitrator finds that the petitioner failed to meet his burden to show any accident happened or work or that his condition was caused or aggravated by any work activity.

With respect to Issue F - Is Petitioner's current condition of ill-being causally related to the injury, the arbitrator finds the following:

The arbitrator herby incorporates his findings with respect to Issue D above. The arbitrator finds that the petitioner failed to meet his burden of proof to show that his current condition of ill-being and disability are causally connected to his employment. The contemporaneous medical records specifically deny any recent event. Dr. Stec diagnosed a

degenerative condition and when he reviewed the MRI admitted that there was no herniation found. He stated that the low back pain and sciatica was of unknown etiology. The petitioner had a number of other health problems including both knees, his left shoulder and elbow and cervical spine as well as medical problems such as cardiac issues and abdominal issues. Dr. Stec specifically diagnosed arthritis in multiple joints. He never provided a causation opinion that the petitioner's degenerative condition was caused or aggravated by his work or that Dr. Stec even knew what type of work the petitioner performed other than the petitioner stating he does a lot of heavy lifting. As noted previously, the evidence does not support that statement. The petitioner's belief that his back problems were related to work are suspect when considered with petitioner's belief also that his left elbow and shoulder problem were related to his low back condition.

Although the petitioner denied any prior back problems, the submitted medical evidence does not support that testimony. The records from Accelerated show the petitioner treated there for lumbar pain in 2003 following a car accident. The petitioner was still reporting pain at the level of 8 out of 10 when he stopped treating. The Union Health Services records show the petitioner had back complaints in August of 2005 and April and August of 2006 and was diagnosed with osteoarthritis. The medical records of Northwestern Hospital show the petitioner was treated following a car accident in December of 2006 and the vehicle was noted to have extensive front end damage. The petitioner's denial that that involved any low back issues was inconsistent with the treatment of Dr. Stec in 2007 found within the subpoena response from State Farm for the claim arising out of that 2006 car accident. The petitioner's testimony concerning his lack of prior back problems is not credible. The records show a consistent history of low back problems for 6 years prior to the alleged event at work which is consistent with a developing degenerative condition as Dr. Bauer noted.

The arbitrator again finds persuasive the medical opinions of Dr. Bauer. Dr. Bauer was the only medical professional that knew the petitioner's work requirements and had the opportunity to see in detail what was required of the petitioner with review of the work instructions provided as part of the Section 12 exam. Dr. Bauer agreed with Dr. Stec's initial diagnosis that there was no evidence of disc herniation. Dr. Bauer further explained the petitioner's degenerative condition was progressive and this is consistent with the petitioner's report that his condition continued to have flare ups and did not improve long after the petitioner stopped working as reflected in Dr. Stec's treatment notes.

The arbitrator further notes that the petitioner's refusal of basically all forms of medical care offered to him other than a short course of physical therapy is inconsistent with his testimony that his back pain is unbearable and prevents him from returning to his prior occupation. Although the petitioner is not required to undergo specific medical care, his refusal of such care is relevant to the extent of the symptoms actually experienced by the petitioner. In this case, the petitioner testified he was afraid of surgery but he also refused to be even seen by a spine specialist. He refused injections that both the treating doctor and examining doctor felt could provide relief and he even refused a referral to a pain specialist, all while reporting he is in severe pain and unable to work. The arbitrator further finds it significant that the petitioner was approved for Social Security disability in early 2011 and the submitted medical evidence shows the last appointment with Dr. Stec was just before that, in December of 2010. The petitioner offered no medical evidence of any care for the last almost four years.

Based on the evidence, the petitioner failed to show that his condition of ill-being was causally related to his work.

With respect to Issue 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? – the arbitrator finds the following:

The arbitrator hereby incorporates his findings with respect to Issues C and F above as if more fully set out herein. The arbitrator notes that the petitioner's medical bills were paid by his group health insurance and the parties agree that there are no outstanding balances and no medical to be awarded.

With respect to Issue K - What temporary benefits are in dispute – the arbitrator finds as follows:

The arbitrator hereby incorporates his findings with respect to Issues C, F and J above as if more fully set out herein. The arbitrator notes the petitioner has failed to show an accident has occurred. The petitioner further failed to show his current condition of ill-being is causally connected to his work. As such, the arbitrator finds the petitioner is not entitled to any temporary benefits.

With respect to Issue L - What is the nature and extent of the injury – the arbitrator finds as follows:

The arbitrator hereby incorporates his findings with respect to Issues C, F, J and K above as if more fully set out herein. The arbitrator notes the petitioner has failed to show an accident has occurred. The petitioner further failed to show his current condition of ill-being is causally connected to his work. As such, the arbitrator finds the petitioner is not entitled to any permanent disability.

Arbitrator Kurt Carlson

09-15-14
Date

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	)	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
	SS.		
COUNTY OF WILL	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Glas,
Petitioner,

vs. NO: 11 WC 38157

Harrah's Casino,
Respondent.

16IWCC0056

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 6, 2015 is hereby affirmed and adopted.

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.

DATED: JAN 22 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-01/20/16
drd/wj
68

[redacted]

[redacted]

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GLAS, RICHARD
Employee/Petitioner

Case# **11WC038157**

16IWCC0058

HARRAH'S CASINO
Employer/Respondent

On 2/6/2015, 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 0.06% 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:

5511 DeCARLO LAW GROUP
ANITA DeCARLO
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

1139 NOBLE & ASSOCIATES
LIS BARBIERI
387 SHUMAN BLVD SUITE 210-E
NAPERVILLE, IL 60563

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Richard Glas
Employee/Petitioner

v.

Harrah's Casino
Employer/Respondent

Case # **11** WC **38157**

Consolidated cases: _____

16IWCC0056

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **January 16, 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 **July 18, 2011**, 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 not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**35,770.80**; the average weekly wage was $**687.90**.

On the date of accident, Petitioner was **65** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proof regarding the issue of accident. Therefore, all benefits are denied.

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

2/5/15
Date

FEB 6 - 2015

16IWCC0056

FINDINGS OF FACT

Petitioner testified on July 18, 2011 he was working as a Security Guard, checking hand stamps at the entry and exit way of the casino floor. Early in his shift, petitioner testified he pivoted his body to the right and noticed a sharp burning feeling onto his right knee.

On July 19, 2011, Petitioner reported the incident to his supervisor, Dickson Amoah. The incident was documented on the same date by Mr. Amoah. (RX-2). The Security Department incident report is dated on the date Petitioner testified he made the report to Mr. Amoah. The report indicates they incident took place at 1345 hours. (RX-1)

On July 20, 2011 Petitioner initially treated at Physicians Immediate Care for right knee pain that began two days prior. Petitioner stated that he went to pivot off his right foot but his right foot remained planted causing sharp pain in the medial aspect of his knee. On examination, Petitioner demonstrated good range of motion however with some pain at full flexion and more localized to the medial aspect of the right knee with aggravation upon lateral stress. The results of diagnostic testing of the right knee returned within normal limits. Petitioner was diagnosed with a right knee sprain/strain and given a knee sleeve, and allowed to return to work full duty without restrictions. (PX-1)

On July 29, 2011 Petitioner presented to Joliet Open MRI for an MRI of the right knee which revealed a strain or partial tear of the anterior cruciate ligament with an acute sprain of the tibial and fibular collateral ligaments. Degenerative changes of the posterior horn of the medial meniscus with chondromalacia of the medial joint space and patella along with patella tendinitis and tendinitis about the iliotibial band. (PX-1)

On August 18, 2011 Petitioner presented to Hinsdale Orthopaedics, and evaluated by Dr. Anuj Puppala, who administered a steroid injection to the right knee. Dr. Puppala recommended a right knee arthroscopy medial menisectomy and chondroplasty surgical procedure to repair Petitioner's right knee medial meniscal tear. (PX-2) Petitioner continued to treat at Hinsdale until August 31, 2012. (PX-2).

On September 7, 2011 Petitioner presented to M & M Orthopaedics for an Independent Medical Evaluation with Dr. Timothy C. Payne. (RX-2) Dr. Payne examined petitioner, reviewed the surveillance video (RX-3) and reviewed petitioner's medical treatment and care. Dr. Payne opined petitioner's ongoing pain complaints as consistent with a degenerative meniscal tear of the right knee. Dr. Payne opined Petitioner's condition is due to his degenerative condition that has developed over time and not from him standing and working the turnstile as security. (RX-2)

Petitioner corroborated the video surveillance provided by Respondent and shown during trial was of him working at his assigned location on the date of the alleged incident. Respondent's video surveillance was taken during the time listed on the incident report filed by Mr. Amoah. (RX-1) (RX-3). Petitioner testified he reported the alleged accident the day after it happened to his supervisor, Mr. Amoah. An incident report was drafted with the details of the accident, including when the accident was alleged to have taken place at approximately 1345 hours. (RX-1) Petitioner testified to all material aspects of the report including the exact wording used in the report to describe the accident. The only portion of the report that was refuted by Petitioner was the time of the accident. Petitioner testified he couldn't remember the time when the accident happened, only that it took place early in his shift prior to his dinner break around 5pm.

16IWCC0056

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner failed to meet his burden of proof. In support of this finding, the Arbitrator relies on the testimony at trial as well as the investigative material admitted into evidence. First, the Arbitrator notes that the Petitioner's description of his accident in which he was in the act of pivoting his body to the right, is not in and of itself an accident. Petitioner was at not at an increased risk any greater than that of the general public when he pivoted his body. There was no evidence of any defect in the floor or carpet when the accident allegedly occurred. There was no evidence of any trauma to the Petitioner's leg. There was no evidence that the Petitioner was running or walking, nor was the Petitioner carrying anything or wearing special clothing or gear that could have contributed to the incident. Basically, the Petitioner was standing in one position and moved his leg to the right when he claims to have sustained an injury. Secondly, the Petitioner testified he reported the alleged accident the day after it happened to his supervisor, Mr. Amoah. An incident report was drafted with the details of the accident, including when the accident was alleged to have taken place at approximately 1345 hours. (RX-1) Petitioner testified to all material aspects of the report including the exact wording used in the report to describe the accident. However, in reviewing the video surveillance of the Petitioner performing his duties on and around the time in question, there does not appear to be anything to even suggest that an accident occurred in the video. Petitioner's testimony at trial that he cannot remember at what time the accident occurred, but is able to recall the other details of his initial accident report ultimately belies the credibility of Petitioner's claim. As such, the Arbitrator concludes that the Petitioner failed to prove that he sustained an accident arising out of and in the course of his employment with Respondent on July 8, 2011.

2. Based on the Arbitrator's findings with regard to the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Moore,

Petitioner,

vs. NO: 11 WC 39031

16IWCC0065

Brookwood School District #167,

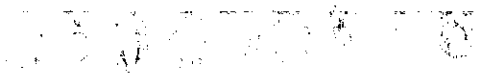
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and permanent disability benefits, hereby reverses the Arbitrator's Decision and finds that Petitioner sustained accidental injuries arising out of and the course of his employment on July 18. 2011, Respondent is liable for medical expenses incurred in the treatment of such accident, and that as a result of the accident Petitioner has suffered a 20% loss of use of the right leg under Section 8(e)12 of the Act.

After a complete review of the evidence, the Commission finds that Petitioner suffered a compensable work accident on July 18, 2011. The Commission finds the Arbitrator's finding that Petitioner exposed himself to a risk outside his reasonable duties by moving a cabinet he was instructed not to move, therefore removing himself from the sphere of his employment, unsupported by the evidence.

The Commission notes that Petitioner was not violating a safety rule or performing personal activities that took him out of the sphere of his employment. Petitioner was injured moving furniture in a classroom. The record clearly indicates that Petitioner had been tasked with moving the furniture in classrooms throughout the school so that the carpets could be cleaned. However, the Commission finds that even accepting that Petitioner had been told not to move any file cabinets, doing so was for Respondent's benefit, not Petitioner's.



The Commission notes that the Arbitrator relied on *Sekora v. Industrial Commission*, 198 Ill.App.3d 584 (1990), in which the claimant had been moving vehicles into a garage for Respondent when he crashed and suffered an injury. The court found that claimant's behavior fell under horseplay since he had taken the vehicle to a field next to the dealership instead of directly to the garage. Furthermore, the employer had told its employees to walk, not ride, the vehicles into the garage. Claimant, however, denied any knowledge of such an instruction.

The Commission finds the case at bar distinguishable from *Sekora*. In the case before us, Petitioner's behavior did not constitute horseplay. As previously noted, moving the cabinet was solely for Respondent's benefit and fell within his job duties, which was to move the furniture in the classroom. The Arbitrator also found the rule in *Saunders v. Industrial Commission,* 189 Ill.2d 623, 631 (2000), applicable in this case. In *Saunders*, the court denied claimant's claim, finding that while claimant's job "included the operation and use of forklifts" he was to use the forklift "by himself, to move machine parts from one part of the plant to another" and not for "hitching a ride to the break room" which was what he was doing when he was injured.

The Commission notes that, as in *Sekora*, the claimant in *Saunders* acted in a way that constitutes horseplay and that was for his benefit and not for the benefit of the employer. The claimants in *Sekora* and *Saunders* suffered injuries as a result of activity prohibited by their employers **and** conducted solely as a personal convenience. In the case at bar, Petitioner may have performed an activity which Respondent had not asked him to perform, but it is clear that his activity was for the sole benefit of Respondent and in no way for Petitioner's benefit or convenience, distinguishing it from *Sekora* and *Saunders*.

The Commission also notes that Anita Lee and Janice Washington, Petitioner's co-workers and fellow custodians, testified that the custodians had been instructed not to move any heavy furniture such as cabinets and bookshelves. (T.101-102,120) Yet, the Commission notes, a dolly was made available to the custodians for moving items. When questioned about the dolly, Charles Anderson, Petitioner's supervisor, testified that it was used to move items that could not be carried. (T.152-153) Considering, as previously noted, that Ms. Lee and Ms. Washington both testified that they had been told not move anything heavy, providing custodians a dolly to move items is suspect. Additionally, the Commission finds it compelling that both Ms. Lee and Ms. Washington were working in the same classroom as Petitioner and yet they did nothing to dissuade him from moving the cabinets. (T.104,125)

Petitioner's decision to move the cabinet did not remove him from the sphere of his employment. Therefore, based on the totality of the evidence, the Commission reverses the Arbitrator's Decision and finds that Petitioner's accident arose out of and in the course of his employment with Respondent on July 18, 2011. As such, the Commission awards medical expenses in the amount of $4,990.61, the outstanding balance of the medical treatment incurred by Petitioner in the treatment of his injuries from the July 18, 2011 accident, and $115.00 for medical payments made by Petitioner out-of-pocket.

Regarding permanent disability benefits, the Commission notes that Petitioner has returned to work, full duty. Petitioner testified that he performs the same duties he did before the

accident. (T.71-72) Petitioner further testified that he is able to perform his job duties as a custodian without difficulty and does not take any medicine, prescribed or over-the-counter, as a result of his leg injury. (T.69) At the arbitration hearing, Petitioner showed the scar to the Arbitrator and the parties agreed that the scar goes from Petitioner's right ankle to just under his calf. (T.65) The parties also agreed that the scar is about ¼ inch wide and that at the bottom of the scar there appeared to be some scaling and discoloration. (T.65-66) Petitioner also testified that "occasionally there is one part of the scar that will seep blood." (T.67) He explained that he feels "numb pain" in his right inner leg when the area is touched. (T.68) Petitioner further explained that he feels numbness in his right leg, but it is in the "background." (T.68) Petitioner testified that injured area has remained "darkish, mottled pigmentation that never was [there] before the accident." (T.70) Petitioner's description of the injured area and scar is supported by the photos in PX5. Therefore, based on the evidence presented, the Commission finds that Petitioner has suffered a 20% loss of use of the right leg under the Act.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. Furthermore, we have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. Finally, one should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator, filed on March 17, 2015, is reversed as stated above.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay the sum of $4,990.6 in medical expenses and $115.00 for out-of-pocket payments made by Petitioner pursuant to Sections 8(a) & 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $317.77 per week for a period of 43 weeks, as provided in Section 8(e)12 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under Section 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.

16IWCC0065

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.

DATED: JAN 2 8 2016
MJB/ell
o-12/07/15
52

Michael J. Brennan

Thomas J. Tyrrell

Dissent

I respectfully dissent from the decision of the majority. Arbitrator Thompson-Smith's findings are both thorough and well reasoned. This decision is correct and should be affirmed

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOORE, DAVID
Employee/Petitioner

Case# **11WC039031**

16IWCC0065

BROOKWOOD SCHOOL DISTRICT #167
Employer/Respondent

On 3/17/2015, 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 0.14% 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:

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OLYMPIA FIELDS, IL 60461

0507 RUSIN & MACIOROWSKI LTD
JOSEPH P BASILE
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

David Moore
Employee/Petitioner

Case # 11 WC 39031

v.
Brookwood School District # 167
Employer/Respondent

16IWCC0065

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 Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on 2/26/15. 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. ☒ Should Respondent pay out-on-pocket expenses of $115.00 to Petitioner.

16IWCC0065

FINDINGS

On 07-18-11, 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 not sustain an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $27,539.72; the average weekly wage was $529.61.

On the date of accident, Petitioner was 57 years of age, married, with 1 child under 18.

Petitioner has received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $8,371.64 under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment by Respondent, therefore no benefits are awarded, pursuant to 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 of 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.

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) out-of pocket expenses; and 5) the nature and extent of Petitioner's injuries. *See*, AX1.

Mr. David Moore, ("Petitioner") testified that he started working with School District 167 ("Respondent"), in 2006 and became permanently, full-time in December 2006, as a day custodian at the Longwood Elementary School.

Petitioner's testimony and treatment

In general, his duties are to open the building and get it ready for classes. He performs various tasks depending on the time of the year, including but not limited to snow removal and grass cutting. He testified that he performs all necessary indoor and outside maintenance and cleaned lunchrooms, washrooms and other areas of the school. In the summer, he also cleans the building, including desks, chairs, windows and carpeting and waxed tiled floors.

He testified that in July 2011, he was working in the maintenance department with two of the night custodians, Ms. Anita Lee and Ms. Washington. His supervisor was Charles Anderson. He further testified that on July 18, 2011, he was injured while working. He stated that a meeting took place before the accident in June 2011, at the Longwood School. It included the two other custodians, Charles Anderson, Jeff Charleston, the business manager, and Dr. Pamela Hollich, who was the district superintendant at the time. The purpose of the meeting was to go over the work to be done as an outside service had been hired to clean the carpeting in the school, instead of using the custodians. He seemed to recall that Dr. Hollich essentially controlled the meeting.

Petitioner testified that the one instruction he recalled was that the custodians were to stay ahead of the carpet cleaners, i.e., clean a classroom and then move on to the next. The idea was to move the furniture, desks and other items to one side of the room so there was an carpet area open, which could be cleaned. After it was cleaned and dry, the furniture would be moved to the opposite side of the room, to open up the other half of the carpet.

Petitioner specifically denied being told not to move the file cabinets or heavy, weighted items. He estimated there were over 20 rooms in the school. Most of them were carpeted and he believed that all of the carpeting was to be cleaned. He testified that he was moving file cabinets having two or four drawers, before the accident occurred.

16IWCC0065

He testified the accident occurred in Room 106, while he was working with Ms. Lee and Ms. Washington, cleaning the classroom. He was attempting to move a four-drawer file cabinet with a dolly. In the process, the cabinet tipped and hit his right leg. He testified that he pulled his right leg away and the cabinet fell to the floor.

He noticed that his right leg started to hurt and he rested it on a desk. When he pulled up his pant leg he saw some redness, but it did not appear to be seriously injured. He did not see any bleeding or swelling. He did leave to go to the St. James Occupational Health Center and he testified that he notified his supervisor, Mr. Anderson

He drove to the St. James Clinic (the "clinic"), experiencing a great deal of pain. A doctor looked at his leg and it did not appear to show a great deal of damage. An x-ray was taken and there was no fracture.

He returned to the clinic on July 21, 2011, now noticing a bruise as well as blistering on his skin. He identified various photographs of his leg taken before he had surgery. PX5.

Petitioner testified that there was bruising, blistering and bleeding in the leg. When he would take a shower, it would appear that the skin would open. He had difficulty walking and was not able to work.

He eventually came under the care of Dr. Aribindi, who recommended surgery to debride the wound. Petitioner agreed that he had approximately thirteen (13) visits with Dr. Aribindi and surgery was performed on September 7, 2011. He testified he had no new injury to the leg between the date of the accident and the date of the operation. He thought the surgery was to open the leg wound and debride it.

Dr. Aribindi did perform a debridement procedure of the right leg with packing of the wound. The doctor's post-operative diagnosis was status post crush injury to right leg with infected right leg wound, with persistent drainage. Petitioner identified additional photographs of his leg taken after the surgery. PX1 & 5.

He returned to work in November 2011. He thought it was full-time and could not recall working part-time. He remembered being told to do what he could tolerate.

Petitioner identified his Exhibit 3, is a bill from St. James Hospital and Health Center showing a balance of $4,574.61 for services on July 18 and July 21, 2011. He also identified his Exhibit 4, which is a bill from Southland Orthopedics showing that he paid $115.00 out-of-pocket and has a balance of $416.00 for services from July 22, 2011 through January 17, 2012.

The Arbitrator then examined a scar on his leg, approximately ¼" wide and discolored, which extends from the calf to the ankle.

He testified that on occasion the scar tissue would seep blood and that there were no particular activities that caused this action. He described feeling a numb sensation and pain to light touch. The scar has no affect on his ability to walk or work and he is not taking any medication for pain. When the bleeding occurs, he applies a bandage. In addition, the pigmentation of his skin is dark in the area of the wound.

Upon cross-examination, Petitioner testified that he will be 62 years old in August of this year and that he continues working at Brookwood as a custodian, performing all of his regular duties. He could not recall the date he returned to work full-time, but agreed it was some time in November 2011. The actual date was November 23, 2011, according to Respondent's Exhibit 1. Petitioner testified that he was not under any restrictions from doctors because of the injury and that he is not taking any prescription medication. Also, he has no current doctor's appointment because of the condition of his leg.

Although he could not recall, Dr. Aribindi allowed him to return to work at a four-hour a day shift, on November 7, 2011. He agreed that once he returned to work as a custodian, he has continued work in a full duty capacity. RX1.

He could not recall Dr. Aribindi telling him that his injury was well healed at the final appointment, on January 7, 2012. He admitted that at that point he was performing his regular work duties and the doctor had discharged him from care, with no limit on activity. He agreed the doctor told him to come back, if necessary and he has not had the need to do so.

Finally, Petitioner testified that he recalled the meeting that was held before the work began in July 2011 but could no remember an instruction that file cabinets or heavy items were not to be moved.

Testimony of Respondent's first witness

The respondent called Ms. Anita Lee. She is employed with the School District and has worked there for eighteen (18) years as a night custodian. She briefly described the duties of a night custodian.

She testified that in the summer of 2011 she was working at the Longwood School along with Mr. Moore and Ms. Spearman-Washington.

She remembered the incident, but could not recall the date or the classroom. She was working with Mr. Moore and Ms. Spearman-Washington and Mr. Charles Anderson was their supervisor.

She testified that there was a meeting that took place before this work began, in which they were instructed as to how they were to perform the work. She did not think Ms. Pamela Hollich was there and Mr. Anderson was in charge of the meeting. They were instructed to move desks, tables, chairs and teacher's desks and things that were light. These items were to be moved to one side of the room, so the carpet cleaning company could clean half of the room. After the carpet was cleaned and dried, they would move the items to the other side of the room so the other half of the carpet could be cleaned. They were not supposed to move heavy furniture or any of the file cabinets.

Ms. Lee did not actually see the accident as she testified that Ms. Spearman-Washington motioned to her, while Mr. Moore was attempting to put the cabinet on the dolly. She testified that she went back to doing what she was doing, when she heard a loud noise and a scream; and realized that the file cabinet had fallen and struck Mr. Moore's leg.

She stated that Mr. Moore hopped on one foot, to an area and put his leg up. She testified that she gave him her cell phone after she dialed Mr. Anderson. Mr. Moore eventually left to go to the hospital and did not return to work that day. She testified that he had been off work for a period and then returned working as a custodian. She testified she has never spoken to him about this case.

On cross-examination, she testified that she could not recall which room they were in or whether it was on the east or west side of the building. She also did not remember the number of rooms they had cleaned on the day of the occurrence. She admitted that it was possible that Mr. Moore had worked in another classroom while she and Ms. Spearman-Washington were working in a separate room.

Testimony of Respondent's second witness

Respondent called Ms. Janice Spearman-Washington and she testified that she has worked as a night custodian for the school for nine years. She also gave a brief description of her job duties, stating that she also works, during the day, in the summer. She recalled working with Mr. Moore and Ms. Lee on the day Petitioner was hurt and testified that the work being done was moving items in the classrooms so that the carpets could be cleaned.

Mr. Anderson was also her supervisor and she recalled a meeting that took place in June to talk about the work that would be done in the Longwood school. Mr. Moore and Ms.

Lee attended and there were discussions on what was to be moved and what was not to be moved. She testified that they were told that file cabinets were not supposed to be moved.
At the time of the accident, she saw Mr. Moore attempting to move a file cabinet and she called Ms. Lee's attention to it. He was moving a dolly under the file cabinet and in the process, she saw the file cabinet fall and strike Mr. Moore's leg.

She could not remember if she found an ice pack for Mr. Moore but thinks she did and she agreed that he left the school and was off work for some time. She also testified that after he returned to work, she did not talked to him about the accident.

Upon cross-examination, Ms. Spearman-Washington testified she could not remember what classroom they were in but that Ms. Lee told Petitioner "David you are not supposed to be moving the file cabinets." She could not recall Mr. Moore's response. She also testified that there were no stickers placed on items that were not to be moved.

Testimony of Respondent's third witness
The respondent called Mr. Charles Anderson as a witness and he testified that he was the director of buildings and grounds for the Brookwood School District until December 2014, when he retired. He had worked for the district thirty-nine and one-half (39-1/2) years and he briefly described his duties, which included supervising the custodians.

He testified that he is familiar with Mr. Moore, Ms. Lee and Ms. Spearman-Washington. In the summer of 2011 after summer school ended, they needed to have the Longwood School building cleaned. That year, summer school went longer than usual and as a result, they contracted out the carpet cleaning. Ordinarily, the custodians would clean the carpet.
Prior to the work beginning, there was a meeting that took place at the school where they went over what needed to be done and how to go about doing it. Mr. Anderson testified that he instructed the custodians to move the furniture and items that were in the traffic area so that the carpet could be cleaned. Heavy items, such as the file cabinets, which were in corners, not in the traffic area, were not to be moved. He explained that this decision had been made because the carpet under the file cabinet was not being trafficked by people and the file cabinets were very heavy.

Mr. Anderson met with the custodians, as well as with the shampoo contractor, the day before the work was to begin and again instructed them on how to go about preparing the classroom carpets for cleaning. He instructed them on what to move and what not to move. They were to move the desks, chairs, tables and teachers' desks. They were not supposed to move heavy items or file cabinets.

Mr. Anderson testified that he did not witness the accident because he was in his office. He received a phone call from an employee at the school, but he could not recall from whom, learning of the accident. Later that day Mr. Moore called him and told him that he had gone to the hospital and would not be able to come back to work. He told Mr. Anderson he needed x-rays and Mr. Anderson asked him why he had moved the file cabinet. It is Mr. Anderson's testimony that the Petitioner then stated "that is how I do things". Mr. Moore did eventually return to work as a full-time custodian and Mr. Anderson testified that he has not had any discussions with Mr. Moore about the accident.

Upon cross-examination, Mr. Anderson could not remember if Dr. Hollich attended the meeting and admitted that the custodians did have free access to dollies while doing their work, for the purpose of moving items that cannot be easily carried. He agreed that no stickers were placed on items that were not to be moved and that Mr. Moore was a good employee.

Mr. Moore testified in rebuttal that he could not recall Ms. Lee telling him not to move the file cabinet, nor could he recall instructions that were given telling them not to move file cabinets. His recollection of the instructions was to stay ahead of the carpet cleaners.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?"

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs.*

Industrial Commission, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also, Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Arbitrator finds the petitioner's testimony with respect to the instructions that were given to the custodians was equivocal at best. He initially testified that at no time were the custodians instructed not to move heavy items or file cabinets. He later testified that he was unable to remember an instruction not to move the file cabinets.

Ms. Lee, Ms. Spearman-Washington and Mr. Anderson testified that the custodians were told that the heavy items and file cabinets were not to be moved. Mr. Anderson explained that there was no reason to move the file cabinets because they were not located in areas where there had been foot traffic; therefore, there was no reason to clean the carpeting underneath the file cabinets. In addition, he did not want the file cabinets moved because they were heavy. The Arbitrator finds the testimony of the respondent's witnesses to be credible.

The meeting conducted in June 2011, was for the purpose of informing the custodians how the work was to be done, in order for the cleaning to proceed in an efficient manner. Mr. Anderson instructed the custodians what they were to move and where to move the items. He wanted the areas where carpet had heavy traffic cleaned. Areas where the file cabinets were located did not need to be cleaned since they were not exposed to heavy traffic. Mr. Anderson testified that he repeated the instructions to the custodians the day the work started, which was the day before Mr. Moore's injury.

Based on these facts, the Arbitrator finds that the petitioner exposed himself to a risk outside of his reasonable duties. The Arbitrator relies on the decision in *Sekora v. Industrial Commission*, 198 Ill. App. 3d 584, 556 N.E.2d 285, 144 Ill. Dec. 818 (1990). If an employee voluntarily and in an unexpected manner, exposes himself to a risk outside any reasonable exercise of his duties, a resulting injury will not be within the

scope of his employment, unless the employer had knowledge of or acquiesced in such unreasonable conduct.

In *Sekora* the petitioner, a salesperson for a motor vehicle dealership, was injured while driving an all terrain vehicle. He and other employees were taking the display vehicles that were outside the dealership building, into the garage for the night. Forty or fifty vehicles had been brought in when the petitioner and another worker drove two of the all terrain cycles into a field next to the dealership building and crashed the vehicle. A week earlier, another employee had been injured driving such a vehicle. The petitioner denied any knowledge of instructions given, after the previous accident, that employees were no longer to ride the vehicles, but instead, walk them into the garage at the end of the night.

The employer presented evidence that because of mishaps, the policy concerning riding the vehicles was changed and instructions were given to the employees, to walk the vehicles into the garage. The respondent's service manager testified that the petitioner should not have been doing what he was doing, when he was injured.

The Commission found the employees were not working or trying to gain knowledge of the operation of the vehicles and benefits were denied. The Appellate Court found that any permission previously given did not encompass the activities, which resulted in the petitioner's injuries. The Court concluded the Commission's finding was not against the manifest weight of the evidence.

In the present case, the petitioner voluntarily took it upon himself to attempt to move the file cabinet. There is no evidence that Mr. Anderson was aware that the petitioner was going to engage in such activity and certainly none that demonstrates acquiescence. The petitioner's activity was not something he was required to do, in order to perform the work needed for the carpet vendor to clean.

The Arbitrator distinguishes the decision in *J. S. Masonry v. Industrial Commission,* 369 Ill. App. 3d 591, 861 N.E.2d 202, 308 Ill. Dec. 137 (2006). In that case, the petitioner was injured when he fell off a scaffold. His employer argued that his claim should be denied because he violated a safety rule, in that, he did not fasten the safety gate of the scaffold. The Commission found his case to be compensable.

The Appellate Court upheld the Commission's decision. The opinion analyzed decisions in *Saunders v. Industrial Commission,* 189 Ill. 2d 623, 727 N.E.2d 247, 244 Ill. Dec. 948 (2000) where compensation was denied to an employee was injured while riding as a double passenger in a forklift truck and *Chadwick v. industrial Commission,* 179 Ill.

App. 3d 715. 534 N.E.2d 1000, 128 Ill Dec. 555 (1989), where death benefits were awarded when a pipe fitter fell to death while working as a result of failing to tether himself to a scaffold lifeline.

The Court's opinion addressed the applicability of the rules of each decision. "The rule in *Saunders* is applicable in cases where the employee is acting outside the sphere of his employment when injured and the analysis in *Chadwick* is applicable when an injury is sustained while the employee is engaged in an authorized work activity." 861 N.E.2d at 207.

The Arbitrator finds that the preponderance of the evidence demonstrates that the rule in *Saunders* is applicable to this case. The petitioner had been specifically instructed not to move the file cabinets. His injury was the direct result of him doing so and by attempting to move the file cabinet; he removed himself from the sphere of his employment. He was not engaged in an authorized activity when he was injured.

Petitioner has not proven, by a preponderance of the evidence, that an accident occurred, which arose out of and in the course of his employment by Respondent, therefore, no benefits are awarded, pursuant to the Act.

Based on the finding that the petitioner has not proven an accident arising out of and in the course of his employment by the respondent; all other disputed issues are moot and will not be addressed.

16IWCC0065

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
11WC39031
SIGNATURE PAGE

Signature of Arbitrator

March 17, 2015
Date of Decision

MAR 17 2015

STATE OF ILLINOIS)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WINNEGAGO		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeanette Solis,
Petitioner,

16IWCC0062

vs.

NO: 11 WC 43825

City of Rockford, Illinois, a municipal Corporation, Head Start Program, CETA,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, permanent disability, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 23, 2015, is hereby affirmed and adopted.

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

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

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.

DATED: JAN 26 2016
o1/20/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

[illegible]

[illegible]

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

16IWCC0062

SOLIS, JEANETTE

Employee/Petitioner

Case# 11WC043825

CITY OF ROCKFORD ILLINOIS A MUNICIPAL CORPORATION HEAD START PROGRAM CETA

Employer/Respondent

On 3/23/2015, 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 0.14% 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:

0529 GREG TUITE & ASSOC
GREGORY SZUL
119 N CHURCH ST SUITE 407
ROCKFORD, IL 61101

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
321 W STATE ST PO BOX 1288
ROCKFORD, IL 61105

16IWCC0062

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JEANETTE SOLIS
Employee/Petitioner

v.

CITY OF ROCKFORD, ILLINOIS, a municipal corporation, Head Start Program, CETA
Employer/Respondent

Case # **11** WC **43825**

Consolidated cases: **N/A**

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 **Robert Falcioni**, Arbitrator of the Commission, in the city of **Woodstock**, on **3/06/15**. 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 **9/26/11**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $**29,217.24**; the average weekly wage was $**561.87**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **5** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Denial of Benefits

Petitioner failed to meet her burden of proof that her accident as alleged arose out of and in the course of her employment with Respondent. All other issues are moot.

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

3-17-15
Date

MAR 23 2015

16IWCC0062

ARBITRATION DECISION

ATTACHMENT

Jeanette Solis v. City of Rockford, Illinois, a municipal corporation, Head Start Program, CETA
Case No. 11 WC 43825

In support of the Arbitrator's findings with respect to (C), did an accident occur that arose out of and in the course of Petitioner's employment by Respondent;

The Petitioner is alleging accidental injuries to the left foot on 9/26/11. At arbitration, the Petitioner testified that she was walking kids to a bus when her left foot stepped into a hole. The Petitioner did not testify where this hole was located, and there was no evidence presented showing that this hole was on property either owned or maintained by the employer.

Furthermore, the Arbitrator notes the Petitioner did have a Section 12 evaluation at her own request with Dr. Jeffrey Coe on December 12, 2012. Dr. Coe's testimony was taken in an evidence deposition and was introduced into evidence as Petitioner's Exhibit No. 4. The Petitioner told Dr. Coe that she "misstepped onto a curb." (Petitioner's Exhibit No. 4.) Dr. Coe was unequivocal in his recitation of the history that Petitioner had given him insofar as how the accident alleged herein had occurred.

The Petitioner testified that she had been, before the alleged accident, having bilateral foot problems, including complaints with respect to her left foot. Petitioner happened to be scheduled for a physical therapy visit on the day of the alleged occurrence, 9/26/11. The Petitioner testified that this physical therapy appointment had been scheduled prior to 9/26/11.

Introduced as Petitioner's Exhibit No. 1 are the medical records of the SwedishAmerican Hospital Physical Therapy Department. There was a visit date of 9/26/11. For history of injury, the following is stated:

> Report that she's been receiving treatment for anemia, then slowly noticed some left foot problem. Since, she's been experiencing this for two years, on and off. Received Cortisone 3x since November of 2010, no plans of another injection.

(Petitioner's Exhibit No. 1.)

In another portion on the physical therapy note, it was noted that the Petitioner reported an increase in pain this morning since she "stepped on a curb." (Petitioner's Exhibit No. 1.) Similar to the history that she provided to her own examining physician, Dr. Jeffrey Coe, the Petitioner told the physical therapist that she injured her left foot while stepping on a curb. To the contrary, at arbitration the Petitioner unequivocally testified that she stepped into a hole.

The Arbitrator also notes that when the Petitioner was seen by Dr. Hoffman on 9/27/11, the Petitioner stated that she simply "stepped wrong" on her left foot. There was nothing in the 9/27/11 medical records stating that the Petitioner stepped in a hole or was injured while at work. (Petitioner's Exhibit No. 2.

Based on the record as a whole, the Arbitrator finds that the Petitioner has failed to meet her burden of proof in showing that her accident arose out of and in the course of her employment with Respondent. Due to the conflicting histories of accident given to medical providers and contained in the properly admitted medical records and the deposition testimony of Dr. Coe, Petitioner's examining doctor, it is impossible for the Arbitrator to determine exactly how the accident alleged herein took place. As late as December 12, 2012, over one year after her

accident, Petitioner was giving a history of accident to her examining doctor that was significantly different than that to which she testified but which was consistent with that recorded in the treating medical records immediately after the accident, and which, if correct, without further elucidation, make this case non compensable. Compensation is denied and all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NANCY CARNEVALE,

Petitioner,

vs. NO: 12 WC 01551

EAGLEWOOD RESORT & SPA, **16IWCC0061**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and permanent partial disability, 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

The Commission finds:

1. Petitioner was the Lead Esthetician for Respondent in 2011. She performed facials which included scalp, neck, hand and arm massages. The massaging required constant thumb rotation and pressure, and pushing and pulling of the limbs. She also engaged in constant pumping of bottles, twisting off caps and squeezing out sponges. When she was not working on a client she was washing bowls and utensils. Facials lasted for 30, 60 or 90 minutes, and some came with an additional 30 minute massage. She also used tweezers to remove hair from client's eyebrows. This required pinching of her thumb and forefinger. Petitioner also handwrote orders for supplies and performed data entry. She worked 8 hours a day.

2. Petitioner also performed lavender wraps while in Respondent's employ. This required dry brushing of the body with long smooth strokes and constant turning of the wrist while squeezing a brush. She applied thumb pressure to sweep away dead skin. These wraps took 45 minutes to complete, followed by a 15 minute lotion massage.

3. In July and August of 2011 Respondent was busy with business. During that time Petitioner began noticing soreness in her hands. In August she also developed swelling in her fingers and lumps on the tendon of every finger. The bottom portion of her fingers began turning blue-ish as well. By the end of the month, Petitioner felt pain shooting up her arm when she put her thumb and pointer fingers together on both hands.

4. Petitioner sought treatment from a Chiropractor, who diagnosed her with carpal tunnel syndrome and tenosynovitis.

5. Eventually Respondent hired another Esthetician, and Petitioner was able to use some vacation time. She subsequently began seeing improvement in her shoulder and elbow symptoms.

6. Petitioner's hand symptoms still persisted, and she sought medical care from her doctor.

7. After treating with a rheumatologist, Petitioner underwent cortisone injections with Dr. Tulipan, two in the right wrist and thumb and one in the left.

8. Dr. Tulipan believed the majority of Petitioner's discomfort stemmed from her osteoarthritis. However, he opined that heavy pinching and gripping activities and pressure on a repetitive basis could exacerbate a person's underlying arthritic condition.

9. On December 20, 2011 Petitioner informed Dr. Tulipan that most of her pain had gone away, with the exception of her shoulder and thumb pain. She was released from care in April 2012 and applied for unemployment.

10. Dr. Fernandez performed an Independent Medical Examination (IME) on Petitioner on November 6, 2012. Petitioner presented with complaints of intermittent and occasional numbness and tingling, mostly in her ring and small fingers on the right hand, pain radiating along her forearm muscles anteriorly around the elbow, and pain at the basilar joint of her thumbs, right greater than left, with associated stiffness and weakness.

11. Upon examination Dr. Fernandez noted that Petitioner's subjective complaints were supported by the objective findings. He found swelling at the base of her thumbs, significant pain on palpation of the thumbs, right greater than left, stiffness and crepitus. He diagnosed basilar joint arthritis in subluxation osteophytes and local sclerosis. He described it as a degenerative arthritis or osteoarthritis occurring at the base of the thumb, and that many cases are asymptomatic. He also stated that this condition occurs irrespective of employment.

12. Dr. Fernandez noted that, while Petitioner had previously been diagnosed with

DeQuervain's Tenosynovitis by her Chiropractor, he did not see evidence of this during his own exam.

13. Dr. Fernandez opined that Petitioner's job activities did not cause or aggravate her diagnosis.

14. Dr. Fernandez testified that the basis of his causal connection opinion was that no medical literature supported such a finding. He disagreed with the Mayo Clinic assertion that arthritis can cause severe hand pain, swelling and decreased strength and range of motion, which would make it difficult to perform simple household tasks such as turning door knobs and opening jars. He also disagreed with the Mayo Clinic assertion that placing high stress on the thumb joint is a risk factor for developing thumb arthritis. Dr. Fernandez disagreed with this assertion despite acknowledging that osteoarthritis is the most common arthritis to affect joints at the base of the thumb.

15. Currently Petitioner works for Nordstrom full time, after having been unemployed for over a year. The position she applied for was "Cosmetic Esthetician." She has held this position since February 2013. She performs mini facial massages 2-4 times monthly.

16. Petitioner also performs some of the same duties at Nordstrom as she did with Respondent, but with less frequency. She also does not perform any computer data entry work at Nordstrom.

17. Petitioner stated that her hands are affected by cold and rainy weather, and that increased use affects the osteoarthritis in her thumbs. Her ring and pinky fingers will fall asleep if she bends her arm to talk on the phone for an extended period of time. She has difficulty opening jars and even Ziploc bags at home.

The Commission affirms the Arbitrator's rulings on the issues of accident, causal connection, medical expenses and temporary total disability.

The Commission, however, modifies the Arbitrator's wage differential award down to an award for permanent partial disability. While the Commission finds Dr. Tulipan's causal connection finding persuasive, it also finds that Petitioner has returned to essentially the same career as she had pre-injury. The only difference being that she now performs her duties with less frequency than which she did for Respondent. Thus a wage differential is inappropriate.

Based on the evidence, the Commission finds that Petitioner's injuries necessitate a 10% loss of use of her right hand and a 7.5% loss of use of her left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $555.00 per week for a period of 35.875 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused a 10% loss of use of Petitioner's right hand, and a 7.5% loss of use of her left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

16IWCC0061

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 $75,000.00. 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.

DATED: JAN 25 2016
O: 11/19/15
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CARNEVALE, NANCY
Employee/Petitioner

Case# 12WC001551

16IWCC0061

EAGLEWOOD RESORT & SPA
Employer/Respondent

On 1/5/2015, 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 0.13% 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:

0975 RIFFNER BARBER ROWDEN & SCOTT
SCOTT BARBER
1834 WALDEN OFFICE SQ 5TH FL
SCHAUMBURG, IL 60173

1153 MARTIN, PATRICK W
203 N LASALLE ST
SUITE 2100
CHICAGO, IL 60601

16IWCC0061

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nancy Carnevale
Employee/Petitioner

v.

Eaglewood Resort & Spa
Employer/Respondent

Case # **12** WC **1551**

Consolidated cases: _____

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **April 14, 2014 and June 12, 2014.** 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. [x] 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. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] 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 **8/30/2011**, 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 $**48,100.00**; the average weekly wage was $**925.00**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent is entitled to a credit of $**12,933.93** under Section 8(j) of the Act as a result of short-term disability benefits paid by the Respondent and $**5,052.89,** also under Section 8(j), as a result of medical bills paid by the Respondent through its group medical plan.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $**616.67**/week for **71-2/7** weeks, commencing **10/16/11** through **02/25/13**, as provided in Section 8(b) of the Act.

- Respondent shall pay the charges for the reasonable, necessary and related medical services of $**9,658.00** to Mary Luther, DC, $**984.00** to Elmhurst Clinic, $**1,414.00** to Elmhurst Memorial Hospital, $**559.00** to Quest Diagnostics, $**54.00** to Elmhurst Radiologists, and $**1,304.00** to LabCorp, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

- Respondent shall pay Petitioner wage differential benefits of **$161.97/week from February 26, 2013 through the date Petitioner reaches the age of 67 (12/27/2028), or 5 years from the date the award becomes final, whichever is later,** because the injuries Petitioner sustained caused her to become partially incapacitated from pursuing her usual and customary line of employment and also caused her to sustain an impairment of her earnings, as provided in Section 8(d)1 of the Act, as amended.

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

January 2, 2015
Date

JAN 5 - 2015

In support of the Arbitrator's Decision, the Arbitrator makes the following findings of fact:

This matter came before the Commission for hearing on the Petitioner's Application for Adjustment of Claim alleging repetitive injuries to both of her hands arising out of and in the course of her employment with the Respondent. The parties were represented by counsel and executed a Request for Hearing form stipulating to some of the issues and placing others in dispute. The issues in dispute were whether the Petitioner suffered accidental injuries; whether those injuries arose out of and in the course of her employment; the causal connection between the employment and the Petitioner's injuries; whether the medical bills were reasonable and necessary; the amount of temporary total disability benefits due, if any, and the nature and extent of the Petitioner's injuries.

The Arbitrator closed proofs on April 14, 2014.

On May 28, 2014, the Petitioner mailed, with proper postage, a Motion to Amend Application for Adjustment of Claim, to opposing counsel and to the Arbitrator. The Petitioner set such motion on the Arbitrator's June 2, 2014 status call, at which time the Arbitrator set the matter for hearing on the agreed-upon date of June 12, 2014.

On June 12, 2014, the Petitioner moved to re-open proofs, amend the Application for Adjustment of Claim to a date of accident of August 30, 2011 and moved to amend the stipulation sheet (AX 1) to reflect a date of accident of August 30, 2011. The Arbitrator granted the Petitioner's motion, pursuant to McLean Trucking Company v. Indus. Comm'n, 449 N.E.2d 832, 70 Ill. Dec. 485 (1983) and Illinois Institute of Technology Research Institute v. Indus. Comm'n, 731 N.E.2d 795, 247 Ill. Dec. 22 (1st Dist. 2000). The Arbitrator then closed proofs.

The Petitioner testified that she was employed as Lead Esthetician with the Respondent. (TR 10) There were two estheticians while she was employed there. Using a menu of services

offered at the spa that Respondent offered as an RX 5, she testified about the services she provided, the length that each service took to perform and she demonstrated and described how the service was performed.

One of the services she provided was a facial. The menu has several different types of facials listed and she described the basic facial. She testified that the basic facial is 60 minutes long. An exfoliation is done first, and then a massage of the face, neck and décolleté is performed (TR 12). Then a second mask is applied and while that was on, a scalp and back of the neck massage is performed (TR 12-13). She testified that the customer lies in front of her and that she massages the customer's neck by using her thumb in a rotating motion to get up under the neck. (TR 15). The neck massage lasts between 10-15 minutes. (TR 20) Afterwards, she performs an arm and hand massage. She testified that she would push and pull her hands in a gliding motion up and down the arms and hands of her customers while she would push and rotate her thumbs in a circular motion. (TR 14.) She would also knead around the customer's palms and back of the hands. (TR 14). The hand massage lasts about seven minutes (TR 20). She testified that the facial also involved a facial and scalp massage. She testified that these actions involved a lot of use of the thumbs applying pressure and squeezing with the fingers (TR 16).

Performing the facial required her to open bottles, wring out and squeeze towels and pump bottles to get product out. She testified that she would wring out towels about twenty times during a facial because clean towels were needed to wipe off product. (TR 17). She testified that these actions were done quickly because the facial is only supposed to last one hour. She testified that while the customer is relaxing, she must wash things quickly, sanitize them and get on to the next step in the facial. Once the facial is done, she walks the client to a different

area of the spa and she then returns to change the sheets on the bed, sanitize everything and refill the steamer. (TR 19) She estimated the weight of the steamer to be about 40-50 pounds and she had to pull it across the carpeting. Since the steamer did not have a handle on it, she had to grab it with her thumb and fingers and pull it.

She testified that two types of facials lasted 90 minutes. One type, the lavender bliss facial, is the basic facial with more masking and extra massage (TR 24). The second type, a Reiki facial, involves "energy work" in which she tries to bring balance to the customer (TR 22).

She also testified that she performed waxing of the eyebrows, back, bikini and chin. She testified that waxing required dipping a stick into hot wax and then continually twirling it with the fingers and thumb so the wax does not drip on the customer. (TR 22-23) The wax is applied to the customer and then a strip is placed over the wax. (TR 23). Then with the thumb and fingers, the strip is pulled out in a flicking of the wrist motion. Afterwards, she pulls out any remaining hair with a tweezers by again using a flicking motion of the wrist using the thumb and forefinger to grip the tweezers. (TR 24).

She testified that when she was not performing spa services for customers, she ordered the professional supplies and tended to the retail store as well as to the guests at the fitness center and the spa. (TR 26). These activities involved writing orders, then entering them in to a computer using the keyboard. She also did the time card edits, helped with payroll, answered the phone and booked appointments. (TR 27).

In July and August 2011, the spa became very busy (TR 25). She noticed that her hands started hurting in July and became worse as time went on. In August, she noticed the bottom of her fingers swelling and she started to develop lumps "almost like on the tendons of every finger." (TR 25). In August, she reported her symptoms to the HR director after a manager's

meeting on the importance of filling out injury reports. (TR 25) She first sought medical attention at the end of August (TR 28) with a chiropractor named Mary Luther (TR 29). However, she received chiropractic care but continued to work as an esthetician; she would take two steps forward with her symptoms and then one step backward. (TR 29). In July, the Respondent hired another esthetician. The Petitioner was then able to use five weeks of vacation time and she noticed that her hands started feeling better during that rest period. (TR 30 – 31)

On September 13, 2011, Dr. Luther noted that the Petitioner had blood tests for bruise-like areas of her fingers. (PX 2)

Since she was getting limited benefit from the chiropractic care, Dr. Luther referred her to Elmhurst Clinic. She first saw a rheumatologist (31). The rheumatologist did blood work and then referred her to an orthopedic doctor named Tulipan. (TR 33). The Petitioner testified that Dr. Tulipan gave her three injections, one in the left hand and two in the right wrist and thumb (TR 33). She testified that Dr. Tulipan made recommendations. She stopped working for the Respondent. She testified that she had a hard time finding work because her qualifications were as an esthetician. Currently she works for Nordstrom (TR 34).

She testified that she collected unemployment for a little over a year and during that time, conducted a job search. Her job search log was introduced as Petitioner's Exhibit 8. She testified that in February 2013 she applied for and received a job at Nordstrom in the Woodfield Mall as a beauty advisor. (TR 36 – 37). Her job duties now consist of selling skin care at the retail level and performing a mini version of the facial that lasts about 40 minutes total (TR 37). She testified that there is very little massaging involved in this min facial because the client sits in a massage chair that mechanically kneads the whole body (TR 37).

On cross-examination, the Petitioner testified that she still maintains her esthetician license and renewed it as recently as September 2013. She testified that she is still licensed to perform the same type of work she performed for the Respondent. She explained that she kept her license current because she went through all of the schooling it took to earn the license and she finds that to be a licensed esthetician makes her more credible to her current clients when she recommends skin care products. Moreover, the cost of the license is only $50 every two years (TR 41).

Respondent's Counsel continued the cross-examination of the Petitioner by introducing Respondent's Exhibit 5, which includes the menu of spa services and a record of the spa services the Petitioner performed for the Respondent over the relevant period of time. Petitioner testified that there were errors in that Exhibit. She testified that there were services she performed that are missing from RX 5, specifically 24 hand treatment services (TR 43).

On August 20, 2011, the Petitioner performed four facials and a body wrap. She described the body wrap as involving dry brushing of the entire body with a brush. She squeezes the brush with one hand, followed by the other hand, and then she performs a massage. The Petitioner testified that she applies enough pressure during the facial to stimulate the muscles, and not just the skin. She described the pressure as a medium pressure (TR 47). On August 24, 2001, she performed seven services (TR 45).

She testified that on August 25, 2011, she spent 90 minutes giving a facial and performing a wrap. (TR 44) The Petitioner further testified that she went to doctor on August 25, 2011. She said that she had worked 12 days in a row prior to that date (TR 46).

The Petitioner was then cross-examined about the services she performed every day from April 1, 2011 through the Petitioner's original alleged accident date, August 25, 2011. Using her

own notes, she testified about the number of services she performed each day during that time period. She testified that she kept her own record of the services she performed. She produced such record by gathering copies of receipts for the services she performed for the Respondent, and then recording that information.

The Petitioner was handed Respondent's Exhibit 3, which was her application for her job with Nordstrom. The application stated "Cosmetics Esthetician – Woodfield." She testified that that is the position identified on the application, but the job was that of a cosmetic retail sales clerk. (TR 84) She testified that the number of facials she does per month at Nordstrom varies. There are months when she does no facials and other months when she does three or four facials.

She notices today that her hands are affected by cold and rainy weather and they become stiff and sore. She said sometimes the thumbs will lock in place and she has to use the other hands to move it and unlock it. She also testified that if her arm is bent, her last two fingers fall asleep all the way down the elbow and that this wakes her up at night (TR 92). She testified she has to lie on her stomach with her arms underneath her and keep them straight. During the night, if she bends her arms, she will wake up because her arms will fall asleep. She testified that she is able to perform the job at Nordstrom because there is no repetitive motion involved. She said that she can do one facial and her hands will not bother her. She testified that she has difficulty opening jars and closing and opening zip lock bags because it requires pinching of her thumb and finger together (TR 92-93).

The Petitioner first sought medical care on August 30, 2011 with Dr. Mary Luther, a chiropractor. She complained of neck pain, upper extremity pain and hand, arm and shoulder pain (PX 2, p. 24). The Petitioner treated with Dr. Luther through January 2012. During this time Dr. Luther's records indicate that the Petitioner was getting some intermittent relief,

particularly when she would rest from her work activities. Overall, the chiropractic adjustments and treatments provided little relief to the Petitioner.

The Petitioner was then examined by Dr. Costamire, a rheumatologist at Elmhurst Clinic, on October 21, 2011. She complained of small lumps from the MCP to the PIP joints on multiple fingers, of swelling in this area, and that her rings were too tight. She said that her fingers were very painful when she hits them on something. She had pain in both thumbs right greater than left, and the pain can go up to the lateral epicondyle, especially of the right arm. She noted that her grip strength had been weakened. On physical exam, the doctor noted that there may be some slight gray discoloration of the skin over the extensor fingers from the MCP to the PIP joints. He also thought he could feel some slight thickening over the extensor or medial or lateral fingers between the MCP and PIP joints. There was no swelling. He also noted that there was no synovitis across the MCP or PIP joints of her hands. He noted, diffuse myofascial discomfort to palpation from her neck down into her shoulders, across her upper and lower back, over the lateral epicondyles of her elbows. He also noted there was some tenderness to palpation around the base of the right thumb, especially, but that it was not obviously squared. He diagnosed her with the right tennis elbow and possible mild osteoarthritis of her hands with thumb base pain with increased use. He thought she might have a possible autoimmune disease and ordered a complete evaluation (PX 3, pp. 125 – 126). When she returned a week later, Dr. Costamire noted that her lab reports were normal. He thought she possibly had mild osteoarthritis in the thumbs (PX 3, p. 133). She was then referred to Dr. Tulipan at the Elmhurst Clinic.

Her first visit to Dr. Tulipan was on December 20, 2011. At that point she had been off of work since October 19, 2011. She complained that she had very limited range of motion in

her thumbs and the pain was aggravated with movement. She said the right is much worse than the left, but she denied any numbness and tingling in her hands. She described the pain as aching when she is not moving and sharp when she moves the thumbs. She said that she had some chiropractic treatment three times a week for several months and that most of her discomfort had gone away except for that in the shoulders and shoulder girdle. In particular, she complained of pain around the thumbs. This was the condition for which she was seeing Dr Tulipan. His examination of her revealed that pressure around the shoulder girdle/biceps was uncomfortable for the Petitioner. However, she had an excellent range of motion of those areas. She had a mildly positive flexion compression test on the wrist on the right and negative on the left and she had a positive Finkelstein's test bilaterally more so on the right than the left. She had a positive grind test more so on the right than the left. There was also some pain to resisted extension of the thumb bilaterally, but no significant pain to palpation over the first extensor compartment. Dr. Tulipan reviewed x-rays of the wrist that were previously obtained that showed basal joint views, revealing some early joint space irregularity and osteophyte formation consistent with early-stage 2 basal joint arthritis on the wrist. His impression at the time was bilateral upper extremity pain, possible myofascial pain syndrome with probable mild bilateral basal joint arthritis and deQuervain's syndrome. He offered an injection to her, which she received on January 24, 2012 (PX 3, pp. 133 – 137). She returned to him on February 14, 2012 and said she had absolutely no improvement from the steroid injection. She still complained of pain around the thenar eminence and basal joint on the right, but also on the left. He believed that a majority of her discomfort stemmed from her osteoarthritis. He recommended a stronger anti-inflammatory medication and so he prescribed a higher dose of Mobic to relieve her discomfort. If that did not work, he would try one more injection.

She returned to Dr. Tulipan on March 13, 2012. He gave her another injection and opined: "The etiology of this problem is always difficult to say. A great deal of arthritis is genetic in nature. Certainly heavy pinching/gripping type activities and pressure on a repetitive basis, opening bottles, given (sic) massage could on a regular basis exacerbate an underlying arthritic condition. Certainly it will make the symptoms more manifest." (PX 3, p. 141)

She returned for her final visit on April 17, 2012. At that point she denied any pain and stated she felt some aching along the thumb and through the fingers. Dr. Tulipan gave her an injection in the left hand that day. He told her that she should follow up with him on an as needed basis if the pain recurs. He recommended that she "avoid any type of activity that requires heavy pinching and gripping. This will more than likely be a lifelong restriction. Certainly, keyboard work, office work, light pinch and grip is (sic) all accessible to her" (PX 3, pp. 142-143).

Petitioner introduced, and the Arbitrator admitted into evidence, her wage statements from Nordstrom as Petitioner's Exhibit 1. Respondent raised no objection. Those records demonstrate that Petitioner received an hourly rate of $15.75, plus commission for product that she sells. Petitioner was paid semi-monthly. The hours Petitioner worked during a semi-monthly pay period varied, and the hours she worked each day was not broken out. The Arbitrator totaled the current gross wages for each of the 26 full pay period immediately prior to April 14, 2014, which was the first hearing date. Those semi-monthly amounts add up to $35,466.75. Then $35,466.75 divided by 52 weeks yields an average weekly wage of $682.05. (PX 1)

Petitioner also introduced, and the Arbitrator admitted into evidence, the medical records and bills of Mary Luther, DC as Petitioner's Exhibit 2; the medical records and bills of Elmhurst

Clinic as Petitioner's Exhibit 3; the medical records and bills of Elmhurst Hospital as Petitioner's Exhibit 4; the medical bill from Quest Diagnostic as Petitioner's Exhibit 5; the medical bill from Elmhurst Radiologists as Petitioner's Exhibit 6; the bill from Lab Corp as Petitioner's Exhibit 7.

The Respondent presented the Evidence Deposition of Dr. John Fernandez as its only witness. The Petitioner underwent an examination conducted by Dr. Fernandez pursuant to Section 12 of the Worker's Compensation Act. The Petitioner provided a history to Dr. Fernandez that she had been an esthetician for Eaglewood Resort & Spa for over 8 ½ years (RX 1, p. 14) Dr. Fernandez testified that the Petitioner provided him with a job description that was consistent with the medical records and the other sources he reviewed, both in terms of the intensity of her work and the use of her hands (RX 1, p.15). Dr. Fernandez testified that the Petitioner told him that her symptoms began in July 2011 and she attributed them to work activities because her symptoms would get worse with those activities and they would improve when away from those activities (PX 1, p. 16). He testified that when he saw her, she complained of intermittent and occasional numbness and tingling that mostly affected her ring and small fingers on the right hand. She complained of pain radiating along the forearm muscles anteriorly around the elbow. But the main focus of her pain was at the basilar joint of her thumbs, right greater than left, with associated stiffness and weakness (RX 1, p. 17).

When he examined Petitioner, he found that her symptoms subjectively correlated well with the objective findings and did not feel that there was any symptom magnification or pain behavior (RX 1, p. 18). His examination revealed that she had swelling and thickening at the base of the thumbs. She had significant pain palpation at the base of the thumb, right greater the left. She had crepitus, which is a noise that is generated by the joint with movement. She had stiffness, about 20% compared to normal, with pain at the ends (RX 1, p. 19). He had x-rays

taken that showed she had grade II to III out of IV degeneration of the basilar joints with subluxation osteophytes and local sclerosis. He came to a diagnosis of basilar joint arthritis in both thumbs right greater than left (RX 1, p. 21).

He described basilar joint arthritis as a type of degenerative arthritis or osteoarthritis that occurs at the base of the thumb (RX 1, p. 20). He said many cases of osteoarthritis are asymptomatic. He testified that the incidence of osteoarthritis is reported to be as high as 50% of people over the age of 50, but that not everyone has symptoms. He testified that this condition occurs irrespective of employment. There is a certain percentage of the people who have arthritis and develop symptoms. Dr. Fernandez noted the following:

> "There's (sic) anatomic differences, for example, between men and women. Specifically to basilar joint arthritis, for example, the incidence of arthritis is almost 10 times higher in women than in men. We think that has to do with the fact that women are slightly more lax, so they have more motion through that joint. The fact that there is an estrogen effect on the joint as well as on the ligaments which creates or contributes to the arthritis. So, what happens is, basically, the cartilage on the end of the bone wears away, just like the rubber on your tire, and eventually, it will start to cause problems."

Dr. Fernandez further testified, "We haven't been able to figure out why some people have symptoms and some people don't." (RX 1, p. 23). He further testified that from her records, she had been diagnosed with deQuervain's tenosynovitis, but that he didn't see any evidence of that on his exam. He testified that deQuervain's tenosynovitis is a tendinitis of the extensor tendon that occurs at the wrist and is unrelated to basilar joint arthritis.

Dr. Fernandez testified that his primary diagnosis was basilar joint arthritis (RX 1, p. 25). He rendered the opinion that her job activities did not cause or aggravate her diagnosis of basilar

joint arthritis (RX 1, p. 26). He testified that arthritis is a degenerative condition and that it occurs over time "irregardless" of what caused it or contributed to it (RX 1, p. 27). He did render an opinion that Petitioner's arthritis is symptomatic with any use of the hands. The more intense the use, the more likely that she is going to be symptomatic, with work activities or without work activities. He testified, "So my opinion on the record is that her work activities did not cause or aggravate the disease, but I will reasonably agree that her work activities will increase her symptoms. They will manifest her symptoms." (RX 1, p. 29). He further testified that her restrictions would be related to her comfort level. (RX 1, p. 29). He testified that from an objective basis, she has all the capabilities to return to work in any job, including an esthetician, but that she may not feel like she can do it. He opined that the capabilities of the patient are primarily determined by the patient themselves (sic), because they tell you how symptomatic they are. (RX 1, p. 32).

On cross-examination, Dr. Fernandez testified that any use of her thumb is going to increase the pain in the thumb. (RX 1, p. 42). He testified that the more physical the use of the thumb, the more likely it is going to cause symptoms (RX 1, p. 43).

Dr. Fernandez testified that the sole basis of his opinion that Petitioner's work activities did not aggravate or cause the basilar joint arthritis was because there was no medical literature to support that it does (RX 1, p. 43). However, he admitted that he did not know when he last did a medical literature search on basilar thumb arthritis prior to his Section 12 examination of the Petitioner (RX 1, p. 46). He further admitted that he was unaware that the Mayo Clinic issued a statement that one of the risk factors for osteoarthritis of the thumb is work activities that aggravate symptoms (RX 1, p. 46). He was also unaware of the article written in the *Annals of Internal Medicine*, Volume 133, 8, October 17 of 2000, on the issue of osteoarthritis in the

workplace. He was unaware that the article stated that jobs in which workers do repetitious tasks that overwork the joints and fatigue the muscles that protect the joints, increase the risk for osteoarthritis in those joints (RX 1, pp. 46-47). He was also unaware of the study done in a Virginia textile mill that found female workers whose jobs required repeated pinch and grasp motions (pinching the thumb and index or middle fingers together to hold something) had a much higher rate of osteoarthritis in the joints than did other female workers (RX 1, p. 47).

Dr. Fernandez opined that there was no medical literature to say that pinching and grasping did not cause basilar thumb arthritis. So it was his opinion there were no studies either way, i.e., there were no studies that either prove or disprove the relationship (RX 1, pp. 47-48).

Dr. Fernandez testified that he is a member of the American Association of Orthopedic Surgeons, but would not consider their articles authoritative (RX 1, pp. 43-44). He testified that he agreed with the statement made by the American Academy of Orthopedic Surgeons that arthritis is a condition that irritates or destroys a joint; that the one that most often affects the joint at the base of the thumbs is osteoarthritis; and that osteoarthritis is degenerative or wear-and-tear arthritis (RX 1, p. 44). He also testified that articles distributed by the Mayo Clinic would not be authoritative (RX 1, p. 45). He did agree with the statement made by the Mayo Clinic that arthritis can cause severe hand pain, swelling and decreased strength and range of motion, which would make it difficult to do simple household tasks such as turning doorknobs and opening jars. He disagreed with the Mayo Clinic that the risk factors for thumb arthritis would be performing certain activities on jobs that put high stress on the joint (RX 1, p. 40). He testified that her underlying condition could limit capabilities as an esthetician because those activities would produce pain and that pain would restrict her from repetitive tasks involving pinching, because that activity would increase the pain (RX 1, pp. 54-55).

The Respondent introduced and the Arbitrator admitted in to evidence, Dr. Fernandez's Section 12 report as Respondent's Exhibit 2; the Nordstrom job application as Respondent's Exhibit 3; and a copy of the Petitioner's esthetician license as Respondent's Exhibit 4.

Based on the forgoing findings of fact, the Arbitrator makes the following conclusions of law:

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator finds that the Petitioner suffered an accident of a repetitive nature while in the employment of the Respondent. It was undisputed that the Petitioner was the Lead Esthetician for the Respondent, and that she developed pain and discoloration in her fingers that manifested in late August 2011. She testified that her date of accident was August 25, 2011 and that she had worked 12 days in a row performing several services each day up to that date.

The Petitioner filed a motion to amend the Application for Adjustment of Claim. The Arbitrator granted the Petitioner's motion to change the claimed date of accident to August 30. 2011, which is the first date that she sought medical care for her condition with Dr. Luther.

Petitioner's Exhibit #2 indicates that on August 30, 2011, the Petitioner first received treatment for her upper extremities with Mary Luther, D.C. The Petitioner subsequently sought treatment with Dr. Costamire and Dr. Tulipan.

Based on the type of hand and thumb movements that she performed, the Petitioner's testimony, the medical records and the opinions of Dr. Tulipan and Dr. Fernandez, the Arbitrator concludes that on August 30, 2011, the Petitioner sustained repetitive trauma injuries to her thumbs.

F. Is Petitioner's current condition of ill-being casually related to the injury?

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to her job duties with the Respondent. The Petitioner testified that she noticed that while she was performing her esthetician duties with the Respondent, her fingers started swelling, hurting and developed lumps. She testified that these conditions worsened while she was working and lessened while she was not. Dr. Tulipan noted: "Certainly heavy pinching/gripping type of activities and pressure on a repetitive basis, opening bottles, giving massage could on a regular basis exacerbate an underlying arthritic condition. Certainly it will make the symptoms more manifest."

Dr. Fernandez testified that while it was his opinion the work activities did not cause or aggravate the arthritis, her work activities would increase her symptoms. He testified that from an objective basis, she has all the capabilities to return to work in any job, including an esthetician, but that she may not feel like she can do it. He opined that the capabilities of the patient are primarily determined by the patient themselves (sic), because they tell you how symptomatic they are. He testified that the more physical the use of the thumb, the more likely it is going to cause symptoms.

When an employee with a pre-existing condition is injured in the course of his employment, serious questions are raised about the genesis of the injury and the resulting disability. The Commission must decide whether there was an accidental injury, which arose out of the employment, whether the accidental injury aggravated or accelerated the pre-existing condition or whether the pre-existing condition alone was the cause of the injury. Generally, these will be factual questions to be resolved by the Commission. However, the Commission's decision must be supported by the record and not based on mere speculation or conjecture. If

there is an adequate basis for finding that an occupational activity aggravated or accelerated a pre-existing condition, and thereby caused the disability, the Commission's award of compensation must be confirmed. Sisbro v. Indus. Comm'n, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. City of Springfield v. Illinois Workers' Comp. Comm'n, 388 Ill. App. 297, 315 (4th Dist. 2009).

The sole basis of Dr. Fernandez' opinion that the Petitioner's work activities did not cause or aggravate her arthritis was that he found no medical literature to support such claim. However, on cross-examination, Dr. Fernandez admitted that he could not remember the last time he had performed a literature search on this issue and was unfamiliar with literature that indicated that repetitive motions of the fingers and thumbs can aggravate arthritis.

The Arbitrator finds the opinions of Dr. Tulipan to be more persuasive than those of Dr. Fernandez.

Since the Arbitrator finds that the Petitioner suffered repetitive trauma injuries from her work activities, the Arbitrator finds that the Petitioner's current condition of ill-being of her thumbs is causally related to the activities she performed for Respondent on or around August 30, 2011.

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?

Since the Arbitrator finds that the Petitioner suffered repetitive trauma injuries from her work activities and that such injuries arose out of and in the course of her employment, the Arbitrator further finds that the Petitioner is entitled to the payment of medical bills she incurred for treatment of those injuries, pursuant to Section 8(a) and subject to Section 8.2 of the Act, specifically, the medical bills from Mary Luther, DC ($9,658.00); Elmhurst Clinic ($984.00); Elmhurst Memorial Hospital ($1,414.00); Quest Diagnostics ($559.00); Elmhurst Radiologists ($54.00); and LabCorp ($1,304.00).

K. What temporary total disability benefits are due to the Petitioner?

The Arbitrator finds that the Petitioner was temporarily totally disabled from her employment starting on October 16, 2011, pursuant to Dr. Tulipan's recommendations, and ending on February 25, 2013, the day before she began working for Nordstrom, for a period of 71- 2/7 weeks.

L. What is the nature and extent of the injury?

The Arbitrator finds that the Petitioner's job duties at the Respondent would increase the amount of pain she was in and would be a prohibitive factor in her continued employment with the Respondent.

Dr. Tulipan's records indicate that he restricted her from performing the type of activities required of a facialist/esthetician.

The Petitioner then underwent a self-directed job search where she found employment with Nordstrom. At Nordstrom, the Petitioner testified, she performs 0-4 facials per month. However, she described her job as being in retail sales. She earns 3% commission on the skin care products that she sells. She earns less than she earned with the Respondent.

The Arbitrator finds that her job search was reasonable and the employment with Nordstrom is suitable. The Arbitrator finds that the Petitioner is currently earning $682.05 per week. Since the Petitioner was earning $925.00 per week with the Respondent, she has suffered a wage loss in the amount of $242.95 per week. Two-thirds of $242.95 is $161.97.

The Respondent is hereby ordered to pay Petitioner permanent partial disability benefits of $161.97 per week commencing on February 26, 2013 through the date Petitioner reaches the age of 67 (12/27/2028), or 5 years from the date the award becomes final, whichever is later, because the injuries Petitioner sustained that caused her to be partially incapacitated from pursuing her usual and customary line of employment and also caused her to sustain an impairment of her earnings, as provided in Section 8(d)1 of the Act, as amended.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Susan Cerza,
Petitioner,
vs.

16IWCC0053

NO: 12 WC 3367

Evanston/Skokie School District 65,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's partial disabilityand being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 30, 2015, is hereby affirmed and adopted.

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

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

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.

DATED:
KWL/vf
O-1/12/16
42

JAN 2 2 2016

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0053

CERZA, SUSAN
Employee/Petitioner

Case# **12WC003367**

EVANSTON/SKOKIE SCHOOL DISTRICT 65
Employer/Respondent

On 7/30/2015, 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 0.14% 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:

4036 MILLON & PESKIN LTD
MITCHELL PESKIN
2100 MANCHESTER RD SUITE 1060
WHEATON, IL 60187

1120 BRADY CONNOLLY & MASUDA PC
JASON R STETZ
10 S LASALLE ST SUITE 900
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0053

Susan Cerza
Employee/Petitioner

v

Evanston/Skokie School District 65
Employer/Respondent

Case # 12 WC 03367

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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **3/6/15**. 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 _____

16IWCC0053

FINDINGS

On **11/15/10**, 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 $**50,177.82**; the average weekly wage was $**1,194.71**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **3** dependent children.

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**2,573.47** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**2,573.47**. The Parties agreed that Petitioner was entitled to TTD benefits from 7/17/12-7/30/12; 8/24/12-8/30/12 and 10/29/13-11/3/13 (3-6/7 weeks) and all TTD benefits have been paid.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services, of **$6,135.99 to Athletico Physical Therapy and $140.00 to Arlington Orthopedics**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$669.64/week** for **110.875 weeks,** because the injuries sustained caused the **17.5% loss of use of Petitioner's right leg/knee, 15% loss of use of Petitioner's left leg/knee, and 20% loss of use of Petitioner's right hand/wrist,** as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner the benefits that have accrued from 11/15/2010 to March 6, 2015 and shall pay the remainder of the award, if any, in weekly payments.

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

July 30, 2015
Date

JUL 30 2015

FINDINGS OF FACT

The Petitioner began her employment with the Respondent in August 2010. She works as a childhood special education preschool teacher. Specifically, she works with children who have cognitive and/or physical disabilities.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on November 15, 2010. Petitioner was leading one of the children off of the school playground. She was holding the child's left hand. The child threw himself to the ground causing the Petitioner to fall forward. Petitioner testified that she was able to avoid landing on the child. She landed on both of her knees and her right wrist. She testified that she immediately felt pain in her right wrist and both of her knees following the accident. She stopped working and sought treatment the same day with Dr. Bryan Neal, an orthopedic surgeon.

Dr. Neal's initial progress note indicated that Petitioner had resolving left knee pain, anteromedial right knee pain and right wrist pain. (PX1). X-rays of the right wrist were taken, which showed no fractures. (PX1). Dr. Neal released Petitioner to return to work and prescribed a Velcro thumb Spica splint. (PX1). On December 13, 2010, Dr. Neal noted that Petitioner was continuing to have bilateral knee pain with the right being more bothersome than the left. (PX1). He also noted that she continued to use the splint and was having localized pain over the first dorsal extensor compartment. (PX1). Petitioner underwent an MRI of her right wrist on January 8, 2010. The MRI showed some asymmetric fluid located along the volar aspect of the distal radius possibly representing reactive edema or a small ganglion cyst and intrinsic signal within the triangular fibrocartilage most likely representing partial tear and degeneration. (PX1). Petitioner also underwent an MRI of her right knee on January 8, 2010 which showed a tear of the posterior medial meniscus extending to the inferior surface. (PX1).

On February 21, 2011, Dr. Neal noted that Petitioner was having clicking in her knees and that her right wrist complaints were not improving. (PX1). He offered Petitioner a corticosteroid injection into the right wrist but the Petitioner refused. (PX1). She testified that she was not comfortable having injections. On May 12, 2011 Dr. Neal noted that Petitioner was reporting her knees were buckling and that she was continuing to have clicking. (PX1). Dr. Neal recommended proceeding with a right knee arthroscopy. (PX1). Petitioner had surgery with Dr. Neal for her right knee on July 17, 2012. (PX1). She underwent an arthroscopic partial medial meniscectomy of the posterior horn of the medial meniscus. (PX1). The post-operative diagnosis was right knee posterior horn medial meniscus tear. (PX1). Following her surgery, Petitioner underwent an MRI of her left knee, on July 30, 2012, which showed a small tear of the medial meniscus near junction of the posterior horn and body, extending to the posterior horn. (PX1). Thereafter, Dr. Neal performed a left knee arthroscopic partial medial meniscectomy on August 24, 1012. (PX1). On October 3, 2012, Dr. Neal noted that Petitioner reported significant improvement in each of her knees following her surgeries, but continued to have right wrist complaints with tenderness along the flexor carpi radialis tendon. (PX1). He prescribed occupational therapy and suggested that Petitioner have an independent evaluation for her right wrist. (PX1). Petitioner attended sixteen sessions of therapy at Athletico from October 9, 2012 through December 13, 2012 for her right wrist. (PX3).

At the request of the Respondent, Petitioner attended a §12 examination with Dr. Scott Sagerman on December 21, 2012. Dr. Sagerman noted that Petitioner has continued to have persistent right hand pain since her November 15, 2010 work accident. (RX1, Sagerman Dep. Ex. No. 2). He diagnosed Petitioner with chronic right radial wrist pain with arthritis. (RX1, Sagerman Dep. Ex. No. 2). Dr. Sagerman suggested consideration of anti-inflammatory medication, resting splint, local steroid injection and surgery on an elective basis. (RX1, Sagerman Dep. Ex. No. 2). He further stated that he would consider a diagnostic arthroscopy to inspect the articular surface and perform debridement. (RX1, Sagerman Dep. Ex. No. 2). He also thought that consideration could be given for a release of the flexor carpi radialis tendon to address symptoms suggesting tendinitis. (RX1, Sagerman Dep. Ex. No. 2). Dr. Sagerman noted that if Petitioner underwent surgery,

postoperatively, she should have supervised hand therapy, temporary activity and work restrictions. (RX1, Sagerman Dep. Ex. No. 2). Dr. Sagerman opined that the need for further treatment is causally connected to Petitioner's November 15, 2010 work injury and found no indication of any pre-existing condition affecting her right wrist before her work injury. (RX1, Sagerman Dep. Ex. No. 2).

Petitioner returned to see Dr. Neal on January 21, 2013. Dr. Neal indicated he had reviewed Dr. Sagerman's findings, but he was hesitant to recommend surgery and suggested a repeat MRI of the right wrist. (PX1). This was performed on February 20, 2013 and showed a 12 mm ganglion cyst between the flexor carpi radialis tendon and radial styloid process. (PX1). On March 4, 2013 after reviewing the MRI of the right wrist, Dr. Neal noted that he believed the ganglion cyst was the source of Petitioner's volar radial wrist pain. (PX1). Dr. Neal recommended a surgical excision of the ganglion cyst as a treatment option. (PX1). On October 14, 2013 Dr. Neal noted that he received approval for a flexor carpi radialis release. (PX1). Per Dr. Neal, the epicenter of Petitioner's wrist pain was over the flexor carpi radialis at the wrist crease. (PX1). In his October 28, 2013 report, Dr. Neal noted that he agreed a flexor carpi release needed to be done and indicated he would perform this procedure. (PX1). He also indicated that he would perform a ganglion cyst removal because he believed that was the painful root cause. (PX1). He agreed to only charge one procedure code for both procedures. (PX1).

Petitioner underwent right hand surgery by Dr. Neal on October 29, 2013 at Northwest Surgicare. (PX1). Specifically she underwent a resection of the right wrist occult volar radial carpal ganglion cyst and a flexor carpi radialis tenolysis. (PX1). Dr. Neal's operative report indicated he did identify a multi-loculated occult gangling cyst after dissecting the deep flexor carpi radialis tendon. (PX1). The post-operative diagnosis was occult ganglion cyst of the right wrist radial carpal joint with secondary flexor carpi radialis irritation. (PX1). On October 28, 2013 Dr. Neal had prescribed occupational therapy for Petitioner's right wrist ganglion cyst resection. (PX1).

Following surgery, Dr. Neal noted on November 4, 2013 that Petitioner was no longer feeling a "pressure" type of sensation. (PX1). On November 27, 2013 Dr. Neal noted that the therapy that Petitioner was having for her right wrist was helping and that she stated "she is getting better every time I go." (PX1). He also noted that the pain Petitioner had in her right wrist prior to surgery was absent and that every day her wrist was getting a little bit better. (PX1). On November 26, 2014, Dr. Neal noted that Petitioner's right wrist was continuing to get better and that Petitioner had stated to him that the therapy was helping. (PX1).

Petitioner attended physical therapy for her right wrist at Athletico from November 5, 2013 through March 27, 2014. (PX3). Consistent with Dr. Neal's medical records, the notes from Athletico reflected that Petitioner's right wrist condition continued to improve during her course of treatment. (PX3). Specifically, the records noted that at the completion of her therapy, her range of motion improved (since November 5, 2013) as follows: active extension (from 40 to 60 degrees), flexion (from 19 to 67 degrees), radial (from 10 to 20 degrees) and ulnar from 30 to 35 degrees). (PX3). In addition, Petitioner's strength in her right hand improved (since November 5, 2013) after completion of her therapy as follows: tip pinch (from 7 to 9 pounds), grip strength (from 32 to 50 pounds), lateral pinch from 8.5 to 17 pounds, and 3 jaw pinch (from 8.5 to 12 pounds). (PX3). As of March 27, 2014, Petitioner was reporting 75% to 80% of anticipated functioning, continued limitations of active wrist range of motion into simultaneous wrist extension and radial deviation, decreased right upper extremity strength compared to the left, significantly decreased right hand pain and the ability to self-manage her impairments. (PX3).

On May 7, 2014 Dr. Neal noted that Petitioner was having discomfort when writing on the blackboard at school. (PX1). She described the discomfort as some vague right volar forearm discomfort. (PX1). Petitioner last saw Dr. Neal on July 7, 2014. He noted that Petitioner had begun to feel "weird stuff" in her right knee but this resolved. (PX1). He noted that her right knee was painless without clicking, and without instability, but Petitioner could not squat or kneel on her knees as much or as well as before. (PX1). With regard to her right wrist, Dr. Neal noted that she was not reporting pain in the wrist, but did report stiffness and achiness. (PX1).

Petitioner testified that she is right handed. She had no right wrist or knee complaints prior to her November 15, 2010 work accident. She testified that her right wrist is sometimes achy and she has difficulty writing on the chalkboard. Petitioner testified that her right and left knees are good, although she experiences a crackling feeling in her right knee, notices her right knee does not flex smoothly and that it is difficult for her to kneel down on both of her knees.

On the issue of causation, Dr. Neal stated in his reports that Petitioner had an occult symptomatic ganglion cyst on the volar radial aspect of her right wrist. (PX1). Given Petitioner's persistent right wrist complaints since her accident and the findings of both MRI's, Dr. Neal opined that her right wrist pain was due to the volar radial wrist ganglion stemming from a traumatic ganglion cyst. (PX1). He opined that this condition was causally related to Petitioner's November 2010 fall. (PX1). While he agreed that Petitioner should have a flexor carpi radialis tenolysis resection of the right wrist, he more firmly believed that she needed a resection of the occult volar radial carpal ganglion cyst to address her wrist complaints. (PX1).

Like Dr. Neal, Dr. Sagerman opined that Petitioner's right wrist condition was causally related to her November 15, 2010 work injury. (RX1, Sagerman Dep. Ex. No. 2). However, Dr. Sagerman was not convinced that the Petitioner had a ganglion cyst and opined that the MRI findings may be consistent with other conditions of tendinitis and arthritis. (RX1; Pg. 12 & Sagerman Dep. Ex. No. 3). He stated that a true ganglion cyst would arise spontaneously and not typically be related to trauma. (RX1, Sagerman Dep. Ex. No. 3).

Dr. Sagerman believed that Petitioner had chronic right radial wrist pain with arthritis and possible flexor tendinitis. (RX1; Pg. 9). It was his opinion that theses diagnoses and Petitioner's complaints were causally related to her November 15, 2010 work injury. (RX1; Pg. 10). Although Dr. Sagerman suggested a release of the flexor carpi radialis tendon, he testified that if a visual inspection through the surgical procedure identified a ganglion cyst, it would be reasonable to remove it. (RX1, Pgs. 10, 24). Dr. Sagerman testified a ganglion cyst is a mass containing a gel-like fluid with a stalk arising from a joint. (RX1; Pg. 14). When asked to assume that Petitioner has both a ganglion cyst and flexor carpi radialis tendinitis, Dr. Sagerman acknowledged that it would be difficult to distinguish where the symptoms from each of the conditions would be emanating from. (RX1; Pg. 16). Dr. Sagerman testified that, postoperatively, Petitioner should undergo therapy for her right hand. (RX1; Pg. 10).

Although, Dr. Sagerman opined that ganglion cysts are not typically caused by trauma (RX1; Sagerman Dep. Ex. No. 3), he provided the following testimony:

Q. And you also indicated in that same report that you thought the MRI findings may not show a ganglion cyst but, rather, could be consistent with other conditions of tendinitis and arthritis?
A. Yes.
Q. What did you mean by that?
A. Well, fluid can be associated with tendinitis. Fluid can form as a manifestation of inflammation. And, **I suppose, you could term it a ganglion**. Ganglions also arise from tendon structures. So I wouldn't - - **I didn't call it a cyst, but I called it a - - or I referred to it as a finding consistent with tendinitis and arthritis**. Those are inflammatory conditions, which can cause fluid to arise as part of the inflammatory process, and that was my impression.
Q. And you also in that report expressed an opinion that you believe that that condition was related to Miss Cerza's injury, is that correct?
A. Yes. (RX1, Pg. 19).

CONCLUSIONS OF LAW

The Arbitrator adopts the Findings of Fact set forth above in support of the Conclusions of Law set forth below.

In support of the Arbitrator's decision relating to F. Whether Petitioner's Present Condition of Ill-being is Causally Related to the Injury and J. Whether the medical services that were provided to Petitioner were reasonable and necessary; the Arbitrator finds the following:

The Parties stipulated that there is no causation or reasonableness or necessity dispute concerning the flexor carpi radialis tenolysis procedure and the left and right knee surgeries that Petitioner underwent. The disputed issue stems from the radial carpal ganglion cyst procedure that was performed simultaneously with the carpi radialis procedure.

The Arbitrator notes both doctors have opined that Petitioner's right wrist condition is causally related to her injury. Dr. Neal is of opinion that Petitioner had an occult symptomatic ganglion cyst on the volar radial aspect of her right wrist as a result of her accident. Dr. Neal believed this was the source of her pain, although he did not disagree that Petitioner also had a flexor carpi radialis condition. Consistent with Dr. Neal's opinions are the findings on both MRI's, and the fact that he identified and removed a ganglion cyst during surgery.

Dr. Sagerman, essentially agreed with Dr. Neal. However, rather than calling the fluid identified on the February 20, 2013 MRI a ganglion cyst, Dr. Sagerman characterized the condition as arising from part of the inflammatory process, which he opined was casually related to Petitioner's injury. Dr. Sagerman acknowledged that it would be reasonable to remove a ganglion cyst if identified during the surgical procedure which is exactly what Dr. Neal did. Dr. Neal kept both procedures under one surgical charge. Regardless, as to whether Dr. Neal or Dr. Sagerman are correct in terms of diagnosing the underlying cause of Petitioner's wrist complaints, both agreed her complaints were related to her injury. No additional charges were incurred for the cyst removal, and Petitioner's condition improved following the surgical procedure.

Based upon Petitioner's testimony and the medical evidence, the Arbitrator concludes that Petitioner had both flexor carpi radialis and a ganglion cyst both of which were causally related to her November 15, 2010 accident. Further, based on the above, the Arbitrator finds the surgery that Petitioner underwent addressing both right wrist conditions, to be reasonable, necessary and causally related to her accident.

Petitioner submitted into evidence as Petitioner's Exhibit 6, the following unpaid medical bills:

Athletico Physical Therapy	$6,135.99 (11/5/13-3/27/14)
Arlington Orthopedic & Hand Surgery Specialists	$ 140.00 (7/7/14)

The Arbitrator notes that the above-referenced bills correspond to treatment that Petitioner had for her right wrist condition following her October 29, 2013 surgery. The July 7, 2014 bill corresponds to Petitioner's last office visit with Dr. Neal. The Althetlico bill corresponds to the post-operative physical therapy treatment that Dr. Neal had prescribed. Dr. Sagerman also opined that post-operative physical therapy was appropriate. Dr. Neal's medical records, the therapy notes from Athletico and Petitioner's testimony establish that her right wrist condition improved during her post-operative course of therapy.

Based upon the Arbitrator's findings on causal connection, the fact that both doctor's believed post-operative therapy was necessary and the fact that Petitioner's right wrist condition improved during her course of therapy, the Arbitrator finds the post-operative therapy treatment was reasonable and necessary to cure or relieve the effects of the injury. The Arbitrator also finds that Petitioner's last office visit with Dr. Neal on July 7, 2014 was reasonable and necessary.

Accordingly, Respondent shall pay the above bills from Dr. Neal and Athletico, pursuant to §8(a) and § 8.2 of the Act. The Parties agreed that Respondent was entitled to a credit for all bills that it paid.

In support of the Arbitrator's decision relating to L. The Nature and Extent of the Injury; the Arbitrator finds the following:

Petitioner underwent treatment for more than three and one-half years for her right wrist injury in the form of therapy and a resection of the right wrist occult volar radial carpal ganglion cyst and a flexor carpi radialis tenolysis. Although she improved, Petitioner's testimony established that she continues to have right wrist achiness and difficulty writing on chalkboards. Further, the therapy records indicated that Petitioner continued to have limitations of active wrist range of motion and decreased right upper extremity strength compared to the left.

Petitioner also underwent a partial medial meniscectomy of the posterior horn of the medial meniscus of right knee and a left knee arthroscopic partial medial meniscectomy. Her testimony established that she presently experiences a crackling feeling in her right knee and notices that it does not flex smoothly. She also has difficulty kneeling down on both of her knees.

The Arbitrator finds that Petitioner was forthright and credible. Her complaints are supported by the medical records. Based on the Petitioner's testimony and the medical records, the Arbitrator finds the injuries sustained caused 17.5% loss of use of Petitioner's right leg/knee, 15% loss of use of Petitioner's left leg/knee, and 20% loss of use of Petitioner's right hand/wrist, as provided in Section 8(e) of the Act and, accordingly, orders Respondent to pay Petitioner the sum $669.64/ week for a period of 110.875 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ PTD/Fatal denied
☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHY WESTFIELD-CARTER,

Petitioner,

vs. NO: 12 WC 08489

UNITED AIRLINES,

Respondent.

AGREED ORDER

This matter was tried before Arbitrator Huebsch on April 7, 2014 and proofs were closed at that time. Arbitrator Huebsch issued a Decision on April 23, 2015 and the Parties subsequently appealed the Decision.

Respondent's Exhibit #11, the video surveillance CD from Global Options of June 20, 2013 and August 5, 2013, was admitted into evidence by Arbitrator Huebsch. Upon review of the transcript, the CD was not a part of the record.

IT IS THEREFORE ORDERED BY THE COMMISSIONER that the Respondent's Exhibit #11, the video surveillance CD from Global Options of August 5, 2013 and June 20, 2013 is admitted into and made a part of the transcript.

DATED: FEB 3 - 2016

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patrick O'Kane,

Petitioner,

vs.

No. 12 WC 08827

City of Chicago,

Respondent.

ORDER

This matter comes before the Commission on: Respondent's motions to dismiss Petitioner's petitions for review; the Commission's motion for a rule to show cause why Petitioner's petition for review should not be dismissed for failure to timely file an authenticated transcript of arbitration; and Petitioner's petition for penalties and attorney fees. The matter came for hearing before Commissioner Stephen Mathis, and a record was made. The Commission having been advised of the facts and law, finds and orders as follows:

On January 23, 2015, the Arbitrator filed a decision awarding temporary total and permanent partial disability benefits. On February 11, 2015, the Arbitrator granted Respondent's petition to correct a clerical error pursuant to section 19(f) of the Workers' Compensation Act (the Act). Contemporaneously, the Arbitrator filed a corrected decision in the case.

On February 26, 2015, Petitioner filed a petition for review referencing the original decision. On April 2, 2015, the Commission issued a notice of return date on review, requiring an authenticated transcript to be filed on or before May 29, 2015.

On April 17, 2015, Respondent filed a motion to dismiss the petition for review. Subsequently, on May 5, 2015, Petitioner filed a petition for review referencing the corrected decision. On May 13, 2015, Respondent filed a motion to dismiss as untimely the petition for review filed May 5, 2015.

On June 11, 2015, the Commission issued a notice of the Commission's own motion for a rule to show cause why Petitioner's petition for review should not be dismissed for failure to timely file an authenticated transcript of arbitration.

Petitioner and Respondent subsequently filed their respective response and reply clarifying their arguments. Petitioner maintained he should be able to proceed under his original petition for review. Respondent, on the other hand, asserted: "Petitioner cannot rely on the February 26, 2015 petition for review because it was filed before the corrected decision [was] received by the Petitioner on March 2, 2015. Furthermore, the Petitioner's February 26, 2015 petition for review specifically referenced that he sought to review the decision filed on January 23, 2015 and received on February 4, 2015." Further, Respondent asserted: "Petitioner's failure to perfect his review and authenticate the transcript renders both of his petitions void."

In the meantime, on June 29, 2015, Petitioner filed a petition for penalties and attorney fees, asserting: "Despite Respondent's position that the [Arbitrator's] decision was final and the Commission has no jurisdiction to hear Petitioner's Petition for Review, Respondent has failed to pay the award rendered by the Arbitrator." Respondent filed a response, asserting that the Arbitrator's decision has not become final because the Commission has not yet determined the status of the petitions for review.

On September 2, 2015, Commissioner Mathis held a hearing in the matter. Petitioner conceded that his second petition for review was untimely. However, Petitioner maintained he should be able to proceed under his original petition for review. With respect to the filing of an authenticated transcript, Petitioner's counsel stated that he had asked Respondent's counsel to authenticate the transcript, but she refused. Respondent's counsel explained that she objected to signing the transcript because it was presented to her after the return date on review of May 29, 2015. With respect to penalties and attorney fees, the parties reiterated the arguments made in their respective pleadings.

As a preliminary matter, the Commission dismisses as untimely Petitioner's petition for review filed May 5, 2015.

Turning to the original petition for review, the Commission notes it was filed 15 days after the Arbitrator issued a *corrected* decision in the case. At that point, the Arbitrator's original decision was a nullity (Garcia v. Industrial Comm'n, 95 Ill. 2d 467, 469 (1983)), and Petitioner had to timely file a petition for review of the corrected decision (Campbell-Peterson v. Industrial Comm'n, 305 Ill. App. 3d 80, 84 (1999)). The Commission finds that Petitioner's original petition for review, although referencing the original decision, was timely filed with respect to the corrected decision and gave Respondent sufficient notice of the issues Petitioner intended to pursue on review. As such, the original petition for review meets the requirements of the Act.

Turning to the issue of the transcript, as noted, on June 11, 2015, the Commission issued a notice of the Commission's own motion for a rule to show cause why Petitioner's petition for review should not be dismissed for failure to timely file an authenticated transcript of arbitration.[1] The notice provides: "If an authenticated arbitration transcript is filed with the Commission within 10 days of the date of this notice *** the Motion for Rule to Show Cause will be satisfied." Petitioner's counsel represented that he tried to comply with the Commission's motion for a rule to show cause by asking Respondent's counsel to authenticate

[1] *Cf.* Ingrassia Interior Elements v. Workers' Compensation Comm'n, 2012 IL App (2d) 110670WC.

the transcript. However, Respondent's counsel refused. The Commission, pursuant to its authority under section 19(b) of the Act, therefore remands this matter to the Arbitrator for the limited purpose of authenticating the transcript. Once the Arbitrator authenticates the transcript, the review shall proceed in due course.

Lastly, we consider Petitioner's petition for penalties and attorney fees. The Commission finds that penalties and attorney fees are not warranted because we have only now determined the status of review in the instant case.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition for review filed May 5, 2015, is dismissed. Petitioner's petition for review filed February 26, 2015, stands.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's petition for penalties and attorney fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the matter is remanded to the Arbitrator for the limited purpose of authenticating the transcript. Once the Arbitrator authenticates the transcript, the review shall proceed in due course.

This order is interlocutory and not immediately appealable.

DATED: JAN 2 9 2016
SM/sk
44

Stephen Mathis

Marc Basurto

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

16IWCC0054

BRIAN SCHNEIDER,

Petitioner,

vs. NO: 12 WC 10168

CHILDS CONSTRUCTION SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability and vocational rehabilitation 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination 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).

The Decision of the Arbitrator awarded Petitioner 21-1/7 weeks of maintenance benefits under Section 8(a) of the Act as well as vocational rehabilitation, also, under Section 8(a) of the Act. The bases for these awards was that Petitioner suffered a diminishment in earning capacity as result of the permanent disability that resulted from his compensable March 15, 2011, injury as well as his inability to return to his pre-injury occupation as a maintenance supervisor. The Commission finds these awards were not justified and modifies the Decision of the Arbitrator.

The Commission, contrary to the findings contained within the Decision of the Arbitrator, finds Petitioner to be capable of resuming his career as a maintenance supervisor, arriving at this conclusion based upon the findings of the functional capacity evaluation (FCE) that was performed on May 3, 2013, as well as the opinions expressed by Dr. William Vitello in his independent medical examination (IME) report dated June 5, 2013.

16IWCC0054

The FCE was prescribed by Petitioner's treating physician, Dr. Aaron Bare, and was performed by Noel Priest, a therapist for Orthopaedic Rehabilitation, on May 3, 2013. The FCE indicated, per the DOT, Petitioner's occupation was found be at a heavy physical demand level and called for the occasional lifting of weights between 51 and 100 pounds. The FCE noted Petitioner stated that his occupation was at a heavy physical demand level but required the occasional lifting between 80 and 100 pounds and the frequent lifting of between 30 and 60 pounds. The FCE reported Petitioner demonstrated the ability to work at a heavy to very heavy physical demand level and capable of occasionally lifting between 80 and 105 pounds and of frequently lifting between 40 and 60 pounds. The Commission notes the FCE findings exceeded the job requirements as set forth in the DOT and equaled or exceeded the job requirements Petitioner had advanced.

The Commission also notes the FCE revealed Petitioner engaged in inconsistent behavior during the evaluation. Petitioner reported a left arm lifting tolerance of 10 to 20 pounds and an 8-pound carrying tolerance but demonstrated the ability to lift and carry between and 80 and 105 pounds with both arms. Petitioner's effort during the 5-position Jamar grip strength testing failed to produce a bell curve. It was noted the lack of a bell curve suggested a submaximal test effort. Petitioner complained of a 9-10/10 level of pain intensity but failed to exhibit compensatory motions or pain behaviors. It was also noted there was no increase of Petitioner's heart rate despite his complaints of 9-10/10 level of pain intensity and his self-reported maximum exertion during lift testing. These inconsistencies lend credence to the finding that Petitioner was capable of working at a heavy to very heavy physical demand level.

Petitioner returned to Dr. Bare on May 10, 2013, and Dr. Bare's record of that visit indicates he reviewed the FCE and found it dipositive of Petitioner's physical condition. Dr. Bare found Petitioner capable of returning to work his usual work duties but, nevertheless, returned Petitioner to work with permanent restrictions because of the potential for overuse and aggravation of his left shoulder. Dr. Bare, in his evidence deposition testimony, testified, however, that he did not remember if Petitioner provided him with any idea as to what he did for a living. He was sure they discussed it, but he acknowledged that he did not document that discussion. The Commission finds the imposition of restrictions without knowledge of Petitioner's job activities, particularly given the findings of the FCE, to be unreasonable.

Dr. Bare's assessment of Petitioner's ability to resume working his usual work duties were mirrored by Dr. William Vitello, Respondent's examining physician. Dr. Vitello conducted an IME of Petitioner on June 5, 2013, and found the examination revealed forward flexion to 170°, abduction to 160°, internal and external rotation to 70° without crepitus, 5/5 rotator cuff strength as well as negative findings on the various tests performed. The Commission finds these results to be very similar to the examination results elicited by Dr. Bare on May 10, 2013. Unlike Dr. Bare, however, Dr. Vitello found no need to impose restrictions upon Petitioner's ability to return to work. Given the results of the FCE and the examinations conducted by Dr. Bare and Dr. Vitello, the Commission agrees.

Petitioner's medical records and the testimony of both Dr. Bare and Dr. Vitello lead the Commission to conclude Petitioner achieved maximum medical improvement as late as May 3, 2013, the date the FCE was performed. The subsequent examinations of Petitioner by Dr. Bare

16IWCC0054

and Dr. Vitello only reinforce the FCE findings. The Commission further concludes, on the bases of the results Petitioner's FCE and Dr. Vitello's IME findings, Petitioner is capable of resuming the normal work duties of a maintenance supervisor without restrictions and is not entitled to either maintenance or vocational rehabilitation. Accordingly, the Commission modifies the Decision of the Arbitrator to vacate these awards.

The Commission modifies the Decision of the Arbitrator further with respect to Petitioner's average weekly wage. The parties, during oral arguments, stipulated that Petitioner's average weekly wage to be $633.71.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator be modified to vacate the maintenance and vocational rehabilitation.

IT IS FURTHER ORDERED BY THE COMMISSION that Decision of the Arbitrator be modified to reflect that Petitioner's average weekly wage is $633.71.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for determination of compensation for permanent disability, if any, but 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.

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 $100.00. 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.

DATED: JAN 2 2 2016
KWL/mav
O: 11/24/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0054

SCHNEIDER, BRIAN
Employee/Petitioner

Case# 12WC010168

CHILD'S CONSTRUCTION SERVICES INC
Employer/Respondent

On 3/13/2015, 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 0.09% 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:

2194 STROM & ASSOCIATES
JOSEPH MULVRY
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0507 RUSIN & MACIOROWSKI LTD
JENNIFER L RIZK
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0054

Brian Schneider
Employee/Petitioner

v.

Child's Construction Services, Inc.
Employer/Respondent

Case # 12 WC 10168

Consolidated cases: ___

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 **Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **August 11, 2014** and **October 1, 2014**. 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☐ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other: **Vocational rehabilitation**

16IWCC0054

FINDINGS

On the date of accident, **March 15, 2011**, 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 **$33,968.22**; the average weekly wage was **$653.24**.

On the date of accident, Petitioner was **34** years of age, *married* with **2** dependent children.

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

Respondent shall be given a credit of **$27,194.55** for TTD, $ **0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$27,194.55**

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay maintenance benefits to Petitioner at a rate of **$435.39**/week for **21-1/7** weeks, from May 14, 2013 through August 23, 2013, from October 1, 2013 through October 2, 2013, and from June 2, 2014 through July 15, 2014.

Respondent shall provide vocational rehabilitation services for Petitioner.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

March 13, 2015
Date

ICArbDec19(b)

MAR 13 2015

State of Illinois)
) SS
County of Cook)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Schneider,	)	**16IWCC0054**
Petitioner,	)	
v.	)	Case Number: 12 WC 10168
Child's Construction Services, Inc.,	)	
Respondent.	)	

ADDENDUM TO DECISION

I. FINDINGS OF FACT

Petitioner testified that he had been employed by Child's Construction for approximately three years when, on March 15, 2011, he injured himself while hanging drywall (TX., p. 8). At the time of his injury, Petitioner was a maintenance supervisor. Petitioner testified that his job duties included lifting posts from the ground to the roof of a van, lifting heavy sewer lids, moving 300 lb. barrels of salt, removing and installing drywall, and carrying and climbing ladders (TX., p. 26). Petitioner testified that in his role as a maintenance supervisor, and over a 52-week period, he had to work overtime 40 - 45 of those weeks (TX., p. 23). He explained that he was given work in the morning and told that he needed to stay until the work orders were done (TX., p. 23).

On the day of the accident, Petitioner and a co-worker were replacing drywall in a ceiling. Petitioner bent down to pick up his drill with his right hand when a drywall sheet fell from above and forced his left arm backwards. Petitioner testified that he heard a "pop" and felt his left arm go numb. Petitioner completed his assignment by screwing in the drywall (TX., pp. 11-12).

Upon returning to Respondent's office, Petitioner reported his injury and was told to seek medical care if necessary. Petitioner began a course of treatment that would culminate in two surgical repairs of his left shoulder.

Petitioner initially treated at Central DuPage Business Health and was referred to Kellen K. Choi, M.D., for an orthopedic evaluation. Petitioner's initial care consisted of a course of

physical therapy and a subacromial injection. The injection provided only mild, temporary pain relief.

On July 5, 2011, Dr. Choi performed an arthroscopic repair of Petitioner's left shoulder. Dr. Choi's post-operative diagnosis: (1) Posteroinferior labral tear from 3 o'clock to 4:30 with associated paralabral cyst (2) Anteriorsuperior labral tear form 9 o'clock to 11:30, bucket handle (3) Subacromial impingement and mild acromioclavicular joint arthritis (TX., p. 14, P. Ex. 3).

Post-operatively, Petitioner completed courses of physical therapy and work conditioning. Petitioner testified that his symptoms "disappeared" following the surgery, but that they returned toward the end of physical therapy. (T.15)

On November 4, 2011, Dr. Choi examined Petitioner and wrote, *inter alia*, the following:

> Mr. Schneider has symmetrical full active range of motion including internal rotation, which now reaches approximately T7. Excellent strength is noted throughout his rotator cuff muscle groups, which has been the case for the last several visits. There is no evidence of side-by-side detectible weakness at the infraspinatus, supraspinatus or subscapularis. Posterior load and shift is well tolerated with no complaint of pain. Hawkins test is negative and Speed's test is negative.
>
> *****
>
> His current work conditioning report demonstrated excellent gains in his ability to lift and carry 70 pounds including floor to chair lift of 90 pounds with no difficulty. This certainly meets the medium-to-heavy physical demand level from a functional standpoint, and therefore, I recommend a release to full duty at this point. He agrees and is confident that he should be able to return to work without any restrictions or concerns . . . I encouraged him to continue his home exercise program learned through formal therapy for rotator cuff strengthening and scapular stabilization in hopes of injury prevention in the future. (P. Ex. 4)

Petitioner returned to full-duty work and continued to perform such work through November 15, 2012.

Petitioner testified that pain in his left shoulder began to flare up in February 2012.

On May 11, 2012, Petitioner sought a second opinion for his left shoulder condition from Aaron A. Bare, M.D., an orthopedic surgeon. Petitioner told Dr. Bare that his shoulder is worse than it was before Dr. Choi's surgery on him. Petitioner reported to Dr. Bare that although he is able to do his job, he has pain with reaching and lifting as well as night pain. Dr. Bare ordered an MRI arthrogram of Petitioner's left shoulder. (P.Ex. 6)

On July 6, 2012, Petitioner followed up with Dr. Bare and complained of a sharp pain like "a knife stuck in [his] shoulder." He noted that these are the same complaints Petitioner had at the last visit. Petitioner reported that it bothers him with overhead activities. Dr. Bare opined that there was substantial structural pathology in his shoulder based on the MRI arthrogram and that Petitioner may, and probably will, require surgical intervention at some point in the future. The doctor gave Petitioner the option of continuing with conservative care or undergoing surgery. Dr. Bare then wrote: "In the meantime, I think it is something for him to consider, in the meantime, as well as he (sic) wants to try full duty." (P.Ex. 6)

After following up with Dr. Bare on October 26, 2012, Petitioner underwent left shoulder surgery on November 21, 2012. Dr. Bare performed an arthroscopic repair of the superior labrum and a mini open biceps tenodesis. Dr. Bare's post-operative diagnosis: (1) Left shoulder failed labral repair (2) Left shoulder biceps tendinitis. (P.Ex. 6)

Petitioner then participated in a course of physical therapy followed by a work hardening regimen. Subsequently, Petitioner underwent 3 Functional Capacity Evaluations ("FCEs") The dates of such FCEs: February 26, 2013, March 22, 2013 and May 3, 2013. Noel K. Priest, M.S., A.T.C., conducted all three FCEs. (R. Ex. 3)

Following the May 3, 2013 FCE, Ms. Priest found, based on the test results, that Petitioner is currently lifting at the heavy-to-very-heavy physical demand level. Therefore, she concluded, Petitioner's capabilities meet the job lifting requirements according to the verbal job description and Dictionary of Occupational Titles for floor to knuckle and shoulder to overhead lifts and push/pull. Ms. Priest noted that there were some inconsistencies with Petitioner's performance during validity testing that would indicate this may not be a completely accurate representation of his current maximum functional capabilities. In describing these findings, Ms. Priest wrote, she was by no means implying intent or denying his symptoms, but rather stating that Mr. Schneider appears to be able to do more at times than he commonly states or perceives. (R. Ex. 3)

In an addendum of May 6, 2013, Ms. Priest wrote:

Brian Schneider called stating that he experienced 9/10 intensity pain

in his entire left shoulder following the FCE on 5/3/13 but that it was

"no different" compared to what he usually feels. Therefore, it appears he is able to tolerate the functional activity levels as outlined in this report and the attached Work Capacity Summary without any adverse reactions. (R. Ex. 3)

Petitioner returned to see Dr. Bare on May 10, 2013. At that time, Dr. Bare discharged Petitioner from care and issued a work status report that indicated the employee may return to light-duty or alternate work if available, with the following restrictions: 50 lbs. to chest, 20 lbs. overhead. (R. Ex. 3) In his chart note of the same date, Dr. Bare noted that these are "permanent restrictions and thus will likely require repetitive actions." (P. Ex. 6)

On June 5, 2013, at the request of Respondent, and pursuant to Section 12 of the Act, Petitioner presented to orthopedic surgeon William A. Vitello, M.D., for an examination. Dr. Vitello took a history from Petitioner, and upon examination, found:

> No asymmetry or atrophy of the shoulder, forward flexion of 170 degrees, abduction of 160 degrees, internal and external rotation of 70 degrees in each direction without crepitus, 5/5 rotator cuff strength testing, negative Hawkins sign, negative impingement sign, negative Speed test, negative apprehension relocation test, negative O'Brien's test and negative Yergason's test. (R. Ex. 2, Dep. Ex. 2)

Dr. Vitello testified that the physical examination findings of the left shoulder were within 10 to 20 degrees of normal, which he considers to be within normal limits. He testified that Petitioner has a stable left shoulder. (R. Ex. 2, pp. 17-18) Dr. Vitello testified that Petitioner is capable of returning to work within the limitations and demonstrated capabilities of the May 3, 2013 FCE. (R. Ex. 2, p. 20)

Petitioner testified that Dr. Vitello spent approximately 15 minutes with him, and that the examination ended when Dr. Vitello moved his left shoulder, his shoulder stuck and popped, and Petitioner screamed. (TX., pp. 19-20)

At the request of Petitioner, Dr. Bare prepared a December 13, 2013 narrative report in which he explained the basis for imposing light-duty restrictions on Petitioner. Dr. Bare wrote that he has reviewed the opinions of Dr. William Vitello in his narrative report. Dr. Bare also wrote that when he last met with Petitioner in May, they discussed his job description and potential need to repetitively reach and lift to help other workers on job sites. Dr. Bare opined that although Petitioner is at MMI, he did not feel that Petitioner could return to "his full duty at

a heavy manual job." Dr. Bare acknowledged that Petitioner did reach his job requirements at the functional capacity evaluation. Dr. Bare then wrote:

> That being said, we need to consider his clinical picture. This is a young individual who has had 2 previous shoulder surgeries. I believe with a high degree of medical certainty that if he works his normal job doing heavy overhead reaching and lifting frequently, then he will probably aggravate his shoulder periodically resulting in further care followup and treatment to his shoulder. What I am recommending is he go forward with restrictions but still allow him to do most of his job as he is a maintenance supervisor. If indeed he does mostly supervisory work, this should not limit his ability to is (sic) to do his normal job. What I am suggesting is that if he does have to help coworkers, to refrain from doing a lot of overhead reaching and lifting. This is more for protection than anything else. He did demonstrate his ability to do heavy demand jobs at a functional capacity evaluation that allows and tests repetitions up to 15 to 20 times. What it is not able to do is to test repetitive lifting and reaching overhead multiple hours at a time. Common sense then would consider permanent light-duty restrictions for repetitive reaching and lifting.

Following his release from care, Petitioner attempted to return to work for Respondent by contacting his supervisor, Brian Stacy, and dropping off a copy of his restrictions (TX. p. 43). On July 10, 2013, Petitioner was contacted by Dave Childs, on behalf of Respondent, and was informed that he could not return to work with the permanent restrictions entered by Dr. Bare (TX. p. 44).

Petitioner testified that after his release to return to work, he and his family moved to Florida. Petitioner's wife received a job offer from a hospital in Florida that they could not pass up. Petitioner has not worked since he moved to Florida. Petitioner further testified that he has been looking for a job. He testified that he spends 3 to 4 hours a day searching online databases and submitting resumes or job applications. (TX., pp. 21-22)

Petitioner offered into evidence a job search log. (P. Ex. 8)

Petitioner testified that he has worked in various occupations over the years, but that all of his jobs have involved heavy lifting. (TX., pp. 24, 86) He further testified that had some college. (TX., p. 24) He further testified that he would like to go to school to be a motorcycle mechanic, and that he has looked into attending the Motorcycle Mechanics Institute. (TX. pp. 25, 91)

II. CONCLUSIONS OF LAW

With regard to issue (F):

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of March 15, 2011. The Arbitrator relies on Petitioner's testimony and on the opinions of his treating surgeon, Dr. Aaron Bare, in support of this decision.

There is no dispute that Petitioner was injured on March 15, 2011 and that his current condition is related to that injury. There is no dispute that Petitioner's treatment has been reasonable and necessary; Respondent has accepted responsibility for the accident and has paid all medical bills. The dispute is the precise state of Petitioner's current condition, specifically whether the restrictions entered by Dr. Bare are reasonable.

Dr. Bare testified that after Petitioner's second shoulder surgery, he had recurrent and ongoing pain in his shoulder. After reviewing the FCE, Dr. Bare, in consultation with Petitioner, concluded that the rigors of Petitioner's job were likely to be too severe to allow him to return to that position. Dr. Bare based his opinion on the nature of Petitioner's job and on his expertise as an orthopedic surgeon:

> I was basically trying to explain, you know, why I was placing him on permanent restrictions when the FCE commented that he met job levels, and it was based on the fact that this is an individual that had to do a lot of heavy overhead reaching/lifting and the repetitive nature of doing that could re-aggravate his injured shoulder and I didn't want to make him worse. So in lieu of the fact that he had to do that at work, I didn't think he was capable of doing his normal job. (P. Ex. 7, p. 17)

Dr. Bare further testified that an FCE is not the only thing that he considers when determining a patient's permanent restrictions. He also considers subjective complaints, objective findings, medical history, multiple surgeries and his clinical experience of having performed a procedure on the shoulder. (P. Ex. 7, p. 18)

Dr. Vitello, Petitioner's Section 12 examining physician, agreed that these factors should be considered when imposing permanent restrictions. (R. Ex. 2, pp. 36, 46)

Dr. Bare had the opportunity to treat and evaluate Petitioner on 10 separate occasions (P. Ex. 7, p. 26). In contrast to Dr. Bare's assessment, Dr. Vitello saw Petitioner on only one occasion for approximately fifteen minutes (TX. p. 19). Further, Dr. Vitello never reviewed a job

description and admitted that it was difficult to comment on job restrictions without more information (R. Ex. 7, p. 49).

Dr. Vitello deferred to Noel Priest's opinions that Petitioner was capable of returning to work without limitations. Notwithstanding, Dr. Vitello testified that Dr. Bare's opinion was "reasonable" that Petitioner should be placed on restricted work given the type of invasive surgery he underwent. Dr. Vitello agreed that medical minds can vary based on opinion from time to time. (R. Ex. 7, pp. 31-32)

The Arbitrator finds the opinions of Dr. Bare to be more persuasive than those of Dr. Vitello.

The Arbitrator finds Petitioner to be credible.

Based on the foregoing, the Arbitrator concludes that the permanent restrictions that Dr. Bare are reasonable and are causally related to the accident of March 15, 2011.

With regard to issue (G):

The Arbitrator concludes that Petitioner earned $33,968.22 in the 52 weeks immediately preceding the accident (sum of "gross pay this period" figures) and that his average weekly wage is $653.24. (P. Ex. 9) Of the 26 fortnightly earning statements, Petitioner performed overtime work in all but 5 of them. (P. Ex. 9) The documents indicate that Petitioner did not work a set number of overtime hours per two-week pay period. (P. Ex. 9) Petitioner testified that he performed overtime work in 40 - 45 weeks of the 52 weeks that he worked. (TX., p. 23) He explained that he was given work in the morning and told that he needed to stay until the work orders were done. (TX., p. 23) Respondent has offered no rebuttal on this issue. Therefore, the Arbitrator concludes that as such overtime hours were mandatory and consistent, Petitioner's average weekly wage is $653.24.

With regard to issues (O) and (L):

The Arbitrator concludes that Petitioner is entitled to maintenance benefits from May 14, 2013 through August 23, 2013, from October 1, 2013 through October 2, 2013, and from June 2, 2014 through July 15, 2014, for a total period of 21-1/7 weeks.

Petitioner testified that he never returned to work for the Respondent following his release from care. (TX., p. 21) He testified that he contacted his boss and dropped off his release form with restrictions. (TX., p. 43) He testified that the owner of the company called and left a voice mail message in which he stated: "Twenty pounds overhead will not work." (TX., p. 44)

Petitioner testified that he moved to Grand Island, Florida, on July 30, 2013, shortly after his release to return to work. (TX., pp. 21-22, 41) He testified that he has not worked since his family moved, but that he has been looking for a job. (TX., p. 22)

Petitioner testified that he spent 3 to 4 hours per day on the computer going through job searches, and that he submitted a resume or filled out an application when a job "comes up." (TX., p. 22) Petitioner testified that since May 3, 2013, he has kept a notebook in which he has recorded each of the jobs for which he has applied. Petitioner did not have this notebook at the time of trial, and testified that he never forwarded it to his attorney. (TX., p. 60) He further testified that he transferred the information from the notebook to the forms that his attorney sent him. (TX., pp. 45-46) The collection of forms constitutes the log. (P. Ex. 8)

Petitioner initially testified that he received a few "call backs" from prospective employers to whom he applied and "a few" e-mails from different companies advising that they had gone with a different candidate. (TX., p. 24) He later testified that he received only one e-mail message in response to his applications, which was from Lowe's and is attached to the job log. (TX., p. 71)

According to the log, Petitioner first applied for a job on May 3, 2013, which was before Dr. Bare imposed permanent work restrictions. (TX., p. 45, P. Ex. 8) Petitioner's notes indicate that he was offered a job as a maintenance supervisor at Nordstrom, but when they found out about his restrictions, they told him they could not hire him since he was too much of a liability for them. (P. Ex. 8)

Petitioner testified that he created this job log approximately one month prior to the trial date of August 11, 2014, and that he forwarded a portion of the log to his attorney two weeks prior to trial. (TX., p. 46) Respondent was not provided a copy of this job log prior to trial.

Petitioner testified that he is currently looking for jobs in construction and driving that are within his job restrictions of 50 pounds to chest and 20 pounds overhead. (TX., p. 25) Petitioner later testified that he did not attempt to specifically search for light-duty jobs within the databases he regularly uses. (T.93)

Petitioner testified that the list of jobs for which he applied is complete. (TX., p. 61) The job log includes a job description with the lifting requirements for each position. The vast majority of such jobs are outside of Dr. Bare's restrictions. (P. Ex. 8) Petitioner testified that the online job postings did not list lifting requirements, and that he referred to the employers' websites after he applied in order to determine the specific requirements. (TX., pp. 82-83) He testified that he only applied through online job search databases. (TX., pp. 83-84)

Petitioner testified that he is interested in undergoing job training to be a motorcycle mechanic. He testified that he used to be a service porter and helped mechanics when working at a Ford dealership. (TX., p. 84) He testified that the position of motorcycle mechanic did not require lifting above waist level, per his communication with the school. He testified that he would have to lift pneumatic tools, but was unaware of their weight. (TX., p. 91) Petitioner provided no information with regard to the cost of the motorcycle mechanic school, the likelihood he could get a job as a motorcycle mechanic upon completion of the program or the amount he could expect to earn as a motorcycle mechanic.

Petitioner offered into evidence a handwritten job log that includes 159 prospective employers to whom he sent applications and/or resumes. Petitioner testified that this is the complete list of all the positions for which he applied over a search period of approximately 15 months. In fact, Petitioner did not apply for any positions in September 2013, and did not apply

for any positions between October 2, 2013 and June 2, 2014. Therefore, the Arbitrator concludes that Petitioner did not conduct any job search whatsoever for a total of approximately 9 months.

The Arbitrator finds that Petitioner is not entitled to maintenance benefits during these two hiatuses.

The Arbitrator notes that after the second hiatus, Petitioner began making job entries on June 2, 2014, which was 4 days prior to his attorney filing a demand for vocational rehabilitation benefits.

It is true that the vast majority of jobs for which Petitioner applied were outside his restrictions. Yet, Respondent did not provide any vocational assistance for Petitioner.

It is clear to this Arbitrator that Petitioner needs help in finding a job or transitioning into a new line of work. Petitioner testified that when he applied for jobs online, he did not think to check the job requirements first because he just wanted to get his name out there. Petitioner testified that he applied for warehouse jobs and maintenance jobs because these were the types of jobs he performed in the past. Petitioner has not undergone a vocational assessment.

Petitioner's testimony establishes that he is not fully equipped to find new employment without outside assistance. The job search logs evince a willingness to put forth the effort necessary to find employment. However, Petitioner has used a relatively unsophisticated approach and his job search has been unsuccessful to date.

Therefore, the Arbitrator finds that Petitioner is entitled to vocational rehabilitation. The Arbitrator finds that Petitioner proved that he suffered a work-related injury and that the restrictions arising from such injury have impaired his earning power. As a result of the accident, Petitioner has been precluded from returning to his pre-injury occupation. Additionally, Petitioner testified that he has worked in various occupations over the years, but that all of his jobs have involved heavy lifting. Petitioner has suffered a loss of job security as a result of the accidental injury. He is a high school graduate with some college. There is no evidence that Petitioner possesses any specialized work skills. On the date of the trial, Petitioner was 37 years old, so he has a fairly long work-life expectancy. Petitioner appears to be motivated to pursue a new career. Therefore, as there are a sufficient number of factors in Petitioner's case that favor vocational rehabilitation, pursuant to National Tea Co. v. Indus. Comm'n, 97 Ill. 2d 424, 432, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983), the Arbitrator finds that vocational rehabilitation is appropriate here and orders Respondent to provide such benefit.

With regard to issue (M):

The Respondent relied on the opinions of William A. Vitello, M.D., and Noel Priest, M.S., A.T.C., in disputing Petitioner's entitlement to maintenance and vocational rehabilitation. The Arbitrator finds that such reliance was not unreasonable. Therefore, the Arbitrator concludes that neither penalties nor attorneys' fees are warranted in this case.

Brian Cronin, Arbitrator

March 13, 2015
Date

MAR 13 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Linda Hodges,

Petitioner,

vs. NO. 12WC010688

State of Illinois/Tamms Correctional Center,

Respondent.

16IWCC0102

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, permanent disability, causal connection, medical expenses, prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 18, 2015 is hereby affirmed and adopted.

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.

No bond is required for removal of this cause to the Circuit Court. 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.

DATED: FEB 4 - 2016
SJM/sj
o-12/10/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HODGES, LINDA
Employee/Petitioner

Case# **12WC010688**

SOI/TAMMS CORRECTIONAL CENTER
Employer/Respondent

16IWCC0102

On 5/18/2015, 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 0.08% 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:

5236 CULLEY FEIST KUPPART & TAYLOR
KREIG TAYLOR
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAY 18 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0102

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Linda Hodges
Employee/Petitioner

v.

State of Illinois/Tamms Correctional Center
Employer/Respondent

Case # 12 WC 010688

Consolidated cases: N/A

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 13, 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 ___

16IWCC0102

FINDINGS

On **March 5, 2012**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**47,978.00**; the average weekly wage was $**922.65**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $- for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**if any** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on March 5, 2012 that arose out of and in the course of her employment and that her current condition of ill-being is causally related to said accident.

Petitioner's claim for compensation is denied and no benefits are awarded.

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.

Nancy Lindsay
Signature of Arbitrator

May 11, 2015
Date

MAY 18 2015

Linda Hodges v. State of Illinois/Tamms Correctional Center, 12 WC 010688

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds:

Petitioner filed an application for adjustment of claim with the Illinois Workers' Compensation Commission. Petitioner alleged that she sustained injuries to her bilateral hands as a result of repetitive duties while working for Tamms Correctional Center. Petitioner has alleged the date of accident as March 5, 2012. This is a repetitive trauma claim and the issues in dispute are notice, accident, causation, temporary total disability benefits, medical bills, and nature and extent.

Petitioner was 60 years old on March 5, 2012, which is her alleged manifestation date for her repetitive trauma claim. Petitioner testified that she has been employed as an office associate at Tamms Correctional Center for 13 years.

On March 5, 2012, Petitioner presented to her primary care provider, Marie N. Wright, APRN, FNP-BC of Southeast Primary Care, with complaints of right wrist numbness and hypertension. Noted onset was two weeks prior. There was no radiation of the pain. There was no reported injury. The pain was aggravated by movement with no relieving factors. She reported night pain, night-time awakening, numbness, tenderness and weakness. There was no bruising, crepitus, decreased mobility, difficulty going to sleep, instability, locking, popping, spasms, swelling or tingling in the arms. Petitioner reported a history of carpal tunnel syndrome in the right wrist in the past. Petitioner was fitted with a cock up splint, and was prescribed Celebrex, and advised to follow up in two weeks.

On March 15, 2012, Petitioner completed a Workers' Compensation Employee's Notice of Injury for Respondent. She claimed an accident date of March 5, 2012, and noted that the accident happened while she was typing in the record office at Tamms Correctional Center. She noted that her hands had been hurting for some time but that on March 5, 2012 her hands started burning down to the tips of her fingers, mainly on the right side.

Also on March 15, 2012, Petitioner's supervisor completed a form titled Supervisor's Report of Injury or Illness. It noted that Petitioner was an Office Associate. It noted that Petitioner had been in her current job title for 22 years. Her job was described as clerical, with duties including typing and filing.

On March 19, 2012, Petitioner followed up with Ms. Wright. Petitioner complained that the symptoms were constant and worsening. Noted onset was one month ago. Petitioner reported that the pain was aggravated by typing and relieved by medication and rest. Ms. Wright ordered a nerve conduction study.

On March 21, 2012, Petitioner underwent a nerve conduction study with Dr. Randall Stahly of Southeast Hospital Department of Clinical Neurophysiology Electromyogram. It revealed right carpal tunnel syndrome and mild left carpal tunnel syndrome.

Petitioner followed up with Ms. Wright on March 29, 2012. It was noted that her pain was aching, throbbing, associated with numbness, and it had begun years ago. The pain was aggravated by lifting and movement. The pain was relieved by medication and rest. Ms. Wright discussed the nerve conduction study and surgical versus medical options. Petitioner was agreeable to surgery, and noted she would be in contact with a surgeon in Herrin, IL.

On April 12, 2012, Petitioner presented to Dr. John Wood of Southern Orthopedic Associates for bilateral hand pain, right greater than left. Dr. Wood noted that Petitioner had symptoms of carpal tunnel syndrome since 2001. Apparently it was fairly significant at that point. Petitioner's work station was modified and her symptoms improved. Petitioner had experienced intermittent problems since then. Petitioner reported that her symptoms had worsened in March of this year when she started a new position that involved a different ergonomically placed keyboard and the symptoms had progressed to the point where she was having frequent night awakening. It was worse with typing or filing. It was noted that Petitioner planned on retiring at the end of June, and she wanted to get it taken care of before then. Her hobbies included crocheting and some other activities at home. Petitioner felt that the work she did, including the keyboard, has been the main factor for her. It was noted that she worked at Tamms Correctional Center for 13 years, and that she worked for the State for 10 years prior to that also doing data entry type work. She was right-hand dominant. Dr. Wood opined that her bilateral carpal tunnel syndrome was related to the work she was doing at Tamms. He also noted that some of her avocational activities may have contributed as well. Surgical options were discussed, and Petitioner wished to proceed.

On March 14, 2013, Petitioner presented to Dr. Richard Tipton of Southeast Primary Care for medical clearance prior to her carpal tunnel surgery. It was noted that Petitioner had a history of hypertension and hypothyroidism. Petitioner was cleared for surgery.

On March 19, 2013, Petitioner underwent a right carpal tunnel release and cortisone injection. At her follow-up appointment on March 29, 2013, Petitioner became pale as her sutures were being removed and had complaints of chest pain. She was taken to the emergency room, and it was noted that she experienced a panic attack.

At her final appointment on April 19, 2013, Petitioner noted a slight soreness over the scar, but was pleased with the surgical results. It was noted that all numbness was gone. Petitioner had a good range of motion. Dr. Wood noted that the soreness was normal and would get better with time. Petitioner was released from care.

Dr. Wood testified via evidence deposition on July 9, 2014. Dr. Wood testified that Petitioner first presented to him on April 12, 2012, at which time she stated that she had been

having numbness and tingling in her hands for approximately 11 years. She had her work station modified, and her symptoms got better. In March of 2012 Petitioner started a new position and her new work station was different. Her symptoms then returned and progressed. Dr. Wood testified that after taking a history of Petitioner's condition and complaints, reviewing the nerve conduction study, as well as performing a physical examination, he diagnosed her with bilateral carpal tunnel syndrome. Given the length of time that her symptoms had been going on, Dr. Wood recommended surgical intervention. Dr. Wood testified that he performed a right carpal tunnel release on March 19, 2013, and Petitioner was released from his care approximately one month later. Dr. Wood testified that Petitioner was to follow up with him if the symptoms on her left side became more pronounced and needed treatment.

Dr. Wood testified that Petitioner is a secretary at Tamms Correctional Center which involved typing and filing. Dr. Wood opined that Petitioner's need for surgery was, at least, aggravated by her work duties. (PX 9, p. 13) On cross-examination, Dr. Wood testified that he was unaware if any of Petitioner's treating physicians had advised her that her condition was work-related, but that Petitioner felt it was related to her work. Dr. Wood testified that Petitioner worked eight hours a day, but admitted he did not know how much of that time was devoted to typing or filing, or if she had any intermittent breaks. Dr. Wood further admitted that he was unaware if Petitioner continued to work after May 2012.

Dr. Wood testified that he did not review the medical records from Petitioner's primary care provider; he only reviewed the nerve conduction study. He further testified that Petitioner told him her symptoms began in 2001 but improved with a change in the ergonomics of her work station. She then described a change in her job activities with a different ergonomic situation resulting in her hands being in a different position when typing and she was reaching different levels for filing. (PX 9, p. 18) Dr. Wood admitted that Petitioner did not demonstrate how she typed, nor did he review the set-up of her work station.

Dr. Wood agreed that if a person is obese he/she would be predisposed to the development of carpal tunnel syndrome. He testified that Petitioner fell into the category of obese. He also testified that older females like Petitioner were at a higher risk for carpal tunnel syndrome, and that hypothyroidism and hypertension were both positively correlated to a higher risk of carpal tunnel syndrome. Dr. Wood further testified that Petitioner's hobbies, specifically crocheting, were an aggravating factor in her condition.

At the request of Respondent, Petitioner underwent a Section 12 evaluation with Dr. Richard Katz on May 16, 2012. Dr. Katz testified via evidence deposition on March 4, 2013. Dr. Katz testified that he is board certified by the American Board of Physical Medicine and Rehabilitation, the American Board of Electrodiagnostic Medicine, and the American Board of Independent Medical Examiners.

Dr. Katz testified that in addition to the physical examination of Petitioner, he reviewed her medical records, a CMS Job Description for Office Associate, as well as the CMS Demands of Job form. Petitioner reported to Dr. Katz that she was hired by CMS in 1998, and that she had been an Office Associate for her entire employment. Her work was clerical in nature and involved typing, filing and bookkeeping, using the telephone, and occasional box assembly.

While Dr. Katz agreed with the diagnosis of carpal tunnel syndrome, Dr. Katz testified that Petitioner had three constitutional risk factors for carpal tunnel syndrome which included obesity, age, and female gender. Petitioner also had two weaker risk factors of hypothyroidism and osteoarthritis. Dr. Katz testified that it is his opinion within a reasonable degree of medical and surgical certainty, Petitioner's job duties did not cause or aggravate her carpal tunnel syndrome. Specifically, Dr. Katz testified that typing, filing and lifting are not the type of activities which cause, exacerbate or aggravate carpal tunnel syndrome, and in his report Dr. Katz provided citations for many medical publications which support his opinion. Dr. Katz clarified under cross-examination by saying that it is not repetitive motion that is associated with carpal tunnel syndrome, but repetitive flexion and extension in the vicinity of 45 degrees in magnitude.

Petitioner testified at arbitration on March 13, 2015. Petitioner testified that she is currently retired, and that she retired from Respondent in June 2012. Petitioner testified that during the 13 years she worked at Respondent she held the position of office associate. Petitioner testified that she first worked in timekeeping at Respondent for two to three years. Petitioner testified that she later transferred to the records office where she worked for the last ten years of her career at Respondent.

Petitioner testified on cross-examination that when fully staffed there were six people working in the records office, three of which were office associates. Petitioner testified that the other office associates did some of the same job duties she did.

Petitioner testified that as an office associate she typed, filed, did retention storage boxes, and answered the phone. Petitioner testified that she worked seven and a half hours a day, and that she was on the computer at least three-fourths of the day. Petitioner testified that on the computer she would type e-mails, letters, restorations, and revocations.

Petitioner agreed on cross-examination that her typing on the computer was intermittent. Petitioner testified that two to three times a week she would be required to type a document that was a couple pages or longer. Petitioner testified that the other documents she was required to type were one page or shorter.

Petitioner testified that when she was not typing she was filing. Petitioner testified that "[w]e had several sheets of paper that you would have to put in inmate records". Petitioner testified that she also answered the phone.

Petitioner agreed on cross-examination that she would do filing intermittently. Petitioner agreed that if she was tired of typing she could go back to filing and that she could change her job duties as she wanted throughout the day.

Petitioner testified that she is right hand dominant, but that she used both hands when performing her job duties. Petitioner testified that her job duties caused her to have pain and numbness, and that typing made her pain worse.

Petitioner testified that she first began to experience pain and numbness in her hands in 2001. Petitioner testified at that time they brought in a table to help with her hand pain. Petitioner testified that the table was a stand that went underneath her desk. Petitioner testified that it helped the pain but it still hurt throughout the day. Petitioner testified that the table "kind of prolonged it for a while," and then it came back. When it came back, it was worse, so she went to the doctor on the 5th of March.

Petitioner testified that March 5, 2012, was the first time she saw a doctor for her hands or wrists. Petitioner testified that her doctor wanted her to wear a splint on her hand, but that Respondent would not allow her to because there was a metal rod in it. Petitioner testified that she wore splints outside of work and that it was helpful but uncomfortable. Petitioner admitted on cross-examination that she was able to wear wrist splints without metal in them at Respondent's facility in 2012.

Petitioner testified that she noticed the pain the most when she was trying to sleep. Petitioner testified that she also noticed the pain a lot when she was doing her job duties, specifically typing and filing. Petitioner testified that when she would go home at night the pain would lessen some but would return. Petitioner later admitted on cross-examination that her hands bothered her any time she used them, including at night, and when she tried to sew, crochet or cook.

Petitioner admitted on cross-examination that she had actually seen a Dr. Eller from Cape Girardeau in 2001 for her right wrist pain, and that the doctor prescribed her the table stand for work and it subsided. Petitioner testified that Dr. Eller did not perform a nerve conduction study then. Petitioner testified that Dr. Eller did tell her she had carpal tunnel syndrome. Petitioner admitted that Dr. Eller related her carpal tunnel syndrome to her work activities. Petitioner testified that she told her employer that she had work-related carpal tunnel syndrome then, but that she could not remember who she told. Petitioner testified that "they" ordered the table and she got it. Petitioner testified that she was diagnosed with left carpal tunnel syndrome at that time as well. Petitioner testified that, except for a couple of months, she has worked in the records office from 2001 through 2012 at the same work station with the table Respondent gave her to accommodate her issues with carpal tunnel syndrome. Petitioner testified that after she received the table in 2001 until she saw the doctor in 2012 she still continued to have symptoms intermittently.

Petitioner testified that she never noticed these issues with her hand prior to her employment with Respondent. However, Petitioner testified on cross-examination that prior to working at Respondent's facility she did not have arthritis, hypertension, or hypothyroidism either.

Petitioner testified that Dr. Wood recommended surgery on both of her wrists. Petitioner testified that she had surgery on her right wrist on March 19, 2013. Petitioner testified that she has not had surgery on her left wrist, and does not plan to have surgery on that hand at the present time. Petitioner testified Dr. Wood released her on April 19, 2013, and that she has not made any appointments with him since then.

Petitioner testified that she no longer has any numbness or pain in her right wrist. Petitioner testified that sometimes her left wrist hurts, but not nearly like her right wrist did. Petitioner testified on cross-examination that her left hand mainly hurts when she is sleeping.

Petitioner testified that when her hand was hurting she could not crochet, and before surgery she hardly crocheted at all due to the pain. Petitioner testified that she can crochet now. Petitioner testified that when her hand was hurting she had to cut down on how much she cooked as well.

Petitioner testified that she has sewed and crocheted for 30 years. Petitioner testified that before she stopped sewing and crocheting due to the pain in her hands, she would perform the activities two to three hours a day. Petitioner testified that since undergoing surgery she has been able to go back to her hobbies of crocheting and sewing.

Petitioner testified that she does not take any pain medication for her hands or wrists.

The Arbitrator concludes:

1. Accident/Causal Connection. Petitioner failed to prove she sustained an accident on March 5, 2012, that arose out of her employment with Respondent. Petitioner failed to prove that her condition of ill-being in her bilateral hands is causally related to her alleged accident of March 5, 2012.

   Petitioner bears the burden of proving each and every element of her case in order to recover under the Workers' Compensation Act. *Shelton v. Industrial Com'n*, 267 Ill. App. 3d 211, 221, 641 N.E.2d 1216, 1224 (5th Dist. 1994). In order to satisfy the "arising out of" portion of the Act the petitioner must show that the injury was derived from 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. v. Indus. Comm'n*, 207 Ill.App.3d 193, 203, 797 N.E.2d 665, 672 (Ill. 2003). However, "[i]n a repetitive trauma case, issues of accident and causation are intertwined. Therefore, a review of the

evidence allows both issues to be resolved together." *Boettcher v. Spectrum Property Group and First Merit Venture Realty Group*, 97 W.C. 44539, 99 I.I.C. 0961.

The Arbitrator finds that Petitioner failed to meet her burden of proof in that regard.

The Commission has determined that a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. *Gambrel v. Mulay Plastics*, 97 IIC 238. Dr. Wood testified that he did not know how much typing or filing Petitioner did, nor did he know if it was continuous or intermittent. Dr. Wood admitted that he did not know the frequency, intensity, or duration of the job duties Petitioner performed. Petitioner readily testified that she typed, filed, and answered phones intermittently throughout the day, and could change or alter the performance of each task at her leisure.

The Arbitrator finds the opinions of Dr. Katz to be more persuasive than those of Dr. Wood. In addition to the physical examination of Petitioner, Dr. Katz reviewed Petitioner's medical records, a CMS Job Description for Office Associate, as well as the CMS Demands of Job form. Dr. Katz and Dr. Wood were in agreement that Petitioner had several medical factors that would predispose her to the development of carpal tunnel syndrome regardless of work; i.e. her age, gender, obesity, hypothyroidism, and hypertension. Additionally, both doctors agreed that Petitioner's hobby of crocheting played a role in the development and/or aggravation of her condition.

The only difference of opinion the doctors was whether or not Petitioner's job duties were also a factor in the development and/or aggravation of her condition. Dr. Katz credibly testified that typing and filing are not the type of activities that cause, exacerbate, or aggravate carpal tunnel syndrome. Additionally, Dr. Katz provided citations for many medical publications that support his opinion.

The Arbitrator also notes that Dr. Wood never rendered a causation opinion based upon the facts presented to him by Petitioner. Dr. Wood opined there was a causal relationship between Petitioner's work duties and her bilateral carpal tunnel syndrome. However, that was really what Petitioner claimed back in 2001. According to the doctor, in 2012 she changed jobs and had a different ergonomically-designed work station. While Dr. Wood testified that as a result of that job change Petitioner had a different ergonomic station, different position when typing, and different levels for filing (PX 9, p. 18) Petitioner never provided him with any details to support that testimony. She never explained to him how the typing was different or the filing was different and he candidly admitted he had no detailed information concerning that (PX 9, pp. 35, 37-38).

On direct examination, Petitioner provided little, if any, testimony concerning the job change/re-assignment in March of 2012. Petitioner was asked on cross-examination if she

recalled a time between 2001 and 2012 when she might have had her work station changed and she explained that there was a very short period of time when Respondent was short-handed and might have put her in the back for clerical but then she returned. Petitioner initially could not recall when that occurred but when asked if it might have been in March of 2012, she responded that it could have been. Thus, it appears from the totality of Petitioner's testimony that, at arbitration, Petitioner was trying to establish that her work duties for Respondent caused/aggravated her bilateral carpal tunnel syndrome. If such is the case, Petitioner's accident occurred in 2001 as that is when she believed she had a work-related carpal tunnel condition and requested ergonomic changes. Petitioner failed to meet her burden of proving that she sustained an accident on March 5, 2012 that arose out of her employment as a result of any job change. First, her testimony was somewhat contrary to what she initially presented to Dr. Wood. Second, if relying on the "job change" theory, Petitioner failed to explain how her job change in March of 2012 changed her manner of typing and filing. Finally, and, Dr. Wood failed to render a persuasive opinion on causal connection based upon a "job change" theory.

Petitioner's claim for compensation is denied. All other issues are moot.

****

STATE OF ILLINOIS)
)
SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alejandro Rangel,
Petitioner,

vs. NO. 12 WC 12105

15IWCC0976

Labor Power, Inc. and Tower Group,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and permanent disability, 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.

The Commission modifies the decision of the Arbitrator to find that Petitioner failed to prove entitlement to additional compensation pursuant to §19(k) and §19(l) and/or attorneys' fees pursuant to §16 of the Act. The Commission finds that Respondent's conduct in delaying payment of TTD benefits in this matter was neither unreasonable nor vexatious under the circumstances, particularly in light of the fact that Respondent at one point was awaiting the report of its §12 examining physician, which it was duly entitled to procure in defense of this matter. Accordingly, the Commission hereby vacates the Arbitrator's award of additional compensation pursuant to §19(l) and §19(k) as well as attorneys' fees pursuant to §16 of the Act.

15IWCC0976

Furthermore, the Commission modifies the decision of the Arbitrator to find that Petitioner sustained the permanent partial loss of use of 30% of his left foot pursuant to §8(e)11 of the Act. The Commission notes that given a date of accident of January 11, 2012, an analysis pursuant to §8.1b is required. Along these lines, the Commission notes that Petitioner was a 49 year old general laborer at the time of the accident. On January 11, 2012, Petitioner injured his left ankle when a skid struck his left leg. An MRI of the left ankle performed on February 17, 2012 was interpreted as revealing 1) moderate to large subtalar joint effusion, 2) no evidence of stress reaction, contusion or fracture; 3) mild subchondral osseous reaction at the superolateral and supermedial talus dome, probably reflecting reactive degenerative changes; 4) scarring and tear of the anterior tibiofibular ligament; 5) scarring of the anterior talofibular ligament and mild sprain of the posterior talofibular ligament; and 6) small plantar calcaneal spur with no significant thickening of the central cord plantar fascia. Petitioner eventually came under the care of Dr. Michael Pinzur who performed surgery on January 16, 2013 consisting of 1) left ankle arthroscopy, 2) extensive synovectomy, and 3) retrograde drilling of osteochondral lesion of the talus. On May 1, 2013 Dr. Pinzur performed a left first metatarsal osteotomy following a diagnosis of cavus left foot. Petitioner underwent physical therapy and completed a course of work hardening on September 8, 2013. A Functional Capacity Evaluation performed on September 10, 2013 demonstrated that Petitioner had the ability to work at a "medium/heavy physical demand level." Dr. Pinzur eventually released Petitioner to return to work with "medium/heavy" restrictions on October 15, 2013. Petitioner tried to return to work for Respondent thereafter but noted that he was "ignored." He eventually found work and is currently employed doing general labor type work in a warehouse setting through Metro Staffing, working 40 hours a week at a rate of $8.25 per hour (AWW=$330). The Commission notes that Petitioner was earning approximately the same amount at the time of the injury while working for Respondent (AWW=$327.61). Thus, it would appear that Petitioner has not suffered a diminution in future earnings capacity as a result of his injuries. Furthermore, the Commission notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Currently, Petitioner testified that his left foot becomes numb walking up stairs and that his toes, especially his big toe, falls asleep. He also noted that he experiences difficulty falling asleep at night and feels depressed. He indicated that he immerses his foot in cold water to help temporarily relieve his symptoms.

Based on the above factors, and the record taken as a whole, and in full consideration of the factors enumerated under §8.1b of the Act, the Commission finds that Petitioner sustained the permanent partial loss of use of 30% of his left foot pursuant to §8(e)11 of the Act.

All else is hereby affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses admitted at PX4-PX7 under §8(a) of the Act, subject to the fee schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 50.1 weeks, as provided in §8(e)11 of the Act, for the reason that the injuries sustained caused the permanent partial loss of use of 30% of the left foot.

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

15IWCC0976

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 $15,000.00. 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.

DATED: DEC 2 3 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-12/15/15
jdl/po
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RANGEL, ALEJANDRO
Employee/Petitioner

Case# 12WC012105

LABOR POWER INC; TOWER GROUP CO
Employer/Respondent

15IWCC0976

On 11/24/2014, 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 0.07% 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:

1876 PAUL W GRAUER & ASSOC
EDWARD ADAM CZAPLA
1300 WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

1872 SPIEGEL & CAHILL PC
PATRICK J JESSE
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ALEJANDRO RANGEL
Employee/Petitioner
v.
LABOR POWER, INC.; , TOWER GROUP CO.
Employer/Respondent

Case # **12** WC **12105**

15IWCC0976

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 **Kurt CARLSON**, Arbitrator of the Commission, in the city of **Chicago**, on **June 9, 2014 and Sept. 12, 2014**. 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 1/11/12, 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 $1,310.43 the average weekly wage was $ 327.61.

On the date of accident, Petitioner was 49 years of age, ***single*** with 1 dependent children.

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ 21,505.00 for TTD, $ 0 for TPD, $ 0 for maintenance, and $ -0- for other benefits, for a total credit of $ 21,505.00.

Respondent is entitled to a credit of $-0- under Section 8(j) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ATTACHED.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $253/week, for 58.45 weeks, because the injuries sustained cases a 35% loss of use of the left foot, as provided in Section 8(e)(11) of the Act.

Respondent shall pay Petitioner the reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner 19(k) penalties of $2,530.00, 19(l) penalties of $4,200.00 and Section 16 attorneys fees of $506.00 pursuant to 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

11·24·14
Date

NOV 24 2014

FINDINGS OF FACT

Petitioner, a 53 year old gentleman, worked for Respondent, Labor Power, Inc., as a general laborer. (Tr. 8). Petitioner's work involved "warehouse and factory work" which consisted of lifting, loading and unloading materials. (Tr. 9). Petitioner was assigned to work at various companies (Tr. 9).

On January 2012 Petitioner was working for a company that coated metals with chrome. (Tr. 10). Petitioner was required to lift large blocks of metal that weighed more than 50 pounds. (Tr. 11). On January 11, 2012 Petitioner injured his left ankle when a forklift picking up a skid struck another skid striking Petitioner's left leg. (Tr. 12-13).

Petitioner reported the accident at work and received medical treatment from the company doctor at Advanced Occupational Medicine Specialists on January 12, 2012. (Px. 1). Petitioner was issued crutches and restricted to office work. (Px. 1). Petitioner returned on January 16, 2012 complaining of left ankle pain and swelling. (Px. 1). Petitioner was released to regular work and discharged from treatment but continued to experience left ankle pain.

Petitioner returned on January 27, 2012 complaining of increased left ankle pain. (Px. 1). Petitioner's ankle was placed in an aircast and he was instructed to ice the ankle 3 times a day. (Px. 1). On February 10, 2012, Petitioner was issued light duty work restrictions which respondent accommodated.

MRI of the left ankle revealed: 1) moderate to large subtalar joint effusion; 2) mild subchondral osseous reaction at the superolateral and superomedial talus dome; 3)

scarring and tear of the anterior talofibular ligament; 4) scarring of the anterior talofibular ligament, calcaneofibular ligament and mild sprain of the posterior talofibular ligament. (Px. 1). Petitioner was prescribed a course of physical therapy treatment which failed to relieve his left ankle pain. (Px. 3). Cortizone injection also failed to relieve his ankle pain. (Px. 1).

Petitioner was referred to an orthopedic specialist, Dr. Michael Pinzur, at Loyola University Medical Center. (Px. 2). Dr. Pinzur reviewed the MRI and diagnosed Petitioner with an anterolateral osteochondral lesion of the talus and lateral ligament instability. (Px. 2). Dr. Pinzur recommended arthroscopic surgery for the osteochondral lesion along with reconstruction of the lateral ligaments and plantar flexion osteotomy of the first metatarsal. (Px. 2).

Thereafter, on June 9, 2012, Dr. Simon Lee examined Petitioner pursuant to section 12 of the Act. Dr. Lee agreed with the diagnosis of the osteochondral defect, tendonitis and loose body. It was Dr. Lee's opinion that the condition is causally related to the January 11, 2012 injury at work and recommended a repeat MRI of the ankle which was done on October 23, 2012.

On January 16, 2013, Dr. Pinzur performed left ankle arthroscopic surgery with extensive synovectomy and retrograde drilling of the osteochondral lesion of the talus. (Px. 2). Petitioner remained restricted from work activity post-operatively and followed up with Dr. Pinzur on January 22, 2013. Petitioner's left ankle was placed in a fracture boot and he began a course of physical therapy at ATI Physical Therapy. (Px. 3). Petitioner returned to Dr. Pinzur on March 12, 2013 and reported "it is no better" and

was still walking with the boot. (Px. 2). By March 14, Petitioner had progressed to where he would ambulate with a CAM boot and one crutch. (Px. 3).

Petitioner continued to complain of left foot numbness and returned to Dr. Pinzur on March 26, 2013 and reported no change in symptoms. Dr. Pinzur stopped the physical therapy and placed Petitioner's left ankle in an aircast support and continued to restrict him from all work activity. Petitioner continued to experience left ankle pain and saw Dr. Pinzur on April 9, 2013. At that time Dr. Pinzur recommended plantar flexion osteotomy of the first metatarsal. (Px. 2).

On May 1, 2013, Petitioner underwent a left first metatarsal osteotomy. (Px. 2). The operative note reflects that at "the time of the initial operation the synovectomy was sufficient and there were sufficient findings to warrant not doing the osteotomy, however, he has had persistent varus deformity secondary to his cavus and has had persistent ankle pain requiring a second surgery." (Px. 2).

Post-operatively Petitioner remained restricted from work activity and resumed physical therapy at ATI Physical Therapy. (Px. 3). Petitioner participated in physical therapy treatment throughout June and July 2013. He complained of shooting pain in his great toe and lateral calf. (Px. 3). On August 6, 2013, Dr. Pinzur noted Petitioner was "walking on the side of his foot" and "is developing symptoms of complex regional pain syndrome." (Px. 2). Dr. Pinzur recommended a course of work conditioning followed by a functional capacity evaluation for Petitioner.

The August 15, 2013 discharge note from ATI Physical Therapy reflects Petitioner was still experiencing shooting pain in his great toe and lateral calf. At that time Petitioner was still walking in his aircast. (Px. 3).

Petitioner completed a course of work hardening at ATI between August 26, 2013 and September 8, 2013. (Px. 3). Thereafter, on September 10, 2013, Petitioner completed a functional capacity evaluation which demonstrated his ability to work at the "**medium/heavy** physical demand level". (Px. 3). On October 15, 2013, Dr. Pinzur examined Petitioner and noted he had reached MMI with a "moderate degree of permanent limitation of function". (Px. 2). Dr. Pinzur issued Petitioner permanent "**medium/heavy**" work restrictions of lifting and carrying up to 70 pounds. (Px. 2).

Petitioner tried to return to work for Respondent but testified "they ignored me completely". (Tr. 25). On November 17, 2013, Petitioner found alternative employment at Metro Staffing for general labor type work. (Tr. 26). Petitioner works full time 40 hours a week earning $8.25/hour.

Since his return to work Petitioner testified he deals with ankle pain every day. (Tr. 27). Petitioner testified "the ankle pain is very uncomfortable, very discomforting when I am doing work there". (Tr. 27). Petitioner testified that standing for long periods, bending his ankle, bending down, and going upstairs at work cause left ankle problems. (Tr. 27). Lifting boxes from the floor and pushing heavy things also cause ankle pain. (Tr. 28).

Petitioner has difficulty climbing the stairs to his second floor apartment and his foot and toes become numb and fall asleep. (Tr. 27). Petitioner testified that he will

immerse his foot in cold water to relieve the ongoing ankle pain. (Tr. 30). Petitioner testified he tried to return to Dr. Pinzur for treatment of the ongoing ankle pain but the treatment was not approved by Respondent. (Tr. 30).

CONCLUSION OF LAW

The Arbitrator adopts the above Findings of Fact in support of the following Conclusions of Law.

WITH RESPECT TO ISSUE F - IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY? THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that based upon the evidence presented at trial along with the medical records admitted into evidence and the testimony of Respondents section 12 physician, Dr. Simon Lee, that petitioner proved that his current condition of ill-being with respect to his left ankle injury is causally related to the January 11, 2012 accident at work.

WITH RESPECT TO ISSUE 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? THE ARBITRATOR FINDS AS FOLLOWS:

Based on the evidence presented at trial including the medical records and itemized medical bills the Arbitrator awards Petitioner the outstanding medical bills contained in Petitioner's exhibits 4 through 7 pursuant to Section 8.2 of the medical fee schedule.

WITH RESPECT TO ISSUE L – WHAT IS THE NATURE AND EXTENT OF THE INJURY? THE ARBITRATOR FINDS AS FOLLOWS:

Finding regarding the nature and extent of the injury:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be considered in assessing permanent partial disability:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion, loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

(i) the reported level of impairment as assessed pursuant to the current edition of the AMA "Guides to the Evaluation of Permanent Impairment";

(ii) the occupation of the injured employee;

(iii) the age of the employee at the time of the injury;

(iv) the employee's future earning capacity; and

(v) evidence of disability corroborated by the treating medical records.

The Act provides that no single enumerated factor shall be the sole determinant of disability. In applying the factors of Section 8.1b to the facts and evidence in this matter, the Arbitrator notes that neither party submitted a report regarding the level of impairment pursuant to the AMA guidelines. Regarding factor (ii), the Arbitrator finds that the petitioner,

although working for a different employer, is performing essentially the same exact job and duties as he was prior to the injury and working in the same capacity as a general laborer. The petitioner testified to this on direct and cross-examination. Regarding factor (iii), the petitioner's age, the Arbitrator notes that the petitioner was age 49 at the time of the injury. The Arbitrator does not find any evidence as to how the petitioner's age might affect his alleged disability. In terms of factor (iv), the employee's future earning capacity, the Arbitrator notes that the petitioner testified that he earns the same exact wage, $ 8.25 per hour at a forty hour a week capacity for Metro Staff as he did for Respondent or $ 330.00 per week. The Stipulation sheet marked as Arbitrator Exhibit 1 revealed a stipulated Average weekly wage of $ 327.61. The Arbitrator therefore finds no evidence to support that the petitioner's disability has had any impact upon his future earning capacity.

Regarding factor (v), the Arbitrator finds the petitioner to be at maximum medical improvement per Dr. Pinzur's October 15, 2013 office note. The petitioner testified to subjective pain complaints in his left ankle, however, he does not use any pain medication and only soaks his foot in cold water. He did not testify to any inability to perform his current job duties and in fact the valid FCE found that he was functioning at the medium to heavy physical demand level. Dr. Pinzur's last note indicated that the petitioner had a permanent restriction of no lifting or carrying greater than 70 pounds. There was no testimony that the petitioner is required to lift over that amount.

The Arbitrator further finds the petitioner only partially credible with respect to his pain complaints and disability. The petitioner testified to a significant amount of swelling in his left ankle, however, when the Arbitrator viewed the petitioner's feet, the Arbitrator could not find any evidence of swelling. The medical records of Dr. Pinzur do not mention any swelling either.

It also appears at least from the Dr. Pinzur's notes that he may have questioned the petitioner's reported pain complaints on more than one occasion. (See August 6, 2013 note and March 12, 2013 note). Furthermore, the Arbitrator asked the petitioner to rotate his feet, which the petitioner's hesitantly moved his left foot. The Arbitrator notes that the last physical examination from Dr. Pinzur revealed "good motion" per his August 6, 2013 office note. This appears contrary to what the Arbitrator visualized at hearing on September 12, 2014. The petitioner also claimed to be depressed but he did not testify to seeking treatment for depression. The petitioner also gave inconsistent testimony on cross about his depression, first denying that he made such a statement on direct and then qualifying his testimony by stating that was how he "felt before".

The Arbitrator also notes that at least some of the pain complaints may or may not be related to the left ankle. It is noted in the PT records that the petitioner did complain of back pain during one of the examinations. The petitioner also testified at trial to problems with lifting and carrying. The Arbitrator takes into account that the petitioner did have a prior back surgery while working for Costco which resulted in an inability of the petitioner to return to work as a stocker. Petitioner ultimately settled that case for a significant amount of money in excess of $200,000.00. Although there were no medical records regarding prior permanent restrictions, if any, the Arbitrator takes the petitioner's prior condition into account with respect to assessing the credibility of his pain complaints as they relate to the January 11, 2012 left ankle injury and the fact that the prior injury resulted in a need for a job change.

In applying the factors of 8.1b to this instant matter, the Arbitrator has determined that the petitioner has sustained permanent partial disability to his left foot in the amount of 35%

loss of use of the left foot. The respondent shall pay the petitioner a sum of $253.00/week for a period of 58.45 weeks, as provided in Section 8(e) of the Act.

WITH RESPECT TO ISSUE M - SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT? THE ARBITRATOR FINDS AS FOLLOWS:

It is undisputed that Petitioner sustained an injury to his left ankle on January 11, 2012. Petitioner initially was restricted to light duty work which Respondent accommodated. However, as of March 12, 2012, Respondent was no longer able to accommodate the light duty work restrictions entitling Petitioner to temporary total disability benefits. (Tr. 18).

Respondent failed to issue Petitioner's temporary total disability benefits during the period March 12, 2012 through June 24, 2012. (Rx. 2). On April 26, 2012, Petitioner filed a petition for penalties and attorneys fees pursuant to Section 19(l) and 19(k) for the unpaid temporary total disability benefits. Pursuant to the section 19(l) of the Act Petitioner is entitled to additional compensation in the sum of $30/day for each day that the benefits under section 8(b) have been so withheld or refused, not to exceed $10,000. 820 ILCS 305/19(l). A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l).

Respondent delayed payment of Petitioner's temporary total disability benefits from March 12, 2012 through June 24, 2012 when they issued a check in the amount of

$3,795. (Rx. 2). This was a delay of **105** days. Pursuant to 19(l) Petitioner is entitled to penalties of **$3,150.00**. (105 days x $30/day = $3,150.00)

Respondent also denied Petitioner's temporary total disability benefits during the period June 25, 2012 through July 29, 2012, a period of 35 days. (Rx. 2). Accordingly, the Arbitrator awards Petitioner 19(l) penalties of **$1,050.00.** (35 days x $30/day = $1,050.00).

Moreover, the Arbitrator finds Respondents failure to timely issue temporary total disability benefits unreasonable in the absence of any medical opinion supporting their denial of Petitioner's temporary total disability benefits. The Arbitrator notes that Respondent denied Petitioner's temporary total disability benefits until they obtained a section 12 medical opinion. However, Respondent's section 12 physician, Dr. Simon Lee, causally relates Petitioner's left ankle injury to the January 12, 2012 accident at work. Consequently, the Arbitrator finds Respondent's denial of Petitioner's temporary total disability benefits unreasonable and awards Petitioner 19(k) penalties as follows:

1st delay (105 days)
15 weeks x $253/week = $3,795;
50% $3,795 = **$1,897.50**

2nd delay (35 days)
5 weeks x $253/week = $1,265;
50% $1,265 = **$632.50**

Finally, the Arbitrator awards Petitioner section 16 attorneys' fees of 20% of the 19(k) penalties in the amount of **$506.00.** ($1,897.50 x 20% = **$379.50**; $632.50 x 20% = **$126.50**.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CRAIG ROBERTS,

Petitioner,

vs.

NO: 12 WC 16990
13 WC 36532

PEORIA ROOFING,

Respondent,

16IWCC0047

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, employer-employee relationship, notice, causal connection, medical expenses, benefit/wage rates, temporary total disability, nature and extent, and statute of limitations, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission clarifies that the manifestation date for Petitioner's right carpal and cubital tunnel injuries is January 31, 2011. For the left carpal and cubital tunnel, the manifestation date is December 12, 2011. We specifically affirm that Petitioner has proven that his hand-intensive work duties for Respondent from 2003 to 2011 are still a contributing factor in the development of his bilateral hand and arm conditions despite the fact that he worked for other employers prior to the manifestation date of December 12, 2011.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 4, 2015, is hereby affirmed and adopted with the clarifications noted above.

16IWCC0047

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $4,100.00. 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.

DATED: JAN 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/1/15
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
REMANDED

ROBERTS, CRAIG
Employee/Petitioner

Case# **12WC016990**

13WC036532

PEORIA ROOFING
Employer/Respondent

16IWCC0047

On 3/4/2015, 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 0.07% 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:

0225 GOLDFINE & BOWLES PC
MICHAEL MARINCIC
124 S W ADAMS ST SUITE 200
PEORIA, IL 61602

2965 KEEFE CAMPBELL BIERY & ASSOC
NATHAN S BERNARD
118 N CLINTON ST SUITE300
CHICAGO, IL 60661

16IWCC0047

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
REMANDED ARBITRATION DECISION
19(b)

CRAIG ROBERTS
Employee/Petitioner

v.

PEORIA ROOFING
Employer/Respondent

Case # 12 WC 16990

Consolidated cases: 13 WC 36532

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 STEPHEN MATHIS, Arbitrator of the Commission, in the city of PEORIA, IL, on 12/23/2013. After reviewing all of the evidence presented and the transcript of the testimony at trial, the Honorable Lynette Thompson-Smith, 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. ☒ Is Petitioner entitled to any prospective medical care?

L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, January 31, 2011 & December 12, 2011, 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 $64,979.20 and his average weekly wage was **$1,249.60**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and 0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Petitioner's average weekly wage is $1,249.60.

Respondent shall pay Petitioner for medical treatment, in the amount of $4,052.06, as indicated in the medical bills attached as Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay for prospective medical treatment as recommended by Dr. Garst and any reasonable and necessary rehabilitative treatment, as needed, pursuant to Sections 8(a) and 8.2 of the Act

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

The disputes issues in this matter are: 1) employee-employer relationship; 2) accident; 3) causal connection, 4) notice; 5) earnings and average weekly wage; 6) reasonableness, necessity and liability of medical bills; and 7) prospective medical treatment. *See,* AX1.

Petitioner's testimony, 12 WC 16990

Petitioner testified that he began his career as a union sheet metal worker on or about August 2003. He further testified that he worked his first month as a union apprentice in Bloomington and then was as hired by Respondent in 2003; and worked steadily for Respondent until 2011. He finished his apprenticeship while working for Respondent then continued to work for them as a journeyman.

He testified that his job duties did not change however; he had more responsibilities after he became a journeyman. Petitioner indicated that his sheet metal work required him to use a variety of hand tools on a regular basis; and the type of sheet metal work that he did at Peoria Sheet Metal was called architectural work, i.e. custom work.

Petitioner explained that some shops do mostly duct work and a sheet metal worker is able to use machines in the shop while custom architectural work requires high maintenance. Petitioner testified that his job duties would vary depending on the day however, he would have to use hand tools, such as caulking gun, seamer, rivet gun, and snips every day, and that these tools required forceful gripping.

As an example, Petitioner testified that he might use a seamer over a 200-foot section of roof, which he would have to go over, inch by inch with hand tools; to seal the metal so that it formed a tight seal. He testified that many times the metal would be 22 or 24 gauge; and he would have to go over that long seam twice, to ensure that it was sealed appropriately. This action required forceful gripping and squeezing.

When doing certain applications outdoor, he would use rivet guns to construct gutters and gutter heads. Petitioner also used tin snips on a daily basis and testified he used these snips so frequently; he wore out four pairs per year.

Petitioner's Exhibit 5 was a printout from Beverly Niswonger, the secretary at the sheet metal union hall. Petitioner reviewed this document, which contained his working hours from January 31, 2006 to July 31, 2013; and also indicated that he worked at Respondent from January 31, 2006 until January 31, 2011, with two (2) intermittent work periods in April and May 2011. Petitioner testified that he worked for Respondent from 2003 until January 14, 2011, when he was laid off.

Petitioner testified that he had no hobbies, such as playing a guitar that required him to have frequent hand movements

On January 31, 2011, Petitioner presented to Dr. Garst with complaints of "paresthesias on the ring and little fingers...numbness and tingling". Petitioner testified that he had been having pain and numbness in both hands and arms prior to this day, however, this was the first time that it went all the way up to his shoulder and it scared him. On that date, Dr. Garst diagnosed him with probable right cubital tunnel and possible right carpal tunnel syndrome. Petitioner testified that he continued to work through the pain and discomfort but it continued to get worse. He went back to see Dr. Garst on February 12, 2011. At this point, he was making complaints of pain in both hands and elbows. Dr. Garst diagnosed him with possible bilateral carpal and cubital tunnel syndrome and had an EMG/NCV test performed on February 8, 2012, by Dr. Troung. The test was read as the petitioner having moderate to severe bilateral carpal tunnel syndrome, more pronounced on the left; and bilateral ulnar cubital tunnel syndrome, more severe on the left. .

On August 28, 2013, Dr. Garst testified that he initially recommended conservative care for Petitioner and after a course of physical therapy and splinting; Petitioner had not improved. Dr. Garst recommended that Petitioner undergo bilateral cubital and carpal tunnel surgeries. He stated he would like to do the left arm first, and Petitioner would be off work for about 4 to 6 weeks then Dr. Garst would do the right side; and Petitioner would be off work for another 4 to 6 weeks. He indicated that if light duty was available, Petitioner might only be off work for two (2) weeks after each surgery.

The petitioner was seen by Dr. Michael Bryan Neal, at the request of Respondent, for an independent medical examination ("IME"). Dr. Neal, an orthopedic surgeon, wrote a report regarding this matter stating that Petitioner did not have carpal tunnel syndrome; which contradicted of both Drs. Garst and Truong; and the EMG/NCV test results. Dr. Neal did believe Petitioner had bilateral cubital tunnel syndrome.

Dr. Neal was asked if the medical documentation supported a causal relationship between the accident and the injury. He opined that Petitioner does not have carpal tunnel and that his cubital tunnel symptoms were not caused by work. Further, Dr. Neal believed that the petitioner only worked for Respondent from October 30, 2010 through May 7, 2011.

When queried as to what types of activities can cause carpal tunnel syndrome, Dr. Neal stated that forceful, repetitive gripping and grasping, in extreme positions of flexion and extension; as well as activities where there is significant vibration exposure, would be the activities that were accepted by the majority of the medical world, as having an occupational causal relationship. In this particular instance, he opined that Petitioner did not have carpal tunnel and that the cubital tunnel symptoms he had were idiopathic.

Dr. Neal came to his conclusions even though Petitioner told him that when he did a lot of heavy cutting and grasping that would hurt and make his hands numb. The opinions of this doctor were

also based on information that the petitioner only worked for Respondent for six (6) months, i.e., October 30, 2010 through March 7, 2011. RX4, pgs.20-29.

Dr. Neal also testified that he believed that Petitioner's cubital tunnel was idiopathic. When he was asked on page 34 of his deposition, "where you do you think Petitioner's cubital tunnel come from (how to do you think he got it)", Dr. Neal indicated that Petitioner said he drank alcohol daily and that was the risk factor. In reviewing the record, Petitioner did indicate he drank one (1) beer per day. The doctor was asked several times during his deposition, whether Petitioner's drinking one beer per day caused Petitioner's cubital tunnel syndrome. Dr. Neal did not answer the question and only said that any alcohol can lead to peripheral neuropathies. Later, Dr. Neal admitted that carpal tunnel could be caused by sheet metal work. RX4, pgs.34-41.

Dr. Garst is Petitioner's treating orthopedic surgeon, who specializes in surgery of the hand and upper extremity. In his opinion, Petitioner's work activities with Respondent, caused the bilateral carpal and cubital tunnel syndromes that he diagnosed Petitioner as having. Dr. Garst was asked if Petitioner's primary job as a sheet metal worker, frequently using hand tools such as tin snips, pattering tools and riveters, would cause of the conditions of bilateral carpal and cubital tunnel syndrome that he diagnosed. Dr. Garst responded that within a reasonable degree of medical certainty Petitioner's conditions were work related. On cross-examination, Dr. Garst was asked a variety of questions about scientific studies, which he indicated could go either way, regarding the causes of carpal and cubital tunnel. However, he stated, "most of my opinion is based on the fact that I live in an area and practice in an area that's heavy with metal workers and my feeling is the frequency among them for compressive neuropathies is higher than the general population". Dr. Garst was unaware of any hobbies or activities that Petitioner had, which would require repetitive use of the hands. Further, both Drs. Garst and Neal agreed that repetitive, forceful use of hand tools could cause the petitioner's conditions. PX3; Dr. Garst Deposition, pgs.13-14; PX4, pgs.13-14, 29.

Respondent's witness' testimony

Mike Boyle, Branch Manager for Respondent Peoria Roofing, testified Petitioner last worked the week ending January 15, 2011, after a lay of a few weeks of work in April and May 2011. Mr. Boyle also testified that the petitioner has worked for Respondent since 2008, as a metalworker. He further testified that those working in the field would use hand tools such as riveters however, those working in the shop would use automated equipment, i.e., auto shears and brakes to cut and bend the metal.

Mr. Boyle further testified that he received a letter alleging a work injury for petitioner however, he did not remember when he received it and that the petitioner was not working for Respondent at the time of the subject injury. Mr. Boyle testified he was aware of the unrelated right long finger extensor tendon laceration repair that Petitioner had in late 2010, but was never provided notice of any other

claims as Petitioner was not employed with Peoria Roofing, at the time of the claims were alleged or filed. Mr. Boyle testified that as branch manager, he would be the appropriate party to be given notice of any alleged work related claim. He further testified that Marty Craig was the petitioner's supervisor and that Marty "takes care of the sheet metal shop"; and if someone reports an accident to Marty then Marty is supposed to notify him. He also testified that he could have pressed a button and printed the petitioner's earnings for the fifty-two (52) weeks prior to the accident date but he thought that they just wanted what the petitioner's earning were in 2011. He agreed that sheet metal workers make $32.15 per hour and that the petitioner did work with the type of tools to which he testified. Tr. pgs. 40-52.

12 WC 16990, date of accident January 31, 2011

Petitioner had previously sought medical treatment for a right, long finger, extensor tendon laceration repair. Treatment ended on January 18, 2011; when Dr. Jeffrey Garst recommended s full duty work release. Medical records during late 2010 and prior to January 31, 2011 reflected discomfort of the hand and fingers due to the casting involved in the unrelated right long finger extensor tendon laceration repair. Petitioner testified to right hand pain and numbness prior to January 31, 2011 but medical records, prior to January 31, 2011, make no mention of complaints of bilateral hand or elbow pain. The Arbitrator notes that the petitioner was relegated to one-armed or one-handed duty in November and December 2010. PX1.

The amended application 12 WC 16990 alleges a right upper extremity claim on January 31, 2011. The medical records document the first complaints of hand pain and numbness were when Petitioner returned to Dr. Garst January 31, 2011 and complained of right hand pain and numbness. Petitioner testified to ongoing pain complaints and Dr. Garst recommended an EMG January 31, 2011. Petitioner failed to appear for any scheduled appointments until almost a year later on December 12, 2011. The Arbitrator notes that the petitioner was apparently negligent in pursuing treatment for his hand complaints however, there is evidence that he was suffering from these afflictions since on or about 2010.

13 WC 36532, date of accident December 12, 2011

Application 13 WC 36532 alleges a bilateral, upper extremity claim from alleged repetitive trauma on a date of accident of December 12, 2011. Petitioner's medical records, of that date, state that he presented to Dr. Garst with "right hand pain and numbness with some left hand pain and numbness" that the petitioner "had been getting ulnar paresthesias and he had reported that previously". Dr. Garst reordered EMG/NCV testing. PX1.

Petitioner testified that on January 31, 2011, he had complaints related only to the right hand. Petitioner further testified to pain worsening in the right upper extremity; and additional symptoms

in the left upper extremity, after January 31, 2011. This was his reason for filling an additional claim for alleged bilateral upper extremity complaints.

In a letter to Petitioner's counsel, dated November 5, 2012, Dr. Garst stated he had a rather vague understanding of the type of work Petitioner performed and that his knowledge of the Petitioner's work history was limited. Concerning work duties, Dr. Garst stated that he had not addressed that issue with Petitioner. He stated that he noted that Petitioner was a sheet metal worker and that they do have repetitive jobs that are strenuous on their hands; and if this was the case with the petitioner, then the doctor opined that the compression neuropathies of carpal tunnel and cubital tunnel syndrome were related to his work. Dr. Garst also pointed out he had not physically examined Petitioner since July 3, 2012, in that Petitioner had cancelled his October 2012 appointment; therefore he was not recommending surgery, at that time however, if Petitioner's symptoms persisted, he thought surgery would be contemplated; and that if Petitioner continued to work, his compressive neuropathies would worsen over time. PX2.

At deposition, Dr. Garst indicated because of the ongoing nature of complaints, surgery may repair the various impingements but again he agreed that he did not have more than a very vague understanding of Petitioner's job duties, when he wrote the narrative report with his causation opinion. With more questioning on cross examination, Dr. Garst kept referring back to the duties as described during the hypothetical on direct examination as being a foundation for his opinion. However, Dr. Garst acknowledged he had not known of the specific job duties when he offered the opinion on causation, as memorialized in the November 5, 2012 narrative letter to Petitioner's counsel. Dr. Garst also stated that recent medical studies have not proven that carpal tunnel is caused by repeated hand movements while working. PX3.

After review of Petitioner's job description, in an IME report dated March 25, 2013 and addendum dated August 28 2013, Dr. Neal opined that Petitioner's work duties did not cause, contribute to or permanently aggravate Petitioner's conditions. Dr. Neal stated that Petitioner did not clinically express bilateral carpal tunnel regardless of EMG abnormalities. Dr. Neal also noted there was no bilateral finger triggering or complaints.

Dr. Neal further opined that if the petitioner had cubital or carpal tunnel syndrome, it was not related to his employment activities because Petitioner did not seek medical treatment or complain of any symptoms during employment with Respondent Peoria Roofing. RX2 & 3; PX2.

Petitioner testified to right, upper extremity pain, which worsened after January 31, 2011; and that he later developed left, upper extremity pain on or about December 12, 2011. However, Petitioner later testified all alleged symptoms occurred relatively at the same time, or within months of each other. Petitioner also provided a history at the IME, that all symptoms occurred at once, or within months,

and Dr. Neal opined this suggested an intrinsic biological origin as opposed to an occupational relationship. RX2 & 3.

Dr. Neal noted Petitioner was working without restrictions and opined that he could continue to do so. He did not recommended surgery although he thought that conservative care, such as wrist splinting and elbow pads, may be beneficial. He reiterated that Petitioner's conditions were not related to work and further opined that Petitioner's consumption of one beer per day may have caused his cubital tunnel syndrome, as daily alcohol use contributes to cubital tunnel syndrome. PX2; Rx. 4.

CONCLUSIONS OF LAW

B. Was there an employee-employer relationship?

The Arbitrator concludes that the petitioner was an employer of Respondent. The Arbitrator relies on the testimonies of the petitioner and Mike Boyle; and the fact that the respondent agreed, on the Request for Hearing, that Petitioner and Respondent were operating under the Illinois Workers' Compensation Act and their relationship was one of employee and employer.

C. Did an accident occur that arose out of and in the course of the Petitioner's employment by the Respondent?

A claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in medical evidence. *See, O'Dette v. Industrial Comm'n*, 79 Ill. 2d. 249, 253, 403 N.E.2d 221, 223 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses and assign weight to the witnesses' testimony. *See, R & D Thiel*, 398 Ill. App.3d at 868; *See also, Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury to be compensable to be compensable under the Workers' Compensation Act, he must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *See, Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App.3d. 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accident injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. *See, Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill.2d 207 at 214, 254 N.E.2d 522 (1969).

Based on the above, the Arbitrator concludes that an accident did occur that arose out of and in the course of the petitioner's employment with the respondent. The petitioner worked for the respondent from 2003 until 2011, in the capacity as a union sheet metal worker. During this time, he was required to do forceful and repetitive gripping and grasping. Petitioner testified that his arms and hands began to hurt a couple of years before he went to the doctor. The event that led him to go to the doctor was when he felt pain go all the way up his right arm into his shoulder. With this in mind, the Arbitrator concludes that an accident did arise out of and in the course of the petitioner's employment.

E. Was timely notice of the accident given to Respondent?

The petitioner testified that he gave his supervisor, Marty Craig, notice of these accidents. As Mr. Craig was not called as a witness to rebut Petitioner's testimony, the Arbitrator concludes that timely notice was given, pursuant to the Act.

F. Is Petitioner's current condition of ill-being causally related to the injury?

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). In addition, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was the cause by the injury.

The petitioner worked for the respondent from 2003 until 2011, in the capacity as a union sheet metal worker. During this time, he was required to do forceful and repetitive gripping and grasping. Petitioner testified that his arms and hands began to hurt a couple of years before he went to the doctor. The event that led him to go to the doctor was when he felt pain go all the way up his right arm into his shoulder. The Arbitrator concludes that the petitioner's present condition of ill-being is

causally related to his work. The Arbitrator finds the opinions of Dr. Garst to be more persuasive than those of Dr. Neal.

G. What were Petitioner's earnings?

Petitioner testified, on an uncontested and unrebutted basis, that he had worked for Respondent from 2003, when he started as an apprentice, until 2011, when he was laid off. He stated that his rate of pay was $32.15 per hour. He also testified that his average weekly wage was $1,249.60. Petitioner called Mike Boyle, a manager for Respondent, to testify. Mr. Boyle testified that he was a roofer who became a manager and worked for Respondent. He was never a sheet metal worker. He read and agreed that the job duties that were provided in Respondent's Exhibit 1 corresponded with the Petitioner's testimony regarding his job duties. Mr. Boyle testified that he was never notified of the subject accidents, however, he did testify that Marty was Petitioner's supervisor; and that if there was an accident, that is something that Marty was supposed to tell him. In regards to the wage statement, Mr. Boyle agreed that a person in Petitioner's position would make $32.15 per hour. Mr. Boyle bought a wage statement, which only consisted of Petitioner's last twelve (12) weeks of pay when he could have brought a wage statement showing the fifty-two (52) weeks of Petitioner's wages, prior to the accident date. The Arbitrator finds that Petitioner's testimony regarding his average weekly wage being $1,249.60, is credible.

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?

Having found in favor of Petitioner concerning accident and causal connection, the Arbitrator now finds that the medical bills itemized in Petitioner's Exhibit 6, are reasonable and necessary; and represent office visits with Dr. Garst at Great Plains Orthopedics; and the EMG testing for Petitioner performed by Dr. Troung. The Arbitrator concludes that these bills were reasonable and necessary and Respondent shall pay to Petitioner the amount of these bills, pursuant to the medical fee schedule or the negotiated rate, whichever is less.

K. Is Petitioner entitled to any prospective medical care?

This Arbitrator finds Dr. Garst's opinions to be more persuasive than those of Dr. Neal; and that Dr. Garst's prospective medical treatment plan is reasonable and necessary. Therefore, the Arbitrator concludes that the petitioner is entitled to prospective medical care, as recommended by Dr. Garst; and any reasonable and necessary rehabilitative care, needed thereafter.

The petitioner has indicated, on the Request for Hearing, that TTD, TPD, maintenance; and the nature and extent of Petitioner's injuries is not at issue, therefore these issues will not be addressed.

16IWCC0047

ILLINOIS WORKERS' COMPENSATION COMMISSION
REMANDED ARBITRATION DECISION
12WC16990 & 13 WC 36532
SIGNATURE PAGE

L Thompson

Signature of Arbitrator

March 4, 2015
Date of Decision

MAR 4 - 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donna Niven,

Petitioner,

vs. NO. 12WC023221

16IWCC0089

American Liberty School Bus,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary disability, causal connection, medical expenses, permanent disability, reimbursement to husband's group insurance for bilateral knee replacements, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 18, 2015 is hereby affirmed and adopted.

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

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

16IWCC0089

No bond is required for removal of this cause to the Circuit Court. 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.

DATED: FEB 1 - 2016
SJM/sj
o-12/17/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NIVEN, DONNA
Employee/Petitioner

Case# **12WC023221**

AMERICAN LIBERTY SCHOOL BUS
Employer/Respondent

16IWCC0089

On 5/18/2015, 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 0.08% 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:

1759 MARTAY LAW OFFICE
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CHICAGO, IL 60602

0208 GALLIANNI DOELL & COZZI LTD
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16IWCC0089

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Donna Niven
Employee/Petitioner

v.

American Liberty School Bus
Employer/Respondent

Case # **12** WC **23221**

Consolidated cases: **N/A**

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 6, 2015**. After reviewing all of the evidence presented, the undersigned 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 **April 5, 2012**, 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, in part,*** causally related to the accident as explained *infra.*

In the year preceding the injury, Petitioner earned $**15,521.48**; the average weekly wage was $**298.49**.

On the date of accident, Petitioner was **63** years of age, ***married*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services as explained *infra.*

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services as explained *infra.*

Respondent shall be given a credit of $**691.43** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**691.43**.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act. *See* AX1.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner sustained a right hip contusion and strain and that she failed to establish a causal connection between her bilateral knee condition and accident at work.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 2 & 6/7th weeks, commencing May 4, 2012 through May 23, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from April 5, 2012 through March 6, 2015, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $691.43 for temporary total disability benefits that have been paid.

Medical Benefits

Respondent shall pay the reasonable and necessary medical services of MedWorks totaling $1,168.90 that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for amounts paid toward this bill, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

As explained in the Arbitration Decision Addendum, Petitioner's claim for payment of bills for medical treatment related to the bilateral knees or for reimbursement of $96.232.79 paid by her husband's group insurance carrier (Blue Cross/Blue Shield) is denied.

Permanent Partial Disability: Schedule Injury

Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week for 10.75 weeks, because the injuries sustained caused the 5% loss of the right leg, as provided in Section 8(e) 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

May 5, 2015
Date

MAY 18 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Donna Niven
Employee/Petitioner

v.

American Liberty School Bus
Employer/Respondent

Case # **12** WC **23221**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include causal connection, Respondent's liability for certain medical bills that were paid by Petitioner's husband's group insurance plan, Petitioner's entitlement to a period[1] of temporary total disability benefits commencing July 26, 2012 through March 21, 2013, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[2] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that she was hired by Respondent as a bus aide in 2007. She took a pre-employment physical, which she passed. Petitioner described her job duties to be those of a bus monitor, which included taking care of wheelchairs, putting children in car seats, and escorting small children up and down stairs.

Petitioner testified that she previously worked for Laidlaw Bus Company as a bus monitor for about 11-12 years before she worked for Respondent. She explained that she performed the same job duties for this company and Respondent. Petitioner described these duties to include walking the aisle of the bus, ambulating up and down bus stairs, securing wheelchairs to the bus, and monitoring up to 16 children.

Petitioner also testified that on November 26, 2008, she was injured. She explained that she was talking to one of the drivers in the bus and she tripped over the cross bar falling on both hands and knees. Petitioner testified that she saw Dr. Niemeyer and was placed off work approximately one month. She testified that she had no other medical care.

The medical records reflect Petitioner's report on November 26, 2008 at MedWorks that she tripped and fell down injuring her right knee. RX3. Petitioner's right knee x-rays showed severe degenerative changes and a large knee effusion. *Id.* Dr. Arain of MedWorks diagnosed Petitioner with a right knee contusion and restricted her to no walking over 10 minutes per hour. *Id.* Petitioner returned to MedWorks on December 29, 2008 at which time she reported some persistent pain in the outer aspect of the right knee which she attributed to her arthritis. *Id.* She was diagnosed with a right knee contusion with underlying arthritis and released to full duty work. *Id.*

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[1] The parties stipulated to Petitioner's entitlement to temporary total disability benefits from May 4, 2012 through May 23, 2012. AX1.

[2] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. Exhibits attached to depositions will be further denominated with "(Dep. Exh. _)."

Petitioner testified that she returned to work January 1, 2009 to her job as a bus aide. She worked six hours per day five days per week. Petitioner testified that she continued to work for Respondent through April 4, 2012 and was not under any medical care for her left leg or knee.

April 5, 2012

On April 5, 2012, Petitioner testified that she was at the end of the driveway made of pavement and gravel. She was standing by a mailbox where drivers put their trip sheets waiting for her driver to pick her up when another bus came by and stopped. Petitioner reached in and grabbed the trip sheet from that driver, but the bus was still rolling and she shouted that to the driver. Petitioner testified that she somehow ended up on the floor.

Petitioner testified that she does not know if she hit her left knee, but she landed on her right knee and hip. Other than this injury at work, Petitioner testified that she has had no other injuries to either leg or knee.

Medical Treatment

Petitioner testified that she was sent to see Dr. Niemeyer at MedWorks on the same day. She testified that she told them how she was hurt. Petitioner testified that she was given pain pills and sent home. She was also placed on light duty.

The medical records reflect Petitioner's report "that earlier this morning, while in the parking lot at the bus company, she fell and landed on the right hip. She now complains of right hip pain. She points to the greater trochanter." RX1. Dr. Niemeyer noted the following on physical examination: "She gets up out of her chair without apprehension or sign of discomfort. She has full range of motion in the lumbosacral spine. She states that she has bad knees and cannot perform a quick test. In the seated position, usual neurovascular fully intact with negative straight leg raising. Supine examination fails to reveal tenderness in the groin. Passive internal and external rotation. Hip unremarkable and nonprovocative. The range of motion is full. She is diffusely tender over the right hip greater trochanter. There is bone point tenderness." *Id.* Petitioner was diagnosed with a right hip greater trochanter contusion and released to sedentary work. *Id.*

Petitioner testified that she went back the following day for x-rays of both her right knee and right hip. However, the medical records of April 6, 2012 reflect Petitioner's report of soreness in the right hip. RX1. Petitioner's x-rays of the right hip showed no fracture, dislocation or substantive arthrosis. *Id.* Pelvic x-rays showed no acute fracture and partially visualized generative changes in the spine. *Id.* On physical examination, Dr. Niemeyer noted some bruising in the lateral thigh and tenderness over the greater trochanter. *Id.* He noted that Petitioner's x-rays of the pelvis and hip were unremarkable and there was no arthritis. *Id.* Dr. Niemeyer maintained his diagnosis of a right hip contusion. *Id.*

On cross examination, Petitioner testified that she told the doctor on both April 5, 2012 and April 6, 2012 that she fell on her right and left knees at the time of the accident. She explained that there were indents on both knees from the little gravel stones. Petitioner testified that she showed the swelling in her knees to Dr. Niemeyer.

Petitioner returned to MedWorks Occupational Health on April 11, 2012. RX1. Dr. Niemeyer noted that Petitioner "now complains of a lateral right knee pain that radiates down the lateral aspect of the leg. To the best of my memory, she did not tell me about that the first time I saw her." *Id.* On physical examination, he noted tenderness over the greater trochanter and "diffuse discomfort over the lateral aspect of the knee, nothing

specific." *Id.* Dr. Niemeyer diagnosed Petitioner with a right hip contusion and right knee contusion. *Id.* He kept Petitioner restricted to sedentary level work. *Id.*

Petitioner returned on April 18, 2012. RX1. She reported that the discomfort over the greater trochanter was no longer present. *Id.* "Now she is describing deep buttock discomfort and actually points towards her right ischial tuberosity. She is miserable if she is riding a bus because of that discomfort over the right ischial tuberosity. She also complaints of right knee discomfort worse than previous. When she was seen originally in the emergency room, they only x-rayed her hip." *Id.*

Dr. Niemeyer noted lateral joint line tenderness, tenderness over the lateral tibial plateau, and discomfort that radiates down the lateral aspect of the tibia. *Id.* He also reviewed Petitioner's knee x-rays which showed quite advanced osteoarthritic changes with marked osteophytosis and no acute fractures or healing injuries. *Id.* Dr. Niemeyer placed Petitioner off work and ordered physical therapy. *Id.*

Petitioner testified on cross examination that if Dr. Niemeyer's records do not contain her complaints about her left knee, those records are incorrect. Petitioner was off work from May 4, 2012 through May 23, 2012 and she received temporary total disability benefits.

Section 12 Examination – Dr. Wardell

On May 16, 2012, Petitioner submitted to a medical evaluation with Dr. Steven Wardell at Respondent's request. RX4 (Dep. Exh. 2). Petitioner testified that she reported a bilateral knee injury to Dr. Wardell.

Dr. Wardell's report reflects Petitioner's reported history of injury to the lateral aspect of the right hip and right knee while getting a trip sheet from a bus driver and being pushed forward onto the ground by the bus' folding door. *Id.* Petitioner reported right buttock discomfort and right lateral hip discomfort that shot down her leg at the time of her evaluation. *Id.*

Dr. Wardell noted a marked deformity of the right knee, angular malalignment, a mild effusion with minimal swelling about the knee and crepitation upon range of motion in both knees. *Id.* On examination of the right hip, Dr. Wardell noted painless range of motion in the groin, mild pain within the right buttock, significant extra soft tissue in the right buttock and hip area, and no evidence of ecchymosis. *Id.*

Dr. Wardell reviewed bilateral knee x-rays which he noted showed severe end stage chronic osteoarthritis to the bilateral knees with marked valgus alignment, marked osteophyte formation with marked valgus and evidence of loose bodies within the posterior compartments of the right knee that may be a chronic bone spur, and a very large bone spur osteophyte emanating off the superior patella that appeared chronic with valgus alignment left worse than right. *Id.*

After reviewing records from MedWorks and physical therapy notes from Accelerated Rehab Center, Dr. Wardell diagnosed Petitioner with a right knee strain, a right hip muscle strain, obesity, and chronic, severe osteoarthritis to the bilateral knees with marked valgus alignment. *Id.* He also opined that, given Petitioner's mechanism of injury, Petitioner had very severe chronic osteoarthritis of the bilateral knees that was causing significant valgus deformitites to both knees predisposing her to falls and instability. *Id.* Dr. Wardell also opined that Petitioner's mechanism of injury caused minimal injury and her symptoms appeared to be primarily related to a sprain/strain. *Id.* He recommended one more week of physical therapy followed by a home exercise program and return to full duty work. *Id.*

Dr. Wardell noted no need for surgery to the right knee or hip as a result of her injury at work. *Id.* He further noted that given the chronicity of Petitioner's bilateral knee condition, she would likely require a total knee replacement, which he opined was completely unrelated to her fall at work. *Id.*

Continued Medical Treatment

Petitioner testified that she returned to work for Respondent after May 23, 2012 through the end of the school year for two hours per day on June 1, 2012. On May 25, 2012, Petitioner testified that she was released by MedWorks.

On July 5, 2012, Petitioner saw her primary care physician, Dr. Dinesh Jain. PX2. She reported bilateral knee pain and bilateral shoulder pain. *Id.* After an examination, he diagnosed her with degenerative joint disease in the knees and referred her to Dr. Nikkel. *Id.* On cross examination, Petitioner testified that she told Dr. Jain that she injured her knee.

On July 26, 2012, Petitioner saw Dr. Mark Nikkel at Bone and Joint Physicians. PX3 (P's Dep. Exh. 3). She reported bilateral shoulder and bilateral knee pain that was equal on both sides. *Id.* She reported trouble walking, sitting and standing with pain a little worse on the right. *Id.* Petitioner also reported "an injury in April when she was waiting for the bus. She was about to get on the bus and the bus, for whatever reason, started rolling forward resulting in her falling over injuring both knees and shoulders. She denies any other complaints." *Id.* Dr. Nikkel reviewed Petitioner's July 5, 2012 x-rays which showed "severe tricompartmental DJD." *Id.* He diagnosed Petitioner with severe degenerative joint disease in the bilateral knees and recommended a total knee replacement on the right. *Id.* Petitioner testified that it was only after her injury at work that any doctor recommended knee replacement surgery.

Petitioner underwent a total right knee replacement surgery on September 24, 2012. PX3 (P's Dep. Exh. 3 & 4). She then underwent post-operative physical therapy[3]. *Id.* On October 10, 2012, Dr. Nikkel recommended the same surgery on the left knee. *Id.* Petitioner underwent a total left knee replacement surgery on December 10, 2012 followed by post-operative physical therapy. *Id.*

Petitioner continued to follow up with Dr. Nikkel on and off through July 9, 2013. *Id.* At a visit on March 22, 2013, Dr. Nikkel indicated that Petitioner could return to work. Petitioner testified that she did not return to work, however. She applied for social security and Medicare benefits, which she receives. Petitioner is also claiming temporary total disability benefits during period of time she saw Dr. Nikkel from July 26, 2012 through March 21, 2013. Petitioner testified that she continues to see Dr. Nikkel on a yearly basis.

In a narrative letter dated February 19, 2014, Dr. Nikkel indicated that Petitioner's fall at work in April of 2012 aggravated her pre-existing arthritic condition in the bilateral knees causing the need for total knee replacements. PX3 (P's Dep. Exh. 2). At his deposition, Dr. Nikkel testified that he provided this letter in response to Petitioner's handwritten note requesting "a causal connection letter that my work injury of April 5th, 2012 might or could be related to this work injury and that my surgery was necessary, that the injury of April 5th,

[3] Petitioner had an initial physical therapy evaluation for her bilateral shoulder condition on October 15, 2012 as reflected in Dr. Nikkel's medical records. PX3 (P's Dep. Exh. 3). At that time, Petitioner reported in pertinent part: "H/O RECENT BIL SHLD DISLOCATIONS W/ONSET SOMETIME DURING SUMMER 2012 BUT UNKNOWN ORIGIN OF DISLOCATIONS. H/O P.T., FOR BIL SHLDS UNTIL KNEE SURGERY 9-24-12 (RIGHT TKA)." *Id.*

2012, aggravated by pre-existing conditions on both knees and shoulders and that is why I had surgery to both left and right knee, Donna Niven, please send to law office." PX3 at 30-31.

Deposition Testimony – Dr. Nikkel

Petitioner called Dr. Nikkel as a witness and he gave testimony at an evidence deposition on July 29, 2014. PX3. Dr. Nikkel is a board-certified orthopedic surgeon specializing in knee and shoulder surgery. PX3 at 4-5; PX3 (P's Dep. Exh. 1). Dr. Nikkel testified about Petitioner's bilateral knee condition and medical treatment, and he rendered various opinions consistent with his February 19, 2014 narrative report. *See generally* PX3.

Dr. Nikkel testified that Petitioner did not report any significant problems with her knees prior to seeing him. PX3 at 9. He maintained that Petitioner's accident at work accelerated her need for the bilateral total knee replacement surgeries. PX3 at 12. Dr. Nikkel also reviewed the reports generated by Dr. Wardell and disagreed with his conclusions. PX3 at 14.

On cross examination, Dr. Nikkel acknowledged that Petitioner did not provide any historical information to him about a pre-existing condition [in the knees] prior to her accident at work on April 5, 2012. PX3 at 18-19. He also acknowledged that he did not receive or review any medical records with regard to her pre-existing condition. PX3 at 19, 29. Dr. Nikkel testified that Petitioner did not provide him with information that she received medical treatment after her injury at work for her knees. PX3 at 20-21. He also acknowledged that he did not review any records related to Petitioner's knee injury in 2008 or her x-rays from 2008. PX3 at 34.

However, after reviewing the MedWorks April 5, 2012 note Dr. Nikkel testified that the contents did not change his opinion. PX3 at 23-24; PX3 (R's Dep. Exh. 1). After some discussion, Dr. Nikkel maintained that his training as an orthopedic specialist placed him at an advantage over a primary care doctor without such specialized training and he noted that the MedWorks record did not show an entire bone and joint exam. PX3 at 24-26; PX3 (R's Dep. Exh. 1). He reviewed the MedWorks notes from April 6, 2012 and April 11, 2012. PX3 at 26-27; PX3 (R's Dep. Exh. 2 & 3). He maintained his causal connection opinion, but acknowledged that Petitioner did not report any knee pain until she reported right knee pain on April 11, 2012. *Id.*

After further discussion, Dr. Nikkel testified that he knew Petitioner had a pre-existing condition because he could read her x-rays and it was obvious that she had a pre-existing condition, which he maintained was exacerbated by her fall. PX3 at 31. When asked what showed that Petitioner's pre-existing condition had been aggravated, Petitioner testified that he based his opinion on "[t]he fact that she came to me as a physician. People don't come to the doctor just because they're not having problems. She came to me because she was having pain. And so, I addressed her pain. You asked my opinion. The pain was exacerbated by a fall." PX3 at 31-32. When asked what findings he made on physical examination or intraoperatively to support his opinion, Dr. Nikkel testified that he based it "on the patient's subjective history." PX3 at 32.

On cross examination, Dr. Nikkel also testified that Petitioner's x-rays showed very significant osteophytes that take many years to form. PX3 at 33. He testified that he was not surprised if Petitioner had complained of severe knee pain in 2004 or even 10 years before her accident at work. PX3 at 33-34. Dr. Nikkel also testified that Petitioner was overweight and that obesity alone could aggravate a pre-existing osteoarthritis condition in the knees in the absence of trauma such that a total knee replacement would be necessary. PX3 at 34-35. Dr. Nikkel also testified that Petitioner submitted an intake form in which she noted that her condition was not work-related. PX3 at 20; PX3 (R's Dep. Exh. 5).

Section 12 Examination Addendum Report – Dr. Wardell

On April 30, 2014, Dr. Wardell issued an addendum report noting the additional information that he reviewed. RX4 (Dep. Exh. 3). Petitioner met with Dr. Wardell to review her knee x-rays from November of 2008. *Id.* He interpreted those x-rays to show osteoarthritis of the right knee with severe bone on bone changes within the lateral compartment with associated valgus alignment, multiple loose bodies in the intercondylar notch and posterior compartments with large hypertrophic osteophytes emanating off the superior patellar posterior femur and lateral femur, large draping osteophytes off the femoral trochlea and patella with joint space narrowing, and bone on bone changes within the lateral compartment. *Id.*

Dr. Wardell opined that "[u]pon review of the radiographs stated above from November 2008, it is very apparent that [Petitioner] has had pre-existing, severe osteoarthritis within her right knee that in 2008 radiographically [sic]. She was noted to valgus alignment with complete bone on bone changes within the lateral compartment with multiple loose bodies and large osteophytes. I strongly feel that her reported work related injury on 4/5/12 did not accelerate or aggravate her need for a total knee replacement, which was readily evident prior to her reported injury, based on these radiographs...." *Id.* Dr. Wardell maintained his other opinions as indicated in his original report. *Id.*

Deposition Testimony – Dr. Wardell

Respondent called Dr. Wardell as a witness and he gave testimony at an evidence deposition on September 8, 2014. RX4. Dr. Wardell is a board-certified orthopedic surgeon specializing in adult joint reconstruction of the hip and knee. RX4 at 4-5; RX4 (Dep. Exh. 1). He testified consistent with his reports about Petitioner's physical condition and medical treatment, as well as the various opinions he rendered in his reports. *See generally* RX4.

Dr. Wardell described Petitioner's severe valgus deformity to be that her knees touched and it was difficult for Petitioner to put her heels together. RX4 at 14. He testified that obesity can accelerate the progression of osteoarthritis in the knees because of increased weightbearing load in the joints such that it can aggravate the knee condition to the point that the patient could need a total knee replacement. RX4 at 14-15. He noted that at the time of his evaluation, Petitioner had mild effusion and mild swelling in both knees. RX4 at 18.

Dr. Wardell opined that Petitioner's right hip strain was causally related to her accident at work. RX4 at 20-21. He noted that she did not report any knee pain until about a week after the accident. *Id.* Dr. Wardell maintained his opinion that Petitioner's severe end stage osteoarthritis was not caused by her accident and her need for total knee replacement surgery was unrelated to the accident. RX4 at 21-22. He explained that Petitioner's need for this surgery was not accelerated, aggravated, or hastened by her accident at work because she had well documented severe osteoarthritis in both knees with no acute injury or comment by the initial medical examiners as to any right knee complaint. *Id.* Dr. Wardell also testified that the x-rays that he later reviewed from 2008 reinforced his previous opinion that Petitioner had a longstanding severe osteoarthritis condition that essentially was unchanged in four years and was at the end stage. RX4 at 24-25.

On cross examination, Dr. Wardell acknowledged that he did not know whether Petitioner worked full duty after her injury in 2008 or that she was injured either at home or at work between that time and her injury on April 5, 2012. RX4 at 28-29. When asked whether Petitioner's injury on April 5, 2012 could have "broken the camel's back," Dr. Wardell replied that "[t]here was no indication for almost six days that she had any type of injury." RX4 at 30. He added that there was quite a delay in symptoms for six days. RX4 at 30-31.

With regard to questions regarding the possibility that a patient could hurt one part of the body and not realize the injury to another part until several days later, Dr. Wardell testified that "[g]enerally, if there was an acute injury on that day to the that portion of your body, there generally would have been a complaint verbalized or have been obvious on physical exam that that area was injured, especially since the same extremity was examined." RX4 at 32. Dr. Wardell also testified that severe osteoarthritis may or may not require a total knee replacement surgery with or without trauma. RX4 at 32-33.

Additional Information

Regarding her current condition, Petitioner testified that she has pain in both knees. She also has difficulty balancing, stiffness in the morning in the bottom parts of her legs, and she uses a walker to keep her balance. Petitioner testified that she did not use a walker before her injury at work or have any of these complaints before her accident other than pain in her knees. On cross examination, Petitioner testified that she had bad knees for a long time before her accident at work stemming back to 2004.

The medical bills paid by Petitioner's husband's insurance company, Blue Cross/Blue Shield, were submitted into evidence. Petitioner testified that she seeks reimbursement of this amount to repay Blue Cross/Blue Shield.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

After a careful review of the record as a whole, the Arbitrator finds that Petitioner did sustain a right hip contusion and strain as a result of her undisputed accident on April 5, 2012 and addresses the extent of that injury below. The Arbitrator further finds that Petitioner's bilateral knee condition of ill-being is not causally related to her accident at work on April 5, 2012. In so concluding, the Arbitrator notes significant inconsistencies between Petitioner's testimony and her reports as reflected in other record evidence, and relies on the opinion of Respondent's Section 12 examiner, Dr. Wardell, which is persuasive given the facts of this case.

To recover in a preexisting condition case, a claimant need only establish a causal connection between her work-related injury and claimed current condition of ill-being by showing that her injury aggravated or accelerated the preexisting disease. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 204-206, (2003). As in this case, even where an employee has a pre-existing condition that renders her more vulnerable to an injury, the claimant's employment need not be the sole or even the primary cause of the condition of ill-being; it need only be a causative factor. *Sisbro*, 207 Ill. 2d at 205; *Tower Automotive v. Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434 (1st Dist. 2011).

The medical records reflect that Petitioner first reported symptoms in her right knee six days after her accident when she complained of lateral pain to Dr. Niemeyer at MedWorks on April 11, 2012. According to the note, Petitioner did not report any injury to the left knee and Dr. Niemeyer noted that the right knee complaint was new. When Petitioner presented to Dr. Wardell six weeks after her accident at Respondent's request, she only reported right hip pain and right knee pain. Dr. Wardell does not note any report of left knee pain or injury.

The medical records first reflect a complaint of left knee symptoms three months after her accident, on July 5, 2012, when Petitioner saw her primary care physician, Dr. Jain. He diagnosed her with degenerative joint disease in the knees and referred her to Dr. Nikkel. Dr. Nikkel's initial evaluation note reflects a different account of the accident entirely. Dr. Nikkel noted on July 26, 2012 that Petitioner reported "an injury in April when she was waiting for the bus. She was about to get on the bus and the bus, for whatever reason, started rolling forward resulting in her falling over *injuring both knees and shoulders*. She denies any other complaints." PX3 (P's Dep. Exh. 3) (*emphasis* added).

By contrast, Petitioner testified at trial that she reported falling on both knees at the time of her accident and she disputed the accuracy of Dr. Niemeyer's records from MedWorks in the absence of such notations. On cross examination, however, Petitioner admitted that she did not know if she hit her left knee when she fell, but she did land on her right knee and hip. Petitioner also disputed the accuracy of her history as noted in Dr. Wardell's Section 12 report, and testified that she reported bilateral knee pain to him at the time of her examination on May 16, 2012.

Petitioner's testimony at trial that she fell on both knees at the time of her accident appears to be consistent with

Dr. Nikkel's initial evaluation note, regardless of the lack of such notations by Dr. Niemeyer, Dr. Jain, or Dr. Wardell. However, Petitioner also reported to a physical therapist on October 15, 2012 that she did not know how she dislocated her shoulders and she believed that it occurred sometime in the summer of 2012. She presented to Dr. Nikkel to address bilateral knee and bilateral shoulder pain. Thus, to Dr. Nikkel, Petitioner reported an injury to both knees and both shoulders at the time of her accident at work, which is contrary to her testimony at trial as well as prior treating medical records, but she also tells gives a different history to a physical therapist stating that she does even not know how she injured her shoulders and her belief that her bilateral shoulder symptom onset was not in April or the spring of 2012, but during the summer of 2012.

While Petitioner does not claim compensation for any bilateral shoulder injury, the inconsistencies regarding her shoulder pain onset and the mechanism of that injury—whether at work or not—raise further concern about the reliability of her testimony as a whole and whether she injured her knees when she fell at work as she now claims. With regard to her fall at work, the notations by Dr. Niemeyer at MedWorks are much more contemporaneous with the accident than is the history she gave to Dr. Nikkel or her testimony at trial. Petitioner's inconsistent and contradictory reports as noted by various medical providers—which even varied at trial between direct and cross examination—are simply too many and too varied to ignore as *de minimus* given the advanced state of bone-on-bone degeneration in both knees at issue here. Thus, the Arbitrator finds that Petitioner's testimony is unreliable and turns to the medical opinions offered by Petitioner's treating physician and Respondent's Section 12 examiner.

Dr. Nikkel and Dr. Wardell opined on causal connection based on the medical records and x-rays available to them and Petitioner's history as reported to each. Dr. Nikkel understood a different mechanism of injury reported by Petitioner than that reported to Dr. Niemeyer at MedWorks, Dr. Jain, or Dr. Wardell. Indeed, none of the latter physicians noted any report by Petitioner of an injury to the left knee or bilateral knees on April 5, 2012. Additionally, Dr. Nikkel admitted that he did not have any of Petitioner's medical records pre-dating her April 5, 2012 accident or even Petitioner's medical records from after her accident. He based his diagnoses, treatment recommendations, and causal connection opinions on the information he obtained and the history given to him by Petitioner.

Both doctors agree that Petitioner had severe, pre-existing degenerative joint disease in both knees. But Dr. Nikkel's causal connection opinion was offered without the benefit of significantly more information than was available to Dr. Wardell. Dr. Nikkel did not have Petitioner's 2008 x-rays, knowledge of her bilateral knee injury or condition in 2008, or the inconsistencies notable in the reported mechanism of injury given to Dr. Niemeyer or Dr. Jain after her accident and before seeing him for the first time. Given that Petitioner's bilateral knee x-rays taken four years before her accident show the same type of bone-on-bone changes and severe osteoarthritis noted in Petitioner's 2012 x-rays, and Petitioner's varying reports to all of the examining doctors, the Arbitrator finds the opinions of Dr. Wardell to be persuasive. Specifically, the Arbitrator finds Dr. Wardell's opinion that Petitioner's accident did not cause, aggravate, or accelerate her bilateral knee condition to be persuasive. Dr. Wardell simply had a more comprehensive understanding of Petitioner's pre-existing condition and post-accident medical care than did Dr. Nikkel.

Thus, in light of the record as a whole, the Arbitrator finds that Petitioner sustained a right hip strain as a result of the undisputed accident at work on April 5, 2012 and further finds that her bilateral knee condition is not causally related to the accident. By extension, all other issues related to the bilateral knees are rendered moot and all requested compensation and benefits related to the bilateral knees are denied.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)). Whether a medical expense is either reasonable or necessary is a question of fact to be resolved by the Commission, and its determination will not be overturned on review unless it is against the manifest weight of the evidence. *F&B Manufacturing Co. v. Industrial Comm'n*, 325 Ill. App. 3d 527, 534 (1st Dist. 2001).

At trial, the parties stipulated that the bill from MedWorks for $1,168.90, if it remained unpaid, should be paid by Respondent pursuant to Sections 8(a) and 8.2 of the Act. This bill is for medical treatment after Petitioner's accident at work. Thus, the Arbitrator awards payment of this bill.

The remaining bills submitted into evidence relate to medical treatment for Petitioner's bilateral knee condition. Petitioner testified her husband's group insurance paid (BlueCross/BlueShield) paid medical bills on her behalf and Petitioner's Exhibit 1 reflects payment in the amount of $96.232.79. Petitioner requests payment by Respondent directly to her for that sum of money so that she could reimburse Blue Cross/Blue Shield. As explained in the causal connection analysis above, the Arbitrator finds that Petitioner's bilateral knee condition is not causally related to her accident at work and, by extension, the Arbitrator finds no evidence that the medical treatment for the bilateral knee condition was reasonable or necessary to alleviate Petitioner from the effects of her accident at work resulting in a right hip strain. Thus, Petitioner's claim for reimbursement or payment of these bills is denied.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

Petitioner claims that she is entitled to temporary total disability benefits for the disputed period beginning July 26, 2012 through March 21, 2013. As explained above, the Arbitrator finds that Petitioner's bilateral knee condition is not causally related to her accident at work. The period of disputed temporary total disability benefits beginning on July 26, 2012 was for time off work during medical treatment for the bilateral knees. Petitioner's medical treatment for the right hip ended before this date.

Based on the foregoing, Petitioner's claim for temporary total disability benefits beginning July 26, 2012 through March 21, 2013 is denied. As stipulated by the parties, Petitioner is entitled to temporary total disability benefits from May 4, 2012 through May 23, 2012 and Respondent shall received a credit for $691.43 for temporary total disability benefits paid to Petitioner.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole, which reflects that Petitioner sustained a right hip contusion and strain as explained in detail above, the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 5% loss of use of the right leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCCLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Byrd,

Petitioner,

vs. NO: 12 WC 24862

Bridgestone,

16IWCC0057

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, permanent partial disability, medical, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 9, 2015 is hereby affirmed and adopted.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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.

DATED: JAN 2 5 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
o:12/10/16
43

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BYRD, KEVIN
Employee/Petitioner

Case# **12WC024862**

16IWCC0057

BRIDGESTONE
Employer/Respondent

On 6/9/2015, 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 0.08% 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:

0564 WILLIAMS & SWEE LTD
DIRK A MAY
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2904 HENNESSY & ROACH PC
EMILIE A MILLER
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

16IWCC0057

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin Byrd
Employee/Petitioner

Case # **12** WC **24862**

v.

Bridgestone
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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 21, 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 **June 1, 2012**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the alleged accident.

In the year preceding the injury, Petitioner earned $**26,000.00**; the average weekly wage was $**500.00**.

On the date of accident, Petitioner was **24** years of age, ***single*** with **0** dependent children.

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

ORDER

The Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment by the Respondent. The Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

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.

Arbitrator Anthony C. Erbacci

June 3, 2015
Date

JUN 9 - 2015

16IWCC0057

FACTS:

The Petitioner testified that he worked for Respondent as a Spadone Operator and that he started working for the Respondent at its Bloomington plant beginning in 2011. The Petitioner testified that on June 1, 2012 he slipped on oil residue on the stairs of the Spadone Machine after straightening material that had come off the roll. The Petitioner testified that when he slipped he fell down approximately 20 stairs and injured his back and left hip.

The Petitioner testified that after he fell he provided notice of his accident to his supervisor, Curtis Smith, and the plant nurse, Sheril Donahue. The Petitioner testified that he also completed an incident report. The Petitioner testified that when he reported his accident he was asked if he wanted to seek medical treatment, but he said no because he did not want to make a big deal out of it. The Petitioner testified that he did, however, eventually seek medical treatment approximately one week later. While Petitioner testified that he sought treatment about one week after his accident, the medical records admitted into evidence by Petitioner do not document treatment until June 14, 2012.

Petitioner testified that he first sought treatment at OSF Occupational Health upon referral from the plant nurse. However, the medical records admitted into evidence by Petitioner confirm that he actually first sought treatment at OSF St. Joseph Prompt Care on June 14, 2012. The Petitioner was not seen at OSF Occupational Health until June 21, 2012.

Upon presenting to OSF St. Joseph Prompt Care on June 14, 2012, the Petitioner reported a three week history of back pain after falling down steps three weeks ago. There is no indication in the record that the Petitioner reported that his fall occurred at work. It is noted that Petitioner also reported moving into an apartment three weeks ago. The Petitioner returned for treatment at OSF St. Joseph Prompt Care on June 18, 2012 and that time he did report his fall occurred at work, but did not confirm a date of accident.

The Petitioner testified that while serving National Guard duty the weekend of June 8th, 9th, and 10th of 2012, he was not required to do much because he "had a doctor's note". The Arbitrator notes, however, that no medical records were admitted into evidence by the Petitioner confirming that he had sought or obtained any medical treatment prior to June 14, 2012.

During his visits to OSF St. Joseph Prompt Care on June 14th, 18th and 21st, the Petitioner was diagnosed with back pain. The Petitioner was referred for physical therapy on June 21st by Dr. Dowden at OSF Occupational Health; however, Petitioner testified he elected to pursue chiropractic treatment at AlignLife instead. The Petitioner was first seen at AlignLife on July 31, 2012 and he was discharged on November 9, 2012.

On November 16, 2012, the Petitioner presented for evaluation at Orthopedics of Illinois. At that time, Petitioner was evaluated by David Kieser, a family nurse practitioner for Dr. Kolb. After examining the Petitioner, Mr. Keiser again diagnosed him with low back pain and recommended an MRI of his lumbar spine. It was noted that the Petitioner reported to

16IWCC0057

Mr. Keiser that he had not worked since June 14, 2012 and that he did not think he could work without restrictions. The Arbitrator notes, however, that the Petitioner testified that he began working a new job as a security guard in August of 2012 and that he remained so employed at the time of his testimony.

After November 16, 2012, the Petitioner did not treat again until February, 2013 when he returned to AlignLife. The Petitioner testified that the delay in his treatment was due to the fact that his first attorney had closed his case and that payment of his medical bills was coming out-of-his own pocket. The record of the Petitioner's treatment at AlignLife on February 7, 2013, demonstrate that he reported left-sided, sharp pain in his back and hips that began on January 25, 2013 after he flipped his truck on the way home from work and was thrown from his vehicle. While the Petitioner admitted that he was involved in a motor vehicle accident, he denied an injury other than to his left shoulder blade.

The Petitioner did return to Orthopedics of Illinois again on February 20, 2015 and was seen by Dr. Anderson. When asked why he returned to Orthopedics of Illinois in February of 2015 after not seeking treatment for almost two years, the Petitioner testified that he was told by his doctor at AlignLife that his efforts had been exhausted. The Arbitrator notes, however, that there is no record of treatment of the Petitioner at AlignLife since February 7, 2013. While the Petitioner testified that he returned to AlignLife in 2014, record of that treatment was not admitted into evidence. On February 20, 2015, Dr. Anderson again recommended an MRI of Petitioner's lumbar spine. The Petitioner underwent that MRI on February 23, 2015 and the MRI was reported to be normal.

Curtis Smith, the Petitioner's supervisor, testified that the Petitioner never reported a work accident to him on June 1, 2012. Mr. Smith testified that had the Petitioner reported a work accident on June 1, 2012, or any other day, he not only would have immediately prepared an accident report himself, but he would also have had the Petitioner complete a report. Mr. Smith testified that Respondent's policy requires that once notice of an accident is provided reports are prepared by the supervisor and employee and are scanned and submitted via email to the Safety Department, the department manager and the operations manager. Mr. Smith testified that upon conducting a review of the Respondent's records, no reports were located related to an alleged accident on June 1, 2012.

Mr. Smith testified that had Petitioner first reported to the plant nurse with report of a work related injury she would have inquired of him, as the Petitioner's supervisor, regarding the Petitioner's report, which she never did. Mr. Smith also testified that in that instance it would have triggered him to inquire with Petitioner and prepare a report.

Emily Nolan, the Respondent's Safety and Health Coordinator, also testified. Ms. Nolan testified that as the Safety and Health Coordinator she is in charge of all workers' compensation claims occurring at the Respondent's Bloomington plant. Ms. Nolan testified that the Respondent did not receive notice of the Petitioner's accident until a copy of his Application for Adjustment of Claim was received from the Commission, she thought at the end of July, 2012. Commission records show that Petitioner's Application was filed on July

16IWCC0057

20, 2012.

The Petitioner testified that he currently continues to experience constant pain in his low back that shoots down his left leg, sometimes all the way to his ankle. He also testified his left leg goes numb. The Petitioner testified his pain is irritated by standing, sitting, and lifting.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here. Specifically, the Arbitrator finds that the Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment by the Respondent. In so finding, the Arbitrator questions the reliability and credibility of the Petitioner's testimony.

The Arbitrator notes that the Petitioner did not seek any medical treatment until June 14, 2012, two weeks after his alleged injury, and that, after allegedly falling down 20 stairs, he failed to report when first seeking treatment that his injury occurred at work. It was not until June 18, 2012 that the Petitioner first reported his injury occurred at work and, even then, he reported that he was unsure of the exact date of the incident. The Arbitrator finds it difficult to believe that had the injury occurred as the Petitioner testified and had the Petitioner in fact notified the Respondent of his accident as alleged on June 1, 2012, that he would have failed to mention his accident when seeking treatment on June 14, 2012. The Arbitrator also finds it difficult to believe that had the Petitioner reported falling down 20 stairs when he first sought medical treatment that such a detail would not have been included in the record of that treatment.

The Petitioner's testimony that he reported his injury to his supervisor is, similarly, unsupported by the record. Curtis Smith, the Petitioner's supervisor, testified that the Petitioner never reported a work accident to him on June 1, 2012. Mr. Smith testified that had the Petitioner reported a work accident he would have immediately prepared an accident report and would have had he Petitioner complete a report. Mr. Smith testified that Respondent's policy requires that once notice of an accident is provided reports are prepared by the supervisor and employee and are scanned and submitted via email to the Safety Department, the department manager and the operations manager. Mr. Smith testified that upon conducting a review of the Respondent's records; no reports were located related to an alleged accident on June 1, 2012. Emily Nolan, the Respondent's Safety and Health Coordinator, testified that the Respondent did not receive notice of the Petitioner's accident

until a copy of his Application for Adjustment of Claim was received from the Commission at the end of July, 2012.

The Arbitrator also notes that the Petitioner testified that he already had a "doctor's note" when he reported for National Guard duty the weekend of June 8th, 9th and 10th of 2012, after his accident, but before first seeking treatment on June 14, 2012. The Petitioner provided no explanation via testimony or evidence as to why he had a "doctor's note" before presenting for treatment of his alleged work injury. Similarly, although the Petitioner testified that he only injured his left shoulder blade in the motor vehicle accident of January 25, 2013, the record of the Petitioner's treatment at AlignLife on February 7, 2013, demonstrate that he reported left-sided, sharp pain in his back and hips that began after he flipped his truck on the way home from work and was thrown from his vehicle. These inconsistencies, together with the inconsistencies noted above, cause the Arbitrator to doubt the reliability and the credibility of the Petitioner's testimony.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that on June 1, 2012 he sustained an accidental injury that arose out of and in the course of his employment by the Respondent.

Having found that the Petitioner failed to prove that an accidental injury arising out of and in the course of his employment by the Respondent occurred, determination of the remaining disputed issues is moot. The Petitioner's claim for compensation is denied and no benefits are awarded herein.

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STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elida Lozano,

Petitioner,

No. 12 WC 31176

Coolersmart, Inc.,

Respondent,

ORDER

Petition and motion to transfer the matter back to Arbitrator Carlson, having been filed by Respondent's attorney herein and due notice given, this cause came before Commissioner Gore on July 7, 2015, in Chicago, Illinois. The Commission having jurisdiction over the persons and subject matter and after being advised in the premise finds:

- This matter was properly filed by Petitioner's attorney regarding an accident date of July 10, 2012.

- The matter was heard, on November 19, 2013 and January 9, 2014, before Arbitrator Carlson under §19(b) of the Act in Wheaton, Illinois with decision filed April 3, 2014, wherein the Arbitrator awarded 32-3/7 weeks of temporary total disability benefits (TTD) and 6-6/7 weeks of temporary partial disability benefits (TPD) and mileage and travel expenses for treatment and therapy of $2,461.01, and the Arbitrator denied Petitioner's Petition for Vocational Rehabilitation and maintenance.

- Timely Review was filed by both parties and the Commission heard arguments November 13, 2014, and issued their decision affirming TTD and TPD benefits-(stipulated as previously paid) and noting credit for TTD paid by Respondent of $22,874.20, and modifying only as to the medical mileage expenses, to $2,121.35,

and further remanding the matter back to the Arbitrator for further proceedings consistent with the Commission decision.

- Respondent then filed a §19(e) motion submitting questions regarding the Review, wherein, the Commission issued their Order January 9, 2015 denying and dismissing Respondent's motion noting Respondent presented more than five questions-(as the set out questions were compound and clearly exceeding that allowed by the Act) to be addressed by the Commission. The Commission further noted their prior affirmance of the Arbitrator's decision, except for modification of the medical mileage expense reimbursement award.

- Subsequent to the prior §19(b) hearing and Review, there was a change in the Arbitrator covering the territory, formerly assigned to Arbitrator Carlson, and currently assigned to Arbitrator Cronin in Wheaton.

- The parties had a pretrial before Arbitrator Cronin on or about June 22, 2015 regarding transferring the matter back to Arbitrator Carlson who had previously heard the matter under §19(b). Thereafter, Respondent filed the instant motion, June 26, 2015, to transfer the matter back to Arbitrator Carlson-(currently sitting in Chicago) in interest of judicial economy and fairness under the circumstances.

- The matter came before Commission Gore in Chicago, Illinois in July 7, 2015. Respondent at that time argued that the matter should be transferred back to Arbitrator Carlson as he had heard the prior §19(b) in the interest of judicial economy and fairness as Respondent understood no new evidence would be presented and arguments would be based on the prior transcript and evidence. Petitioner argued Respondent's motion should be denied and dismissed for want of subject matter jurisdiction and that the Commission does not have jurisdiction over a petition to transfer jurisdiction absent a final determination by an arbitrator and the Commission review of that decision. Petitioner in argument and their response to the motion noted that arbitration assignments are final as to the proper venue (Wheaton in this case, where Arbitrator Cronin is currently sitting). The matter was taken under advisement and consideration.

The Commission finds that, per Commission rules, this matter was properly set in the Wheaton venue, previously handled by Arbitrator Carlson, and as such, the matter properly should remain at the Wheaton venue, currently being handled by Arbitrator Cronin. The remand order by the Commission is to the venue site and not just following the Arbitrator. Per Commission rules, the Commission has no jurisdiction to allow for the matter to change venue to Chicago to follow the Arbitrator, therefore, the Commission, herein, denies and dismisses Petitioner's petition and motion for transfer to the Chicago venue with Arbitrator Carlson.

THEREFORE IT IS ORDERED BY THE COMMISSION that Respondent's Petition and motion, to transfer the matter to the former sitting Arbitrator of the Wheaton venue to the Chicago venue is hereby denied and the motion dismissed.

DATED: JAN 15 2016

David L. Gore

Stephen Mathis

Mario Basurto

DLG/jsf
7/7/15
045

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN ALVAREZ,

Petitioner,

16IWCC0096

vs.

NO: 12 WC 36753

ILLINOIS CRANE INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical treatment, including prospective medical treatment, and temporary total disability 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. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

On September 15, 2012, Petitioner drove a JLG lift into a pothole and caused an injury to his lumbar spine. He subsequently treated, first, at MacNeal Hospital and then continued his treatment with his primary care physician, Dr. Siddiqui. He subsequently came under the care of Dr. Alexander Ghanayem, an orthopedist, on October 29, 2012. Dr. Ghanayem diagnosed Petitioner's condition as broad-based disc herniations at L4-L5 and at L5-S1 and a small disc herniation at L4-L5 and then treated Petitioner's lumbar spine symptoms conservatively, employing physical therapy and an epidural steroid injection. The conservative treatment failed to resolve Petitioner's complaints, and Dr. Ghanayem, on February 19, 2013, performed an anterior lumbar discectomy at L5-S1, a decompression of the spinal canal as well as an interbody fusion at L4-5 and L5-S1. Petitioner testified to sleeping in a reclining chair for approximately

two months postoperatively as he found the chair to be more comfortable than his bed and the chair allowed him to stand without assistance.

Petitioner testified further that on or about April 1, 2013, he awoke in the reclining chair with a pinched neck and both numbness and tingling into his right shoulder and right arm. Four days later, when the symptoms failed to abate, Petitioner contacted Dr. Ghanayem's office and was seen by Dr. Ghanayem's nurse practitioner, Dorota Pietrowski. Petitioner was next seen by Dr. Ghanayein on April 22, 2013. Dr. Ghanayem diagnosed Petitioner as having cervicalgia and had Petitioner undergo an MRI. The MRI revealed Petitioner had a left pericentral disc protrusion at C4-5 and a right pericentral disc protrusion at C5-6. Physical therapy was ordered to address Petitioner's cervical spine symptoms, and Petitioner undertook the prescribed physical therapy but achieved no relief. A return visit to Dr. Ghanayem on April 22, 2013, resulted in a recommendation for a cervical discectomy and fusion at C5-6.

At the request of Respondent, Petitioner underwent a Section 12 examination with Dr. Avi Bernstein on October 3, 2013. The examination addressed both Petitioner's lumbar and cervical spine. Dr. Bernstein declared Petitioner to be at maximum medical improvement with respect to the lumbar spine and agreed with Dr. Ghanayem concerning the necessity for surgery to address Petitioner's cervical spine symptoms. Dr. Bernstein, however, attributed the condition of Petitioner's cervical spine to degenerative changes and not to Petitioner's September 15, 2012, accident.

Dr. Ghanayem testified on Petitioner's behalf concerning Petitioner's cervical spine symptoms and his recommendation to surgically address those symptoms. Dr. Ghanayem, having testified that a protrusion is the same as a herniation, indicated that a disc herniation can be the result of sleeping "funnily" on a couch or a reclining chair and opined this is what Petitioner had experienced. He indicated that sleeping in such a manner can result in a neck losing muscle tone that results in the neck falling to one side and this, in turn, strains the annulus and can result in a tear. Dr. Ghanayem related Petitioner's cervical spine symptoms to Petitioner's September 15, 2012, accident, noting that Petitioner slept in the reclining chair in response to the discomfort he experienced following the lumbar spine surgery that was necessitated by the September 15, 2012, accident.

The proffered evidence does not convince the Commission that Petitioner's protrusions at C4-C5 and C5-C6 were the result of his sleeping in a reclining chair. Ms. Pietrowski, Dr. Ghanayem's nurse practitioner was the first to record Petitioner's complaints concerning his cervical spine and did so on April 5, 2013. She noted Petitioner experienced an exacerbation of cervical symptoms. This entry implies Petitioner had cervical symptoms that could be exacerbated, i.e., a pre-existing condition. The same entry was silent as to a cause for those symptoms. It simply stated Petitioner woke up, was unable to move his neck and had radicular symptoms affecting his right upper extremity. The notes taken upon Petitioner's return to Dr. Ghanayem's office on April 22, 2013, also do nothing explain how Petitioner's cervical spine came to be symptomatic. Dr. Ghanayem, who wrote the record from that visit, noted only that Petitioner continued to have on-going cervical pain with some referral of that pain to his right shoulder girdle. Petitioner was subsequently seen by Dr. Ghanayem's office for his cervical spine symptoms on May 6, 2013, June 10, 2013, July 25, 2013, August 22, 2013, November 4,

2013, and June 16, 2014, and was never recorded attributing his cervical spine symptoms to anything. Though no history of Petitioner's cervical spine symptoms was found in his notes, Dr. Ghanayem nevertheless testified that he understood, as of April 22, 2013, that Petitioner's cervical spine symptoms were the result of Petitioner "sleeping funny" in a recliner chair. This claim was made on July 6, 2014, during his evidence deposition. The Commission finds Dr. Ghanayem's testimony, made more than a year after his April 22, 2013, examination of Petitioner, unconvincing.

The Commission notes the existence of histories of Petitioner's cervical spine symptoms being related to the manner in which he slept following his September 13, 2012, lumbar spine surgery are found in Petitioner's physical therapy records from ATI Therapy. ATI Therapy drafted a Plan of Treatment on May 7, 2013, and a second Plan of Treatment on August 1, 2013. In both, references were made to Petitioner's cervical complaints being attributed to way he slept following his September 15, 2013, lumbar surgery. The Commission finds these records dispositive of nothing. Petitioner was seen by Dr. Ghanayem on May 6, 2013, the day before he presented to ATI Therapy, but did not provide Dr. Ghanayem the history he would provide ATI Therapy the following day. Petitioner saw Dr. Ghanayem on July 25, 2013, approximately a week before Petitioner was seen at ATI Therapy on August 1, 2013, and, again, did not relate the history he later provided to ATI Therapy. The Commission, despite the history contained in the ATI Therapy physical therapy notes, cannot reconcile that history with the history, or lack thereof, Petitioner provided to Dr. Ghanayem and his staff. Couple this with the delayed recitation of that history, the Commission cannot adopt that history as the cause of Petitioner's protrusions at C4-5 and C5-6.

The Commission, therefore, modifies the Decision of the Arbitrator with respect to the issue of a causal relationship existing between Petitioner's September 15, 2012, accident and the ill-condition of his cervical spine and, accordingly, vacates the awards pertaining to his cervical spine, including medical fees incurred treating Petitioner's cervical spine complaints as well as the order instructing Respondent to pay for the surgery proposed by Dr. Ghanayem. The Commission finds no reason to disturb the Decision of the Arbitrator further and affirms and adopts the findings concerning all other issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $519.92 per week for a period of 109-2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the reasonable and necessary medical services as set forth in Petitioner's Exhibit #10 except for medical services related to Petitioner's cervical spine.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

16IWCC0096

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.

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 $75,000.00. 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.

DATED: FEB 3 - 2016
KWL/mav
O: 12/07/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

16IWCC0096

ALVAREZ, MARTIN R
Employee/Petitioner

Case# **12WC036753**

ILLINOIS CRANE INC
Employer/Respondent

On 1/13/2015, 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 0.08% 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:

1609 BOTTO GILBERT GEHRIS
FRANCISCO BOTTO
970 McHENRY AVEN
CRYSTAL LAKE, IL 60014

0507 RUSIN & MACIOROWSKI LTD
DANIEL R EGAN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

16IWCC0096

Martin R. Alvarez,
Employee/Petitioner

v.

Illinois Crane, Inc.,
Employer/Respondent

Case # **12** WC **36753**

Consolidated cases: **none**

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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Geneva**, on **10/23/14**. 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0096

FINDINGS

On the date of accident, **9/15/12**, 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 **$40,553.76**; the average weekly wage was **$779.88**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$30,155.42** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$30,155.42**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $519.92 per week for 109-2/7 weeks, commencing 9/16/12 through 7/21/13 and from 7/25/13 through 10/23/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 9/16/12 through 10/23/14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $30,155.42 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services as set forth in PX10, as provided in §8(a) and §8.2 of the Act.

Petitioner is entitled to prospective medical treatment as prescribed by Dr. Ghanayem with respect to both the lumbar and cervical spine conditions, and Respondent shall pay the reasonable and necessary medical expenses associated therewith, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner penalties of **$0.00**, as provided in Section 16 of the Act; **$0.00**, as provided in Section 19(k) of the Act; and **$0.00**, as provided in Section 19(l) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

12/30/14
Date

ICArbDec19(b)

JAN 13 2015

16IWCC0096

STATEMENT OF FACTS:

The Arbitrator notes that at the commencement of trial, Petitioner withdrew his Amended Application for Adjustment of Claim, at least with respect to the claimed date of accident noted therein (9/14/12) and indicated that he was alleging the date of accident claimed in the original Application, or September 15, 2012. Respondent is not disputing accident. (Arb.Ex.#1). Respondent also indicated that it was not disputing Petitioner's lumbar spine injury, but instead disputes causation as it relates to the cervical spine. Finally, Respondent's counsel represented that payment records reflect Petitioner was paid benefits up through October 3, 2013, or the date of Dr. Bernstein's §12 examination. However, Respondent agreed that if any outstanding balances exist for medical treatment occasioned prior to that date, Respondent would pay any such outstanding balances pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

Petitioner, a 27 year old inspection and maintenance worker, testified that on September 15, 2012 he was driving a JLG lift when he went over a pothole. He noted that he released the pedal at that time which should have stopped the machine. However, the machine did not stop and he was bounced up and down forcefully as the lift machine continued over the pothole. Petitioner testified that he felt pain after this incident and notified his site manager, Dan Pope that same day. A photo of the crane in question was admitted at PX14. He indicated that he was approximately 4-5 feet off the ground as he was driving the lift. Accident is not in dispute. (Arb.Ex.#1).

The next day, September 16, 2012, Petitioner sought treatment at MacNeal Hospital Emergency Room. (PX6). At that initial visit Petitioner stated that he ran over a pothole in his lift machine and that he has been feeling pain ever since. (PX6). He was initially diagnosed with a low back strain and was instructed to follow up with his primary care physician. (PX6).

On September 18, 2012 Petitioner followed up with his primary care physician, Dr. Siddiqui, at Edward Hospital and Health services. At that time it was recorded that his back pain began after the September 15, 2014 lift accident, that his pain was extremely high and that it radiated down his left leg to his toes. (PX9). At that time an MRI of the lumbar spine was ordered and he was taken off of work. (PX9). He again followed up at Edward Hospital on September 21, 2012 where he was given work restrictions of no bending, no climbing stairs or ladders, no lifting more than 5 lbs., no pushing or pulling, and sitting work 50% of the time. (PX9). On September 25, 2012 Petitioner's work status was changed to being off work after a follow up appointment at Edward Hospital. (PX9). An MRI performed on September 27, 2012 revealed disc herniations at L5-S1 and L4-L5. (PX9). On October 2, 2012 Petitioner returned to Dr. Siddiqui at Edward Hospital at which time he was referred to an orthopedic surgeon given the results of the MRI. (PX9).

Petitioner testified that he subsequently visited Dr. Alexander Ghanayem on October 29, 2012 at the suggestion of the insurance adjuster. At that time Petitioner gave the same history of accident to Dr. Ghanayem as he had to his previous physicians. (PX4). Dr. Ghanayem diagnosed Petitioner with a broad based disc herniation at L5-S1 and a smaller disc herniation at L4-L5. (PX4). Dr. Ghanayem recommended physical therapy 2-3 times per week for four weeks. (PX4). On November 19, 2012 Petitioner returned to Dr. Ghanayem and received an epidural steroid injection. (PX4). Petitioner followed up again on November 26, 2014 reporting that he did not have a good result with the injection and Dr. Ghanayem recommended continued physical therapy with an option for surgery if the physical therapy does not improve Petitioner's symptoms. (PX4).

Petitioner treated at ATI physical therapy and eventually returned for follow up with Dr. Ghanayem on December 27, 2012. (PX4). At that time, Dr. Ghanayem stated that since Petitioner had not improved with

conservative management, he recommended surgery consisting of lumbar fusion at L4-L5 and L5-S1, and instructed Petitioner to remain off of work. (PX4).

On February 19, 2013 Dr. Ghanayem performed surgery consisting of an anterior lumbar discectomy L5-S1, decompression of the spinal canal as well as anterior lumbar interbody fusion at L5-S1 and L4-L5 using interbody prosthetic devices and anterior plate stabilization. (PX4). Petitioner was discharged from the hospital on February 24, 2013. (PX4). Petitioner followed up post-surgery on March 18, 2013 and was progressing well by beginning to walk daily, although formal physical therapy had not begun yet. (PX4). Petitioner testified that post-surgery he had difficulty sleeping on his bed because it was difficult to get up without help, and the straight-backed position of sleeping on a bed caused him pain. As a result of this difficulty, Petitioner began sleeping on a reclining chair because it was easier to get up without help, and much more comfortable because it kept his body in a "V" position. He indicated that he slept on the recliner for about 2 months after the surgery.

On or about April 1, 2013 Petitioner woke up from sleeping on his recliner and was unable to move his neck. He testified that he had a severe pinch in his neck as well as numbness and tingling down his right shoulder and arm. Several hours later, when the symptoms did not recede, he called Dr. Ghanayem's office and reported the problems. On April 5, 2013, Petitioner returned to Dr. Ghanayem's office for examination regarding his cervical symptoms and was diagnosed with cervicalgia. (PX4). Dr. Ghanayem's office also instructed him to limit his physical activity at that time. (PX4). On April 22, 2013 Petitioner followed up with Dr. Ghanayem for his cervical issues at which time an MRI of the cervical spine was prescribed. (PX4). The MRI of the cervical spine subsequently performed on April 29, 2013 revealed a left pericentral disk protrusion at C4-5 as well as a right pericentral disk protrusion at C5-6. (PX4).

Petitioner continued to follow up with Dr. Ghanayem for both his lumbar and cervical spine conditions. Dr. Ghanayem treated Petitioner's cervical injuries by prescribing physical therapy for both conditions beginning on May 6, 2013. Petitioner was eventually discharged from physical therapy July 8, 2013. (PX3). After following up with Dr. Ghanayem on July 8, 2013, Petitioner underwent a functional capacity evaluation ("FCE") relating to his lower back at ATI Physical therapy on July 12, 2013. (PX7). The FCE was valid and demonstrated Petitioner's ability to work within the light to medium physical demand level with restrictions of no lifting more than 15 lbs. overhead, 19 lbs. from the floor and 22 lbs. at the waist. (PX4). On July 18, 2013 Dr. Ghanayem reviewed the FCE, stated that Petitioner was at MMI and that his restrictions were permanent. (PX4).

After the FCE Petitioner returned to work under the stated restrictions and almost immediately his cervical symptoms returned. (PX4). Petitioner testified that after two days on the job doing light duty office work he felt the same symptoms as the first day he woke up on the chair unable to move his head. He described at the hearing that his right cheek became stuck or glued to his right shoulder and that he couldn't turn his head. He also indicated that he had numbness down his arm and that he was in a lot of pain. On July 25, 2013 Petitioner returned to Dr. Ghanayem due to his cervical symptoms. At that time Dr. Ghanayem prescribed physical therapy and stated that if conservative management failed Petitioner would be a candidate for an anterior cervical discectomy and fusion at the C5-C6 level. (PX4). He was also taken off work at this time. (PX4).

On August 22, 2013 Petitioner returned to Dr. Ghanayem after completing the prescribed physical therapy. (PX4). At that time Dr. Ghanayem stated that Petitioner's neck motion was better but that he was still having pain on the right side. As a result Dr. Ghanayem recommended a cervical discectomy and fusion at the C5-C6 level. (PX4).

Petitioner subsequently visited Dr. Avi Bernstein on October 3, 2013 at the request of Respondent for purposes of a §12 examination. (RX3). Dr. Bernstein stated that Petitioner was at MMI for his lumbar spine injury as of October 3, 2013 and was capable of working within the confines of the FCE. (RX3). Dr. Bernstein also noted that Petitioner was a surgical candidate for his cervical problems. (RX3). However, Dr. Bernstein was of the opinion that the cervical injuries were unrelated to the work injury in question. (RX3).

Petitioner followed up with Dr. Ghanayem on November 4, 2013 for his cervical condition. Dr. Ghanayem continued to recommend surgery at that time and stated that he believed the cervical problems were related to the original September 15, 2012 injury and subsequent recovery from lumbar surgery. (PX4). Dr. Ghanayem continued to recommend that Petitioner stay off of work until surgery. (PX4). Petitioner has remained off work since that time pending authorization of surgery.

Petitioner followed up with Dr. Ghanayem on June 16, 2014. Dr. Ghanayem continued to recommend surgery at that time. (PX4). However, due to Petitioner's financial situation, Dr. Ghanayem indicated that he would allow Petitioner to return to work on a light duty basis to see how it went. (PX4). Petitioner testified that he did attempt to go back to work at that time. He stated that his employer, and specifically Kent Carver, Respondent's general service manager, contacted him by phone and informed him that he needed to be 100% with no restrictions before being allowed to return to work. Mr. Carver was present at the arbitration hearing but was not called to testify.

Petitioner's final visit with Dr. Ghanayem prior to hearing on this matter was October 6, 2014. (PX2). At that time Dr. Ghanayem once again recommended cervical spine surgery due to Petitioner's ongoing neck pain and right sided arm and periscapular pain. (PX2).

Petitioner testified that he was off of work from September 16, 2012 through July 22, 2013 and July 24, 2013 through October 23, 2014, the date of arbitration, due to his physician's orders. Petitioner was also asked about a posting on his Facebook page dated April 28, 2014 wherein it was noted that he was working in Green Bay. Petitioner admitted making the post, but denied that he ever went to Green Bay to work. Instead, he indicated that he had made a bet with a family friend on a soccer game and had lost, and that he had made the post in response to his friend's post asking him where he had been hiding. Petitioner testified that he did not have the money to pay his friend, and that he didn't know what to say, so he lied to his friend about his whereabouts. Petitioner testified that he was not working anywhere at that time, and that he has not worked since he last worked for Respondent.

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

Petitioner testified that he was working as a lift driver for Respondent on September 15, 2012 when his lift machine failed to stop and rolled over a pot-hole, causing him to be jarred up and down, resulting in immediate pain in his back. Accident is not in dispute, nor is the causal relationship between said accident and Petitioner's lumbar spine condition. (Arb.Ex.#1). What is in dispute is whether or not Petitioner's spine condition, which manifested itself following his cervical spine surgery and allegedly due to Petitioner sleeping in a recliner, was causally related to said accident.

The evidence shows that on February 19, 2013 Petitioner underwent surgery consisting of an anterior lumbar discectomy L5-S1, decompression of the spinal canal as well as anterior lumbar interbody fusion at L5-S1 and L4-L5 using interbody prosthetic devices and anterior plate stabilization. (PX4). Petitioner testified that during his recovery from this surgery he was sleeping on a reclining chair so as to assist him in standing up and to

relieve the pain of being in a flat-back position. He noted that one morning he woke up in his reclining chair and felt immediate pain, numbness and tingling in his neck and down his right side. At that time, Petitioner's physical therapy had barely begun and his only physical activity was a doctor monitored walking program to increase his maneuverability after surgery. Petitioner testified that he had never injured or received treatment for his neck prior to April of 2013. He also noted that he had never slept on a reclining chair prior to his lumbar surgery and that the only reason as to why he slept on a chair rather than his own bed was due to the lumbar surgery and the problems posed by the recovery of said surgery. Petitioner's testimony as to these facts was not challenged or impeached in any way. More importantly, Petitioner's history of events and the mechanism of injury are corroborated by Dr. Ghanayem in his deposition testimony. Along these lines, Dr. Ghanayem testified that "... the most proximate cause of the disc herniation is sleeping goofy on the recliner for a number of days in a row. The root cause for him having him sleep funny on the recliner is recovering from spine surgery. The root cause of that is the low back injury. (PX1, p.23). Dr. Ghanayem went on to note that "[w]hen you sleep sort of semi sitting up you lose your neck muscle tone, it kind of goes off to one side, and it puts a little strain on the corner of the annulus and that can tear from that because torsion and side bending is the mechanism by which you can do that. It's not you know, glorious trauma but it is an event where people tell you I was watching TV, I fell asleep, woke up with my head kinked, and had terrible arm and neck pain. It just happens." (PX1, pp.39-40).

In a report dated October 3, 2013, Respondent's §12 examining physician, Dr. Bernstein, indicated that he did not feel that Petitioner's cervical disc abnormality was "... in any way related to his work incident or subsequent surgery. Clearly, this patient has chronic preexisting degenerative change, and I believe that this may have become symptomatic through the course of daily living." (RX3). The Arbitrator is not persuaded by Dr. Bernstein's opinion in this regard, given that the course of daily living at the time was focused primarily on recovering from major surgery. More to the point, the Arbitrator finds Petitioner's claim that he felt the onset of cervical symptoms after having slept in a recliner for several weeks following his lumbar surgery, and that he had done so not only to assist him in getting up from a supine position but also to avoid the pain he otherwise felt from lying flat, to be both credible and an understandable response to his post surgical needs. The Arbitrator likewise finds Dr. Ghanayem's opinion to the effect that such a mechanism of injury was a contributing factor in his subsequent cervical condition to be reasonable and persuasive under the circumstances.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current conditions of ill-being with respect to both his lumbar and cervical conditions are causally related to the accident on September 15, 2012.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner submitted into evidence medical bills at PX10. Respondent also agreed to pay any outstanding balance in relation to the lumbar spine and incurred prior to October 3, 2013 pursuant to the fee schedule.

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses as contained in PX10, and Respondent shall pay said medical services pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Respondent's defense of this claim was neither unreasonable nor vexatious so as to warrant the imposition of penalties, especially in light of the very real dispute as to whether or not Petitioner's cervical condition was causally related to the accident in question. Therefore, Petitioner's request for additional compensation pursuant to §19(k) and §19(l) as well as attorneys' fees pursuant to §16 of the Act is hereby denied.

Furthermore, Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Once again, the main issue in this case was whether or not Petitioner's current condition of ill-being with respect to his cervical condition was causally related to the accident on September 15, 2012. Having found in Petitioner's favor on this question, the Arbitrator finds that Petitioner is entitled to prospective medical treatment as prescribed by Dr. Ghanayem with respect to both his lumbar and cervical spine conditions. Respondent is therefore ordered to pay the reasonable and necessary medical expenses associated with said treatment pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he was taken off work on September 16, 2012 and returned to work on July 22, 2013. He then worked several days before being taken off work again on July 25, 2013.

Petitioner testified that he eventually asked Dr. Ghanayem to release him to light duty work on June 16, 2014 given that he was at risk of losing his house. Petitioner testified that he subsequently presented the note to Respondent and was eventually told that he needed to be 100% with no restrictions in order to be allowed back to work.

Petitioner testified that Dr. Ghanayem has continued to keep him off work for his neck through the date of his last office visit on October 6, 2014. Petitioner also testified that he has not worked anywhere else since he last worked for Respondent.

Respondent entered into evidence images from Petitioner's Facebook page, including a post wherein he noted that he had been working in Green Bay. (RX2). Petitioner admitted that it was his page, and that he had made the post. However, Petitioner credibly testified that the posting was not true, that he had never been to Green Bay, and that he had only made the post in response to a family friend's inquiry as to where he had been and why he still had not paid off on a bet on a soccer game that Petitioner had lost. While the Arbitrator would agree that such an excuse would appear rather silly on its face, there is no evidence that Petitioner ever actually worked in Green Bay, or for that matter would have to travel such a distance in order to find work. More to the point, this Facebook posting would appear to be more of a spur of the moment and admittedly lame attempt to explain his failure to pay on a gambling debt than a factual accounting of Petitioner's whereabouts and work history during the time in question. Indeed, one would be hard-pressed, in this day and age, to claim that everything posted on Facebook, or the internet for that matter, is true and accurate. Thus, the Arbitrator finds this posting to be less than dispositive on the question of ongoing TTD.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from September 16, 2012 through July 21, 2013 and from July 25, 2013 through October 23, 2014, the date of arbitration, for a period of 109-2/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Torres,

Petitioner,

vs. NO. 12WC038387

University of Chicago,

16IWCC0086

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical care, causal connection, permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 2015 is hereby affirmed and adopted.

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 removal of this cause to the Circuit Court is hereby fixed at $75,000.00. 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.

DATED: FEB 1 - 2016
SJM/sj
o-1/21/2016
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TORRES, LARRY
Employee/Petitioner

Case# **12WC038387**

UNIVERSITY OF CHICAGO
Employer/Respondent

16IWCC0086

On 5/12/2015, 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 0.08% 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:

1702 GRAZIAN & VOLPE PC
VOLPE, RICHARD S
5722 W 63RD ST
CHICAGO, IL 60638

2461 NYHAN BAMBRICK KINZIE & LOWRY
DEIDRE A CHRISTENSON
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

16IWCC0086

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LARRY J. TORRES,
Employee/Petitioner

Case # **12 WC 38387**

v.

UNIVERSITY OF CHICAGO,
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 **STEVEN FRUTH**, Arbitrator of the Commission, in the city of **CHICAGO**, on **February 24, 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. [X] 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. [X] 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 **10/16/2012**, 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 $ **76,616.28**; the average weekly wage was $ **1,473.39**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $ **79,843.70** for TTD, $ **N/A** for TPD, $ **N/A** for maintenance, and $ **N/A** for other benefits, for a total credit of $ **79,843.70**.

Respondent is entitled to a credit of $ **N/A** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $**712.55** /week for **160** weeks, for injuries sustained causing **32** % loss of a person as a whole, as provided in § 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**712.55**/week for **6.325** weeks, for injuries sustained causing **2.5** % loss of the right arm, as provided in § 8(e) 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

MAY 8, 2015
Date

MAY 12 2015

Larry Torres v. University of Chicago Police Department

12 WC 38387

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven J. Fruth on February 24, 2015. The disputed issues were: ***F.*** Is Petitioner's current condition of ill-being causally related to the injury?; ***L.*** What is the nature and extent of Petitioner's injury?

Petitioner testified at hearing. Petitioner offered documents in evidence including records from University of Chicago Medical Center, Orland Park Orthopedics, Hinsdale Orthopedics, Midwest Orthopedics at Rush, and Loyola University Medical Center. Respondent offered in evidence documents including Transaction Table, Dr. Wellington Hus IME reports, Dr. Theodore Fisher AMA Impairment Rating report, and Dr. Alexander Ghanayem return to work note. All exhibits which were offered were admitted in evidence.

FINDINGS OF FACT

Petitioner, age 43, is a sworn police officer for Respondent. Petitioner testified that he was engaged in his regular duties as a patrol officer on October 16, 2012 when he received a "shots fired" call. He responded to a call for assistance from another officer and engaged in a foot pursuit of the suspect. Petitioner testified that during the foot pursuit he stepped in a hole and fell. He suffered immediate back pain with numbness in in his les and right arm numbness and tingling. He testified that prior to the date of accident he had not had any complaints to his low back or legs. He notified his supervisor and drove himself to the emergency room.

At the University of Chicago Medical Center ER (PX 1) Petitioner reported that he had slipped and fallen during a chase. He fell onto a concrete step. He reported back pain and numbness in both legs. He also complained of right elbow pain. X-rays of the right elbow and lumbar spine were taken. A CT scan and MRI were also taken of the lumbar spine. The x-rays were unremarkable. The CT and MRI showed degenerative changes at L4-5 with an annular disruption and central disc protrusion. No acute fractures were noted in any of the imaging. Petitioner was discharged with instruction to follow up with Dr. Patrick Gabikian at University of Chicago.

Petitioner followed up with orthopedic surgeon Dr. Blair Rhode on October 19, 2012 (PX 2). Dr. Rhode noted Petitioner's complaints of bilateral leg numbness and numbness in the right ring and little fingers. Dr. Rhode diagnosed lumbar pain with radiculopathy and elbow pain with ulnar nerve mononeuritis. Dr. Rhode performed transforaminal epidural steroid injections (ESIs) at L4-5 on November 6, 2012, December 4, 2012, and December 29, 2012. Petitioner had minimal relief from the injection. Dr. Rhode referred Petitioner to Dr. Mark Lorenz for evaluation.

Although Petitioner followed up with Dr. Lorenz he continued with Dr. Rhode through April 12, 2013 for the elbow. Dr. Rhode injected Petitioner's right medial

epicondyle on February 4, 2013. Dr. Rhode added a diagnosis of medial epicondylitis. He kept Petitioner off work through the last visit on April 12, 2013.

Dr. Mark Lorenz first examined Petitioner on January 24, 2013 with a history of slipping and falling at work. (PX 3) Petitioner had developed back pain which radiated into his left leg and also numbness and tingling along the right ulnar nerve distribution. 3 ESIs over the prior five months failed to alleviate the symptoms. Dr. Lorenz interpreted Pettioner's MRI as showing a disc herniation at L4-5. He noted the radiologist's impression that the herniation was traumatic. Dr. Lorenz ordered physical therapy Pettioner's disc herniation with segmental instability at L4-5. He also took Petitioner off work. Petitioner received his therapy at ATI through February 22, 2013.

On March 6, 2013 Dr. Lorenz referred Petitioner for a discogram. Dr. Steven Bradfield performed the discogram on March 12, 2013. The discogram generated concordant pain at L4-5. By March 25, 2013 Dr. Lorenz felt a fusion at L4-5 was the option he endorsed.

Petitioner underwent a § 12 examination by orthopedic surgeon Dr. Wellington Hsu of Northwestern University School of Medicine on April 16, 2013.(RX 2) Petitioner reported the facts of his work-related injury and medical care up to that point. He reported the ESIs administered by Dr. Rhode provided only temporary relief. On exam Dr. Hsu noted negative Waddell signs. He diagnosed an L4-5 disc herniation and lumbar spondylosis. Dr. Hsu concluded that Petitioner "...sustained a work related injury on October 16, 2012 that likely caused a lumbar disc herniation on the left a L4-5..." He further opined that Petitioner's subjective complaints correlated with the objective findings. Dr. Hsu also concluded that based upon Petitioner's failed conservative treatment surgery a left sided L4-5 microdiscectomy was appropriate.

Dr. Hsu prepared an addendum to his original report on July 3, 2013. Dr. Hsu had by then reviewed Dr. Ghanayem's surgical evaluation. Based on review of Dr. Ghanayem's evaluation Dr. Hsu changed his opinion and opined that Petitioner was a candidate for either an L4-5 microdiscectomy or an anterior interbody fusion at L4-5.

Petitioner testified that his workers' compensation case manager referred him to Dr. John Fernandez at Midwest Orthopedics at Rush (Midwest) for his continuing problems with is right arm. Petitioner first saw Dr. Fernandez on July 22, 2013. He reported that he had only temporary relief from Dr. Rhode's injection. Dr. Fernandez diagnosed right elbow epicondylitis and possible cubital tunnel syndrome. He recommended a long-arm splint, an EMG, and an MRI.

On follow-up on August 24, 2013 Dr. Fernandez noted the MRI finding of moderate tendinosis of the common flexor tendon consistent with medial epicondylitis. The EMG was positive for cubital tunnel syndrome. Dr. Fernandez recommended platelet-rich plasma (PRP) injections. Dr. Jeffrey Mjaanes performed the PRP injection into Petitioner's right elbow on September 15, 2013. Petitioner had a good response to the injection and was referred for physical therapy for his arm. By December 5, 2013

Dr. Mjaanes believed Petitioner's epicondylitis was resolved and determined he was MMI and able to return to full duty work in terms of the elbow only.

Petitioner came under the care of Dr. Alexander Ghanayem at Loyola University Medical Center (Loyola) for evaluation for surgery. Petitioner was admitted to Loyola by Dr. Ghanayem on September 24, 2013. Dr. Ghanayem and Dr. John Santaniello collaborated in performing an L4-5 anterior fusion and posterior decompression L4 -5 laminotomy on September 24. Petitioner was discharged September 27, 2013 with directions to follow up with Dr. Ghanayem in the orthopedic clinic. Petitioner described the post-operative pain he felt from the surgical wounds both on his stomach and his back. Petitioner testified that by about one month after surgery the shooting pain down his legs were gone but that he continued to have back and hip pain.

Petitioner followed up with Dr. Ghanayem on October 21, 2013. He reported that the shooting pain into his legs was gone but that he still and back and hip pain. He was using a cane to get in and out of chairs. Petitioner was still taking Norco and muscle relaxants. On November 25, 2013 Petitioner reported that he was taking Norco and relaxants occasionally. The numbness and tingling in his legs was gone but his hip pain persisted when sitting a long time or when getting in and out of a chair. Dr. Ghanayem ordered physical therapy to concentrate on core lumbar strengthening, trunk stabilization, and postural strengthening.

By December 30, 2013 Petitioner had completed a month of physical therapy at ATI. He reported that his leg numbness was gone and no longer complained of hip pin. He was released to return to light duty work. Petitioner was to follow up after another course of physical therapy. Petitioner returned to the orthopedic clinic on February 3, 2014. He complained of some back pain when getting up from a seated position. He also complained of some numbness in his feet. Dr. Ghanayem thought he had typical post-fusion symptoms. He recommended another month of physical therapy.

On follow-up with Dr. Ghanayem March 3, 2014 Petitioner was feeling worse with regard to his back pain and numbness in his left foot. The examination revealed decreased sensation in both feet, the doctor ordered an MRI. Physical therapy was put on hold and Petitioner placed off work as well. The March 17, 2014 lumbar MRI showed that an annular fissure remained along with neural foraminal narrowing at L4-5. On examination that day Dr. Ghanayem noted good range of motion and 5/5 strength. Dr. Ghanayem restarted physical therapy and adjusted medication with a recommendation to wean off Norco. He continued to keep Petitioner off work.

On return April 28 Petitioner was noted as doing well with therapy. He had no complaints of numbness. The exam did not reveal deficits in sensation. Petitioner was to begin work conditioning 3 days a week. Use of a leg holster for Petitioner's sidearm was discussed. Petitioner remained off work. Work conditioning at ATI continued through May 30, 2014, at which time Petitioner had progressed to medium to heavy physical demand level.

On June 2, 2014 Dr. Ghanayem released Petitioner with no restrictions and returned him to full duty work.

Petitioner was examined by orthopedic surgeon Dr. Theodore Fisher at request of Respondent on February 18, 2015 for purposes of an impairment rating. (RX 3) During that exam Mr. Torres complained of back pain of 7/10. His pain can be as bad as 9 and as good as 4. Petitioner stated when he sits or walks for long periods he develops left leg radicular symptoms with pain in left buttock. Aggravating factors include wearing a belt. He had maximum tenderness over left PSIS. Petitioner reported burning pain when he wears his duty belt. He reported he exercises with the exercises he learned in physical therapy three times a week.

Dr. Fisher examined Petitioner and reviewed medical records including MRI and CT scan reports, the records of emergency care at University of Chicago Medical Center, Hinsdale Orthopedics, Petitioner's discogram report, the operative report from Petitioner's surgery September 24, 2013, and Dr. Ghanayem's follow-up notes. Dr. Fisher concluded that, pursuant to AMA guidelines, Petitioner suffered whole person impairment percentage of 10%. Dr. Fisher further opined that Petitioner had achieved MMI. He did not address Petitioner's right elbow injury.

Petitioner testified that he returned to his regular job in June of 2014. He testified that Dr. Ghanayem released him to work without restrictions. Petitioner testified that he is capable of doing his normal job duties. He testified that a leg holster was not allowed by his employer. He still has pain and pressure in his low back and left side when he wears his duty belt. A duty belt holds handcuffs, a weapon, ammunition magazines, a heavy flashlight, and a Mace dispenser. Petitioner has transferred most of these items, excepting his weapon, to a vest to relieve the pressure on his back.

Petitioner testified that he takes Motrin and that he uses hot and cold packs for his continuing back pain. On cross-examination, Petitioner testified that he is not on any prescription medications for pain. He has not seen Dr. Ghanayem or a physician for his low back since June 2, 2014. Petitioner testified that he continues to work his regular job as a police officer. His job can involve long periods of sitting in his patrol car interspersed with sudden vigorous activity. When sitting for a long time in his patrol car Petitioner adjusts his posture to relieve back pressure. This causes pressure and stiffness on his right elbow.

F. Is Petitioner's current condition of Ill being casually related to the injury?

The Arbitrator finds that Petitioner's conditions of ill-being with his low back and right elbow were causally related to his accident arising out of and in the course of his employment with Respondent.

Petitioner, a sworn police officer, was engaged in a foot chase when he fell on concrete steps on October 16, 2012. Petitioner sought immediate care in the emergency

department of University of Chicago Medical Center for complaints about his back and elbow. He followed up with extensive medical care from board certified physicians: Drs. Rhode, Lorenz, and Ghanayem. Petitioner was diagnosed with a herniated disc at L4-5 as well as right epicondylitis and cubital tunnel syndrome. Petitioner has proved by a preponderance of the direct and circumstantial evidence, including the temporal relation to the onset of complaints, that the injuries to his low back and right elbow were caused by the work-related accident on October 16, 2012. The records of Petitioner's treating physicians and Pettioner's credible testimony and trial proved that Petitioner's ongoing complaints were caused by the accident on October 16, 2012. The Arbitrator relies upon the direct and circumstantial evidence from the records of Petitioner's treating physicians, Drs. Rhode, Lorenz, and Ghanayem, that the fall during a chase of a criminal suspect as part of his job as a police officer caused Petitioner to suffer a herniated disc at L4-5. Drs. Hsu and Fisher, Respondent's retained examining physicians, supported the opinions of Pettioner's treating physicians. In fact, Dr. Fisher found that Petitioner was permanently impaired to a 10% extent.

Drs. Rhode and Fernandez diagnosed and treated Petitioner's right elbow injury. They found that the work-related accident on October 16, 2012 caused epicondylitis and cubital tunnel syndrome. Respondent offered no opinion in rebuttal of these findings.

The Arbitrator finds the opinions of all of the above physicians persuasive and reliable in finding that Pettioner's current conditions of ill-being are causally related to the accident on October 16, 2012.

L. **What is the nature and extent of Petitioner's injury?**

The Arbitrator finds that Petitioner proved by a preponderance of the evidence that he sustained permanent partial disabilities as a result of his work related injuries caused by the accident on October 16, 2012.

It is undisputed that Petitioner sustained a herniation of the L4-5 disc as a result of the accident. It is also undisputed that Petitioner sustained injuries to his right elbow, including epicondylitis and cubital tunnel syndrome. Petitioner's low back injury required extensive medical intervention, including physical therapy, ESIs and ultimately fusion and microdiscectomy. Petitioner's back surgery was unusually involved in that it required an anterior approach through the abdominal wall and then in the same session a posterior approach for the discectomy. The Arbitrator takes note that recovery from abdominal surgery tends to be more prolonged than recovery from a microdiscectomy only. Petitioner still has back pain, which he testified to in a credible manner. His radicular symptoms have resolved. He treats his continuing back pain with over-the-counter medication and from time to time has to take off work due to his pain. Even so Petitioner works full duty without restrictions.

Petitioner's right elbow injury involved conservative care also. Petitioner was placed in a long-arm splint and had a PRP injection which achieved generally good

results. He does have occasional complaints with his right elbow when he accommodates his back pain by shifting his posture.

§ 8.1b of the Act requires the Arbitrator to consider 5 factors to determine the extent of permanent partial disability: (i) the reported level of impairment pursuant to AMA "Guides to the Evaluation of Permanent Impairment; (ii) the occupation of the injured employee, (ii) the age of the employee at the time of the injury, (iv) the employee's future earning capacity, and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability.

As to Petitioner's back injury the Arbitrator notes Dr. Fisher AMA rating of 10% impairment. The Arbitrator considers Dr. Fisher's opinion in light of his examination of Petitioner and his review of Pettioner's medical records. It is unclear from Dr. Fisher's report whether he viewed original MRI images taken October 16, 2012. It is unclear whether he reviewed a CT scan done that same day. What is clear is that Dr. Fisher did not review the entire body of Petitioner's medical records which were admitted in evidence at arbitration hearing. It is also clear that Dr. Fisher did not review a description of Petitioner's job duties and requirements. Dr. Fisher did not discuss or comment on the nature of a recovery for an anterior lumbar fusion. Therefore, the Arbitrator does not give significant weight to Dr. Fisher's impairment rating.

Petitioner is a sworn police officer. His occupation often involves sedentary and mundane activities subject to interruption with emergent levels of extreme physical activity, activity that involves great stress and physical risk and even can be life threatening. The nature of Petitioner's occupation frequently involves activities which led to his original injury. These work conditions are noted to cause of exacerbation of Petitioner's daily symptoms. The Arbitrator considers this as a major factor of disability.

Petitioner was 43 years old at the time of the injury. Statistically, Petitioner has a life expectancy of approximately 38 years and a worklife expectancy of approximately 19 years. It is reasonably foreseeable that he will continue to suffer from the continuing back pain that he complains of now. The Arbitrator considers this to be a moderate factor of disability.

Petitioner's future earning capacity may be affected in the future. Despite his return to full duty work he may lose additional time from work. due to occasional aggravations of his back injury. The fusion surgery has resulted in permanent alteration of the structure of his lumbar spine. This permanent condition may make Petitioner more susceptible to future injury and therefore may result in future lost time from work or even early retirement. The Arbitrator places greater weight on this factor.

The Arbitrator also places great weight on Pettioner's medical records. Petitioner sustained a herniated L4-5 disc that failed resolution under conservative care. That conservative care included the 3 invasive ESIs performed by Dr. Rhode. Having failed conservative care Petitioner underwent fusion of L4-5 through an abdominal approach

along with a posterior microdiscectomy at the same time. Pettioner's condition effectively kept him off work, except for a short effort to return to work, from October 2012 to June 2014. The fusion of 2 vertebra by definition resulted in loss of motion in Petitioner's lumbar spine. His pain and limitations were well documented in his medical records. His credible testimony at hearing corroborated the opinions set forth in those records. Therefore the Arbitrator places great weight on the records of Petitioner's treating physicians.

In consideration of all 5 factors the Arbitrator, noting both the objective medical findings in evidence along with Petitioner's subjective complaints, finds that Petitioner suffered disability to the Person as a Whole to the extent of 32%, as provided in § 8(d)2 of the Act.

As to Petitioner's right elbow injury the Arbitrator notes that no report of impairment in accord with AMA guidelines was submitted. Therefore the Arbitrator cannot consider that factor

Petitioner is a sworn police officer. His occupation often involves sedentary and mundane activities subject to interruption with emergent levels of extreme physical activity, activity that involves great stress and physical risk and even can be life threatening. Petitioner testified that his elbow bothers him when he adjusts his posture to alleviate back pain. He offered no testimony that his right elbow affects his service as a police officer. The Arbitrator considers this as a lesser factor of disability.

As stated above Petitioner was 43 years old at the time of the injury. Statistically, Petitioner has a life expectancy of approximately 38 years and a worklife expectancy of approximately 19 years. Based on the generally good resolution of Petitioner's right elbow complaints is reasonably foreseeable that he will not continue to suffer from the continuing back pain that he complains of now. The Arbitrator considers this to be a lesser factor of disability.

Petitioner's future earning capacity may not be affected by his elbow injury in the future. Petitioner was able to return to full duty work as a sworn police officer without restriction. Petitioner offered no testimony that he continuing complaints that impaired his functioning as a police officer. The Arbitrator places lesser weight on this factor.

Petitioner's medical records clearly demonstrate that he sustained an epicondylitis and cubital tunnel syndrome to his right elbow. He received conservative care, including splinting. However, he also had an invasive PRP injection. While conservative, Pettioner's care for his elbow problem was aggressive. The Arbitrator places greater weight on this factor of disability.

Accordingly, in consideration of all 5 factors the Arbitrator finds that Petitioner suffered 2.5% loss of use of the right arm as provided in§ 8(e) of the Act.

Respectfully submitted,

Steven J. Fruth, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEGAGO

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Croy Fisher,

Petitioner,

vs. NO: 12 WC38778

16IWCC0078

Jack's Tires,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, notice, motion for bifurcation, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 26, 2015, is hereby affirmed and adopted.

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

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

[illegible]

16IWCC0078

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.

DATED: JAN 2 9 2016
TJT:yl
o 12/7/15
51

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I respectfully dissent from the majority decision and would award benefits to the Petitioner. The Petitioner proved by a preponderance of the evidence that he sustained an injury on September 11, 2012 that arose out of and in the course of his employment. This is despite the confusion over the date of accident as the Petitioner could not recall the exact date that he was injured. The Petitioner made a motion to continue the arbitration hearing in order to subpoena documents from the Respondent. However, that motion was denied by the arbitrator. I believe that the denial of the motion was error because the acquisition of those documents would have clarified the date of accident.

The Petitioner testified that he informed his then supervisor (who later became and was company president at the time of hearing) the day after his accident that he had hurt his back while changing a tire. The supervisor testified to offering to personally pay for the Petitioner to see a chiropractor, although the supervisor denied having knowledge of an alleged work accident. That behavior is suspect, and it defies common sense that the supervisor offered to pay for a supposedly non-work related injury just to "help" the Petitioner. This is especially true considering the supervisor answered "No" when asked whether he would have paid for Petitioner's antibiotics if the Petitioner had strep throat. Further, the Respondent offers health insurance to their employees. Because of this incident in particular, the evidence supports the conclusion that this accident arose out of and in the course of his employment.

Last, I would also find that the Petitioner gave Respondent sufficient notice of his injury. Although there is a discrepancy as to the finding of notice in the Arbitrator's decision between pages two and four, I would find that timely notice was given to the Respondent. Besides the Petitioner's testimony that he informed his supervisor of his accident, there were corroborating records of a work accident. First, Respondent's exhibit (1) , the First Report of Injury Form filled out by a co-owner of Respondent on October 23, 2012 notes that the administrator was notified of the accident date on September 28, 2012. Also, the chiropractic clinic where the Petitioner first sought treatment received documents via fax from the Respondent's workers' compensation carrier with a fax transmission notation of October 26, 2012. Thus, the Respondent was aware of the Petitioner's timely claim of a work related injury.

16IWCC0078

For the aforementioned reasons, I would find that the Petitioner proved that he sustained an injury that arose out of and in the course of his employment and award him workers' compensation benefits including medical expenses and temporary total disability.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

FISHER, CROY
Employee/Petitioner

Case# **12WC038778**

JACK'S TIRE
Employer/Respondent

16IWCC0078

On 2/26/2015, 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 0.06% 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:

2489 LAW OFFICES OF JIM BLACK
TRACY L JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0766 HENNESSY & ROACH PC
ERIN K FIORE
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

16IWCC0078

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CROY FISHER,
Employee/Petitioner

v.

JACK'S TIRE,
Employer/Respondent

Case # 12 WC 38778

Consolidated cases: NONE.

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Rockford**, on **January 20, 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. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other: Is Petitioner entitled to receive certain vocational rehabilitation at the expense of Respondent?

FINDINGS

On the date of accident, **September 11, 2014**, 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 not* sustain an accident that arose out of and in the course of employment.

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

Petitioner's current condition of ill-being *is not* causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned **$40,904.74**; the average weekly wage was **$786.63**.

On the date of the alleged accident, Petitioner was **28** years of age, *married* with **two** dependent children.

Petitioner *has not* received all reasonable and necessary medical services.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and **$3,137.14** for other benefits, for a total credit of **$3,137.14**.

Respondent is entitled to a credit of $ **2,679.82** under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondent on September 11, 2014.

Petitioner further failed to prove that the condition of ill-being complained of is causally related to any accidental injury sustained while in the employment of Respondent.

All claims for benefits in this matter for this alleged accident made by Petitioner are hereby denied.

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 JOANN M. FRATIANNI

February 19, 2015
Date

ICArbDec19(b)

FEB 26 2015

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

E. Was timely notice of the accident given to Respondent?

F. Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified that he worked for Respondent as a mobile tire technician. He was required to drive a Class C work truck to locations to repair and replace tires for semi tractor-trailers, earth moving equipment and farm equipment. Petitioner testified he would clock in and out of the shop at the start and end of each workday, and would travel to where work was needed. He would receive all work orders from the office and would be dispatched by his supervisor either by phone or text. Petitioner testified he would travel up to 100 miles for a job at times and usually worked alone.

Petitioner testified to a repair performed in September of 2012 in Rock County, Wisconsin. Petitioner testified he was changing the left rear tire of a Terra-Gator at a customer location in a cornfield. A Terra-Gator is a large fertilizer spreader with tires approximately 5 feet tall and 3 feet wide. Petitioner testified he was required to jack the vehicle up, remove the wheel, remove the lug nuts, remove the tire, find the hole in the tire, remove the seal using a boom or crane on his own truck and a pry bar, put the tire on its side using the boom, relocate the hole, patch it, clean the ring to ensure proper resealing, lubricate the area, use the boom to flip the tire back over, place the o-ring and snap ring, use the boom to realign the tire, and place the tire back onto the vehicle.

Petitioner testified he would use an air jack that weighed approximately 60 pounds. To jack up the vehicle, he would have to crawl under it and position the jack. He also used a jackhammer that weighed approximately 20 pounds, and pry bar that weighed approximately 8-10 pounds. Removing the seal required a lot of pressure and sometimes he would lift himself in the air while trying to leverage the pry bar under the seal to remove the tire. He further testified to efforts to get the tire realigned with the vehicle. He would use the boom to get the tire close, but the boom would not be able to perfectly align the tire. Petitioner testified this process was more difficult with the Terra-Gator as there are large fenders that lengthens the distance the boom can reach to get to the vehicle. Petitioner would move the tire with his shoulder and a pry bar to roll it closer to the vehicle. Once the openings on the tire were realigned with the studs, he would use an impact gun to replace the 12 lugs. This would require him to reach inside the tire with an extended arm and perform the last task in that position. Petitioner testified he would usually have to take a break after 4 hours, and then complete his work.

Petitioner testified he performed the above task by himself. Petitioner testified he had asked for help but there was no one available to assist him. He further testified he was positive the injury happened at Mallard Feed, which was bought at one point by Agroliance.

Petitioner testified that while moving the tire towards the vehicle, he experienced pain on his left side and lower back. Petitioner testified he then took a breather and finished the job. He then returned to the shop but did not report the incident as the shop was closed. The next day Petitioner testified he was very stiff but went to work. He saw Mr. Ryan Lovejoy, his boss, and mentioned something to the effect of "Are you going to rub the knots out of my back?" Mr. Lovejoy offered to send him to a chiropractor, but Petitioner declined this offer as he felt his condition was not that bad. Petitioner further testified that Mr. Lovejoy tried to take it easy on him at work, and approximately 2 weeks later he decided to visit the chiropractor. Petitioner did not return to work thereafter and was terminated the day before Christmas.

Mr. Ryan Lovejoy testified at the request of Respondent. Mr. Lovejoy testified he is the president of Respondent. His job duties included distributing service calls, overseeing sales and service. Mr. Lovejoy testified he was familiar with Petitioner who worked as a commercial technician. Mr. Lovejoy testified that Petitioner reported back pain in October, 2012. Mr. Lovejoy testified Petitioner did not state that a work accident occurred, but just asked him if he knew a chiropractor. Mr. Lovejoy testified he had an uncle and cousin with a chiropractic practice called Gunderson Chiropractic, and he referred him to them. Mr. Lovejoy testified he offered to pay for the treatment but never received a bill.

There was a great deal of confusion over the date of an alleged accident. Petitioner testified that he was injured on September 28, 2012. When shown an exhibit (Rx6), Petitioner confirmed only one entry under the name of Agroliance with a date of September 11, 2012. The exhibit reflects work orders performed from August 1, 2012 through November 1, 2012. The September 11, 2012 date becomes important because Petitioner was asked if this possibly meant his accident had occurred on that date. Petitioner testified that it "seemed right" and "maybe" but he was unable to recall an accident date. Later during the hearing, Petitioner amended his Application for Adjustment of Claim to allege a September 11, 2012 accident.

Mr. Lovejoy also reviewed the exhibit (Rx6) and testified that after each repair job, the technician would fill out a handwritten work order and turn it in. Mr. Lovejoy enters the work order using a computer software program. He enters this information in order to accurately bill his customers. The software then generates reports of work performed, including work by individual employees. This is called a "Commission Report." Mr. Lovejoy reviewed the Commission Report (Rx6) and testified it represented Petitioner's Commission Report for work performed from August 1, 2012 through November 1, 2012.

Mr. Lovejoy further testified concerning an invoice (Rx7) that reflected a repair to a front tire of a Terra-Gator. Mr. Lovejoy testified that most of the work involved the use of a boom truck and is not very physical.

Mr. Lovejoy testified he saw Petitioner once after the first chiropractic visit and that he had come in stating he had big problems. Petitioner reported he had a cracked vertebra from an accident as a teenager, that he had disc problems and that he would require multiple chiropractic visits. Mr. Lovejoy testified their relationship later deteriorated and Petitioner was fired after failing to report to work. Mr. Lovejoy testified the first time he found out there was a claim for a work injury was when he received paperwork from his workers' compensation insurance carrier. Respondent submitted a First Report of Injury that was completed on October 23, 2012. (Rx1)

Based upon the above, the Arbitrator finds that Petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment with Respondent on September 11, 2012. The confusion over the date of injury remains. Initially a claim was filed for an accident of September 28, 2012, which was later amended to September 11, 2012. The records of Gunderson Chiropractic reflects complaints of back pain for two months during the first visit of October 17, 2012. The records of Dr. Holtan reflect a work accident without a work injury date, and seem to indicate an accident of September 2012 or September 28, 2012. Clearly, Petitioner is a poor historian who could not recall names of doctors or referrals.

Based further upon the above, the Arbitrator finds that Petitioner failed to give Respondent timely notice of an accidental injury as defined by the Act.

Based even further upon the above, the Arbitrator finds that Petitioner failed to prove the condition of ill-being complained of is causally related to any work activities performed on behalf of Respondent.

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?

See findings of this Arbitrator in "C," "E" and "F" above.

Based upon said findings, all claims made by Petitioner for medical expenses in this matter are hereby denied.

K. Is Petitioner entitled to any prospective medical care?

See findings of this Arbitrator in "C," "E" and "F" above.

Based upon said findings, all claims made for prospective medical care in this matter by Petitioner at the expense of Respondent are hereby denied.

L. What temporary benefits are in dispute?

See findings of this Arbitrator in "C," "E" and "F" above.

Based upon said findings, all claims made for temporary total disability benefits in this matter are hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify ☐ Notice	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Thompson,

Petitioner,

vs.

NO: 12 WC 41568

16IWCC0098

Campus Cooks LLC,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical expenses, notice, temporary total disability, 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.

The Commission affirms and adopts the Arbitrator's decision in all respects, except with regard to notice. For the reasons set forth below, the Commission modifies the Arbitrator's decision and finds that Petitioner did give timely notice of his alleged work accident to Respondent. The Commission further concurs with the Arbitrator's finding that the Petitioner failed to establish an accident arising out of and in the course of his employment.

The Petitioner's alleged date of accident was October 21, 2012. His supervisor, Martin Romero, testified that he knew by the following Wednesday (October 24, 2012) that Petitioner had called Respondent to give notice of a work accident. (Tr. 49). Given this testimony, the Commission finds that the Respondent had timely notice of Petitioner's alleged work accident.

16IWCC0098

IT IS THEREFORE ORDERED BY THE COMMISSION that compensation is denied.

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.

No bond is required for the removal of this cause to the Circuit Court by Respondent. 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.

DATED: FEB 4 - 2016

TJT/ gaf
O: 12/07/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

THOMPSON, SCOTT
Employee/Petitioner

Case# **12WC041568**

CAMPUS COOKS LLC
Employer/Respondent

16IWCC0098

On 4/15/2015, 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 0.10% 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:

1315 DWORKIN AND MACIARIELLO
DOMENIC MACIARIELLO
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
BRIAN J KOCH
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0098

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

# ILLINOIS WORKERS' COMPENSATION COMMISSION
# ARBITRATION DECISION
19(b)

Scott Thompson
Employee/Petitioner

v.

Campus Cooks LLC
Employer/Respondent

Case # **12 WC 41568**

Consolidated cases:

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **February 9, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

16IWCC0098

FINDINGS

On the date of accident, **10/21/12**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$36,400.00**; the average weekly wage was $700.00.

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

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

As Petitioner failed to establish an accident arising out of and in the course of his employment, compensation is hereby denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

4/14/15
Date

ICArbDec19(b)

APR 15 2015

16IWCC0098

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

SCOTT THOMPSON, Petitioner,	)	
	)	Case No: **12 WC 041568**
CAMPUS COOKS., Respondent.	)	

ADDENDUM TO THE DECISION OF ARBITRATOR

This matter proceeded to hearing pursuant to §19B of the Illinois Workers' Compensation Act (the "Act") before Arbitrator Jessica A. Hegarty on February 9, 2015. The disputed issues include date of accident, accident, notice, causal connection, medical bills, TTD and prospective medical.

Findings of Fact

Petitioner was employed by Respondent as a Chef in a sorority house at Northwestern University on the alleged date of accident and had been so employed for almost 6 months.

Petitioner testified that on October 21, 2012, while preparing a meal, he leaned over a prep-table and attempted to open a window because he was hot. Ss he applied force to open the window, which was stuck, he heard a "pop" and immediately felt pain in his right shoulder. Petitioner testified he was in a bent over position with his arms extended in front of him at the time of the injury.

Martin Romero, Petitioner's supervisor, testified that he received a telephone call on the evening of October 21, 2012, from Petitioner, who advised that he was in the hospital emergency room. According to Mr. Romero, Petitioner didn't provide any further details with respect to how or where he was injured during that phone call. Mr. Romero reminded Petitioner to call the office first thing in the morning. Mr. Romero testified that Petitioner did not appear for work on October 22, 2012, nor did he call the office to advise that he had sustained an accident while at work or that he would not be working that day. Petitioner was a "no call/no show" for two days and was terminated on October 23, 2012. Mr. Romero testified to making several calls to Petitioner on October 22, 23 and 24 with no return calls from Petitioner.

On October 21, 2012, Petitioner presented to Resurrection Health Center with complaints of shoulder pain for the last eight hours of which he described as sharp, aching and non-radiating. Petitioner denied any symptoms in the past. Petitioner reported "that he was attempting to open a window and felt a pop/snap sensation."(Px.1). Petitioner reported taking Motrin for approximately six hours with

minimal relief before reporting to the emergency room. Petitioner's x-rays were unremarkable. He was diagnosed with a right shoulder strain and was sent home with pain meds and instructions to follow up with his own doctor. (Px.1).

On November 19, 2012, Dr. Alexander Goldvekht examined Petitioner at Advanced Physical Medicine. Petitioner complained of pain to his right shoulder after opening a window while working as a Chef. (Px.4). He was diagnosed with RTC syndrome of the right shoulder, and prescribed an MRI and physical therapy. (Id.).

On November 20, 2012, Petitioner presented to Dr. Ronald Silver noted for an initial consult. (Px.2). Petitioner reported a history of reaching over a table to open a window and feeling a pop in his right shoulder. (Px.2). The doctor noted complaints of severe pain and limited range of motion in his right arm. (Id.). Upon exam, Dr. Silver diagnosed Petitioner with rotator cuff impingement with possible tearing. The doctor administered a subacromial cortisone injection with 40 milligrams of Kenalog and 4 ccs of Lidocaine with a Betadine preparation. Dr. Silver recommended therapy, Vicodin for pain, Meloxicam for inflammation and Omeprazole for gastrointestinal protection. Dr. Silver recommended an MRI scan and noted Petitioner was temporary totally disabled Petitioner from work for approximately four weeks. (Id.)

Petitioner initiated therapy on November 29, 2012 with a date of onset listed at October 28, 2012.

On November 28, 2012, an MRI revealed mild rotator cuff tendonitis/bursitis involving the distal supraspinatus. (Px.3).

On December 10, 2012, Dr. Goldvekht confirmed the results of the MRI as showing an intact rotator cuff with mild tendonitis and /or bursitis.

Petitioner participated in therapy at Advance Physical Medicine in Oak Park through December 27, 2012.

On January 3, 2013, Petitioner followed up with Dr. Silver who reviewed the MRI, performed an exam, and noted continued complaints of pain and that the injection only provided about 48 hours worth of relief. The doctor recommended arthroscopic surgery of the right shoulder. (Px.4).

Petitioner testified that he is currently not working and that he wishes to have surgery for his right shoulder pain.

DEPOSITION TESTIMONY OF DR. RONALD SILVER

The deposition of Dr. Ronald Silver was taken on October 9, 2013. Dr. Silver issued a narrative report wherein he causally relates Petitioner's shoulder condition to his claimed work event of October 28, 2012. Dr. Silver testified that, based upon physical examination and Petitioner's complaints he would perform a right shoulder arthroscopy

to repair the pathology he diagnosed in the right shoulder. On cross examination, Dr. Silver conceded that his opinions with regards to causal connection were reliant upon an accurate history as provided by Petitioner. Dr. Silver consistently testified that Petitioner's description of accident while lifting a window on October 28, 2012 was a consistent mechanism of injury for his right shoulder pathology.

DEPOSITION OF DR. LAWRENCE LIEBER

On April 23, 2013, Petitioner presented to Dr. Lawrence Lieber for an Independent Medical Exam ("IME") at Respondent's request pursuant to Section 12 of the Act. (RX 4.)

The deposition of Dr. Lieber was taken on April 17, 2014. Dr. Lieber testified that after reviewing the MRI report and examining Petitioner he came to the diagnosis of rotator cuff syndrome of the right shoulder. (Rx.3). He testified that he never reviewed the actual MRI Films only the report. (Id.) Dr. Lieber found that Petitioner's MRI showed pre-existing degenerative rotator cuff disease with no evidence of acute abnormality within the right shoulder area that could be related to the October 21, 2012, event. Dr. Lieber found no evidence of any objective abnormalities within the right shoulder that could be related to either an October 2012 event or associated with reaching over and lifting a window.

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to Accident and Notice:

An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause. *E. Baggot Co. v. Industrial Commission*, 290 Ill. 530, 125 N.E. 254 (1919). An injury "arises out of" one's employment if its origin is in a risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *Warren v. Industrial Commission*, 61 Ill. 2d 373, 335 N.E. 2d 488 (1975). Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Howell Tractor & Equipment Co. v. Industrial Commission*, 78 Ill.2d 567, 573, 38Ill.Dec. 127, 403 N.E.2d 215. (1980). A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Orsini v. Industrial Commission* 117 Ill.2d 38, 45, 109 Ill.Dec. 166, 509 N.E.2d 1005 (1987).

If an employee is exposed to a risk common to the general public to a greater degree than other persons, the accidental injury is also said to arise out of his employment. *DeHoyos v. Industrial Commission*, 26 Ill.2d 110, 185 N.E.2d 885 (1962). However, if the injury results from a hazard to which the employee would have been equally exposed

apart from the employment, or a risk personal to the employee, it is not compensable. *Material Services Corp. v. Industrial Commission*, 53 Ill.2d 429, 433, 292 N.E.2d 367 (1973).

The Arbitrator finds that the Petitioner has not provided sufficient evidence that an accident occurred at work on the claimed accident date. The medical records from Resurrection Medical Center do not indicate a history of Petitioner suffering an injury at work. The only history noted is that of lifting a window. When asked on cross-examination as to whether Petitioner provided a history of work accident to his examining physician at Resurrection Hospital, he testified that he most did and that the medical records were incorrect in their omission of a work reference.

Mr. Romero testified that he spoke with Petitioner on October 21, 2012, at approximately 11:30 P.M. Mr. Romero testified that Petitioner called him to let him know that he was in the hospital and that he would likely be unable to work the following day. When asked specifically whether Petitioner provided a history of an accident occurring at work, Mr. Romero testified Petitioner did not.

It is not until nearly one month after the alleged accident date that Petitioner does report a work accident to Dr. Alexander Goldvekht where he complained of pain to his right shoulder after opening a window while working as a Chef.

Even assuming that Petitioner did provide ample evidence that he was injured while at work, he failed to sustain his burden with respect to whether his alleged injury arose out of his employment. There is no evidence that this window is unique to Petitioner's employment or that by virtue of his employment, Petitioner was exposed to an increased risk of injury. This window cannot be assumed to be unique to Petitioner's employment simply because it is located at the work place. The Arbitrator finds that this window was a hazard to which the employee would have been equally exposed apart from the employment.

Based on a careful consideration of the evidence contained in the record, the Arbitrator finds the Petitioner did not sustain his burden of proof with respect to whether the injury occurred at work and whether the injury arose out of his employment. Further, the Arbitrator finds a failure in the evidence on the issue of notice.

In support of the Arbitrator's decision relating to the remaining disputed issues, the Arbitrator finds the following facts:

As the Petitioner failed to prove accident by a preponderance of the evidence, the Arbitrator need not address the remaining disputed issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
MCLEAN

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tracey Chandler,

Petitioner,

16IWCC0069

vs.

NO: 12 WC 42029
14 WC 9837

State of Illinois/Illinois State University,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, accident, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 9, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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

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

DATED: JAN 2 8 2016
KWL/vf
O-1/25/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0069

CHANDLER, TRACEY
Employee/Petitioner

Case# **12WC042029**

14WC009837

ILLINOIS STATE UNIVERSITY
Employer/Respondent

On 6/9/2015, 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 0.08% 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:

0564 WILLIAMS & SWEE LTD
STEVEN WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

4138 ASSISTANT ATTORNEY GENERAL
WARREN WILKE
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 9 = 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0069

Tracey Chandler
Employee/Petitioner

v.

State of Illinois/Illinois State University
Employer/Respondent

Case # **12** WC **42029**

Consolidated cases: **14 WC 9837**

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 22, 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. [x] 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other

16IWCC0069

FINDINGS

On the date of accident, **September 17, 2012**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**35,100.00**; the average weekly wage was $**675.00**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

Respondent is entitled to a credit of $**278.00** under Section 8(j) of the Act.

ORDER

The Petitioner failed to prove any current condition of ill-being in her right wrist which is causally related to the injury of September 17, 2012.

No benefits are awarded herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Arbitrator Anthony C. Erbacci

June 4, 2015
Date

12 WC 42029
ICArbDec19(b)

JUN 9 - 2015

FACTS:

The Petitioner testified that on September 17, 2012 and December 11, 2012 she was employed by the Respondent as a building service worker and that her job duties required her to do janitorial type work which included washing walls, cleaning glass, and dumping trash. The Petitioner testified that she spent two to four hours per day reaching at or above shoulder level. The Petitioner testified that she has been employed by the Respondent for 25 years.

The Petitioner testified that on September 17, 2012 she was washing walls, cleaning glass and dumping trash when she began to experience pain in her right shoulder. She testified that she sought treatment with Dr. Powers on September 19, 2012 and that she completed an accident report on September 21, 2012. The Petitioner testified that she then saw Dr. Kolb on October 17, 2012.

The medical records demonstrate that the Petitioner saw Dr. Regina Powers on September 19, 2012 for complaints of right wrist and shoulder pain. She reported that she switched shifts at work and had to wash walls. She reported pain in her right shoulder and wrist that started two weeks prior and became worse over the past three days. Dr. Powers' diagnoses were right wrist tendonitis and right shoulder strain. Dr. Powers referred the Petitioner to Dr. Kolb for her wrist.

The Petitioner completed an accident report on September 21, 2012. It indicates an injury to the right shoulder and wrist and a date of injury of September 17, 2012. The Petitioner indicated that at the time of her injury she was performing her regular job duties.

On October 17, 2012 the Petitioner saw Dr. Edward Kolb for complaints of right wrist pain. Dr. Kolb noted that the Petitioner complained of right wrist pain since September 17, 2012 and reported that she was doing her normal janitorial duties when her wrist began to bother her. She denied any specific trauma. Dr. Kolb noted that right wrist x-rays performed by Dr. Powers revealed a small cyst in the lunate but no other abnormalities. Dr. Kolb's assessment was right wrist tendinitis.

The Petitioner testified that on December 11, 2012 she was again washing walls and cleaning glass when her right shoulder became more painful. She testified that she saw Dr. Kolb that same day and that he injected her right shoulder and prescribed an MRI.

Dr. Kolb's office note of December 11, 2012 demonstrates that the Petitioner presented there for evaluation of her right shoulder and reported that she had right shoulder pain for the past week. She denied any injury but attributed her symptoms to her work activities, specifically repetitive lifting both boxes and mop buckets as well as having to adjust her vacuum cleaner. Dr. Kolb noted that the Petitioner's x-rays did show a type II acromion and his assessment was right shoulder bicipital tendinitis. Dr. Kolb injected the Petitioner's right shoulder and he noted that he felt her symptoms were secondary to her job duties. The Petitioner returned to Dr. Kolb on January 9, 2013 and reported relief from the injection but a return of her symptoms. Dr. Kolb recommended physical therapy and a return in 4 weeks.

The Petitioner completed another accident report on January 10, 2013. That report indicates an injury to the right shoulder and right wrist and a date of injury of December 11, 2012. The Petitioner indicated at the time of her injury she was performing her regular "janitorial duties", and "cleaning glass in the entranceway and dumping heavy trash cans."

The Petitioner returned to Dr. Kolb on April 17, 2013 and it was noted that she "has a long history of issues with her right shoulder". Dr. Kolb's assessment was right shoulder impingement and biceps tendonitis. Dr. Kolb recommended an MRI and indicated that the Petitioner might be a good candidate for right shoulder arthroscopy with subacromial decompression and biceps tenotomy and tenodesis. The MRI was performed on April 18, 2013 and was reported to demonstrate a full-thickness tear of the supraspinatus tendon, subacromial-subdeltoid bursal inflammation with lateral down-sloping of the acromion contributing to outlet-related cuff impingement, and reactive osteoedema at the insertion site of the supraspinatus tendon.

On May 1, 2013 Dr. Kolb noted the MRI findings and recommended surgical intervention with a right shoulder arthroscopy, rotator cuff repair and subacromial decompression. Dr. Kolb noted that due to some family issues the Petitioner wished to delay the surgery for as long as possible. The Petitioner returned to Dr. Kolb on July 12, 2013 and he continued to prescribe surgery for the Petitioner.

The April 25, 2014 deposition testimony of Dr. Kolb was admitted into the record as Petitioner's Exhibit 1. Dr. Kolb testified as to the treatment he rendered to the Petitioner, his diagnosis of a right shoulder full-thickness rotator cuff tendon tear, and his recommendation for surgery. Dr. Kolb opined that the Petitioner's work activities aggravated her underlying right shoulder condition and lead to the need for the treatment she received.

At the request of the Respondent, the Petitioner was examined by Dr. Michael Lewis on September 19, 2014. Dr. Lewis examined the Petitioner and reviewed the records of her medical treatment and he diagnosed her as having a right rotator cuff tear and pre-existing impingement syndrome secondary to lateral downward sloping of the acromion. Dr. Lewis opined that the Petitioner's condition was not work related. With regard to the Petitioner's right wrist, Dr. Lewis indicated that he found no objective evidence of orthopedic pathology.

The February 2, 2015 deposition testimony of Dr. Lewis was admitted into the record as Respondent's Exhibit 1. Dr. Lewis testified as to the medical records he reviewed and his examination findings and his diagnosis of the Petitioner's condition. Dr. Lewis testified that his diagnosis was a tear of the right rotator cuff and a pre-existing downward sloping acromion. Dr. Lewis also testified that his examination of the Petitioner's shoulder and wrist demonstrated no objective evidence of any orthopedic pathology. Dr. Lewis opined that the Petitioner's work activities did not cause her rotator cuff tear.

The Petitioner testified that she currently continues to experience a throbbing pain in her right shoulder which comes and goes depending on her activity level. The Petitioner

testified that her pain is made worse with any reaching activities.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner testified that she experienced an onset of shoulder pain while washing walls on September 17, 2012. The Petitioner sought treatment with Dr. Powers on September 19, 2012 and reported pain in her right shoulder and right wrist which she attributed to over doing it while washing walls at work. The Petitioner completed an accident report on September 21, 2012 indicating an injury to the right shoulder and wrist on September 17, 2012 while she was performing her regular job duties.

On October 17, 2012 the Petitioner saw Dr. Edward Kolb for complaints of right wrist pain. Dr. Kolb noted that the Petitioner complained of right wrist pain since September 17, 2012 and reported that she was doing her normal janitorial duties when her wrist began to bother her. She denied any specific trauma. Dr. Kolb noted that right wrist x-rays performed by Dr. Powers revealed a small cyst in the lunate but no other abnormalities. Dr. Kolb's assessment was right wrist tendinitis. In his deposition testimony, Dr. Kolb testified that he did not examine the Petitioner's shoulder on that date.

The Petitioner testified that on December 11, 2012 she was again washing walls and cleaning glass when her right shoulder became more painful. She saw Dr. Kolb that same day and he injected her right shoulder. Dr. Kolb's office note of December 11, 2012 demonstrates that the Petitioner presented there for evaluation of her right shoulder. She denied any injury but attributed her symptoms to her work activities, specifically repetitive lifting both boxes and mop buckets as well as having to adjust her vacuum cleaner. Dr. Kolb's assessment was right shoulder bicipital tendinitis and he noted that her symptoms were secondary to her job duties.

The Petitioner completed another accident report on January 10, 2013. That report indicates an injury to the right shoulder and right wrist and a date of injury of December 11, 2012. The Petitioner indicated at the time of her injury she was performing her regular "janitorial duties", and "cleaning glass in the entranceway and dumping heavy trash cans."

A right shoulder MRI was performed on April 18, 2013 and was reported to demonstrate a full-thickness tear of the supraspinatus tendon, subacromial-subdeltoid bursal inflammation with lateral down-sloping of the acromion, and reactive osteoedema at the insertion site of the supraspinatus tendon.

Dr. Kolb, the Petitioner's treating physician, testified that the Petitioner had a right shoulder full-thickness rotator cuff tendon tear, and he opined that the Petitioner's work activities aggravated her underlying right shoulder condition and lead to the need for the

treatment she received.

Dr. Lewis, the Respondent's examining physician, agreed that the Petitioner noticed her pain while she was working and that she attributed her pain to performing her regular work including mopping and cleaning. Dr. Lewis did diagnose a rotator cuff tear and he agreed that washing walls could involve an overhead motion that could at least aggravate impingement syndrome.

Based upon the Petitioner's description of her job duties, her testimony that she injured her right shoulder washing walls, and the medical records of Dr. Powers and Dr. Kolb, the Arbitrator finds that the Petitioner suffered an injury to her right wrist on September 17, 2012 and a repetitive trauma injury to her right shoulder which manifested itself on or about December 11, 2012.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of accident are adopted and incorporated herein.

Following her injury on September 17, 2012, the Petitioner treated with Dr. Powers and Dr. Kolb. On September 19, 2012 Dr. Powers diagnosed the Petitioner as having right wrist tendonitis and right shoulder strain and she referred the Petitioner to Dr. Kolb for her wrist. The Petitioner saw Dr. Kolb on October 17, 2012 and Dr. Kolb noted complaints of right wrist pain. Dr. Kolb noted that x-rays performed by Dr. Powers revealed a small cyst in the lunate but no other abnormalities. Dr. Kolb's assessment was right wrist tendinitis. No mention of the Petitioner's shoulder complaints are noted in the record of that visit and Dr. Kolb specifically testified that he did not examine the Petitioner's shoulder at that time.

In his deposition testimony, Dr. Kolb testified that the bony cyst in the Petitioner's right wrist had no clinical significance. Dr. Lewis testified that his examination of the Petitioner's wrist demonstrated no objective evidence of any orthopedic pathology. The Arbitrator notes that neither Dr. Kolb nor Dr. Lewis offered any specific testimony or opinions as to any causal relationship between the Petitioner's right wrist tendinitis and her work activities. The Arbitrator also notes that there is no evidence which indicates that the Petitioner sought or received any medical treatment or care for her right wrist after she saw Dr. Kolb on October 17, 2012.

The Petitioner next sought treatment from Dr. Kolb on December 11, 2012. Dr. Kolb's office note of December 11, 2012 demonstrates that the Petitioner presented there for evaluation of her right shoulder. She denied any injury but attributed her symptoms to her work activities, specifically repetitive lifting both boxes and mop buckets as well as having to adjust her vacuum cleaner. Dr. Kolb's assessment was right shoulder bicipital tendinitis and he noted that her symptoms were secondary to her job duties. The Petitioner returned to Dr.

Kolb for her shoulder complaints on January 9, 2013, April 17, 2013, May 1, 2013 and July 12, 2013. Dr. Kolb testified that the Petitioner had a right shoulder full-thickness rotator cuff tendon tear, and he opined that the Petitioner's work activities aggravated her underlying right shoulder condition and lead to the need for the treatment she received and the surgery he has prescribed.

Dr. Lewis, the Respondent's examining physician, testified that the Petitioner did have a tear of the right rotator cuff as well as a pre-existing downward sloping acromion. Dr. Lewis testified that his examination of the Petitioner's shoulder and wrist demonstrated no objective evidence of any orthopedic pathology and he opined that the Petitioner's work activities did not cause her rotator cuff tear. Dr. Lewis did, however, agree that washing walls could involve an overhead motion that could at least aggravate impingement syndrome.

Based upon the foregoing, and having considered the totality of the evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove any current condition of ill-being in her right wrist which is causally related to either the injury of September 17, 2012 or the injury of December 11, 2012. The Arbitrator further finds that the Petitioner sufficiently proved a causal relationship between the condition of ill-being in her right shoulder and her work duties for the Respondent and that that relationship manifested itself on December 11, 2012.

In Support of the Arbitrator's Decision relating to (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, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of accident are adopted and incorporated herein.

The Petitioner introduced evidence of medical expenses from OSF Medical Group in the amount of $336.00 and Orthopedics of Illinois/Dr. Kolb in the amount of $3,249.85. Based upon the Arbitrator's findings above, as well as the medical records introduced into the record and the Petitioner's testimony, the Arbitrator finds those expenses to be reasonable, necessary, and causally related to the Petitioner's work injury. The Respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act. The Respondent is entitled to credit for any medical expenses it has paid pursuant to Section 8(j) of the Act.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of accident are adopted and incorporated herein.

Dr. Kolb has prescribed an arthroscopic surgical procedure for the Petitioner's right shoulder condition. In his testimony of April 14, 2014, Dr. Kolb testified that he last saw the Petitioner on July 12, 2013 and that, at that time, he continued to prescribe a right shoulder arthroscopy, rotator cuff repair and subacromial decompression for the Petitioner.

The Arbitrator notes that Dr. Kolb has not seen the Petitioner for almost two years, and there is no evidence in the record that the Petitioner has seen any other physician for her shoulder since she last saw Dr. Kolb. While the Arbitrator finds that the Petitioner is entitled to prospective medical treatment for her right shoulder condition as a result of the injury of December 11, 2012, the Arbitrator finds that Dr. Kolb's prescription for an arthroscopic surgery is stale. The Arbitrator declines to specifically order the Respondent to authorize and pay for the surgical procedure recommended by Dr. Kolb without a current prescription for that surgery.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Pikor,
Petitioner,

vs.

NO: 13 WC 03607

16IWCC0071

Rosemont Exhibition Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanent partial disability, medical expenses, prospective medical expenses, penalties and attorney's fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 16, 2015, is hereby affirmed and adopted.

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 $100.00. 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.

DATED: JAN 28 2016

Joshua D. Luskin

o-01/20/16
jdl/wj
68

Ruth W. White

Charles J. DeVriendt

DISCOUNT

Best of Wishes

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
AMENDED

PIKOR, JOHN
Employee/Petitioner

Case# 13WC003607

ROSEMONT EXHIBITION SRVICES INC
Employer/Respondent

16IWCC0071

On 3/16/2015, 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 0.09% 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:

0206 GAINES & GAINES
GEORGE L GAINES
PO BOX 6345
EVANSTON, IL 60202

0210 GANAN & SHAPIRO PC
MICHELLE L LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
AMENDED ARBITRATION DECISION
19(b)

John Pikor
Employee/Petitioner

v.

Rosemont Exposition Services, Inc.
Employer/Respondent

Case # **13WC 03607**

Consolidated cases:

16IWCC0071

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **October 8, 2014 and November 12, 2014**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **11/9/2012**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**86,320.00**; the average weekly wage was $1,660.00.

On the date of accident, Petitioner was **51** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**72,600.67** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**72,600.67**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,106.66/week for 27-3/7 weeks, commencing 11/10/2012 through 5/20/2013, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $72,600.67 for TTD benefits paid under Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

3-16-15
Date
(Revised 19f)

ICArbDec19(b)

MAR 16 2015

Factual History

Petitioner, John Pikor, was 51 years old at the time of his uncontested work accident. Petitioner was working for Rosemont Exhibition Services as a trade show construction worker/carpenter. Petitioner describes his general job duties as difficult and heavy, with a lot of "aerial" work, involving the use of large crates of materials used in the construction of stages and sets, with occasional lifting of fifty to one hundred pounds.

He had been working as such for Respondent for nine years. On 11-9-2012, while in the process of assembling a trade show booth from a six foot ladder, the ladder broke and Petitioner fell to the floor on his outstretched arms. (Px1, p.12) He was stunned and was not able to arise unassisted due to pain. After he "came to," he noticed he was in a prone position on his outstretched arms and forehead. Most notable was his left arm, which was obviously broken and "twisted like a pretzel." He noticed contusions to his left and right wrists, right elbow and an inability to move his left shoulder. The employer called an ambulance which took Petitioner to Resurrection Hospital. There, Petitioner "reports pain to the left wrist and is concerned about deformity, pain right wrist, pain in the left elbow and pain of the right shoulder." He denied any pertinent medical history. He was found positive for joint swelling (Px1, p.8), "wound," small abrasion to left eyebrow, tenderness of the right shoulder with worsening with abduction of the humerus, minimal tenderness of the right wrist, dorsally displacement deformity of the left radius at the wrist and abrasion to the right fourth finger. Also noted was "wound" (p.9) and "abrasions or friction burn, multiple and unspecified sites." (p.6) Morphine was given. (p.9) Bilateral wrist x-rays were taken revealing an impacted comminuted fracture of the left distal radius (p.10) with "dorsal displacement of a portion of the distal radius fracture fragment. A portion of the articular surface of the fractured radius exhibits a dorsal tilt." (p.13) Petitioner was ordered to apply ice and heat, wear splints and not work until cleared by workman's comp. (p.27) He was ordered to follow up with Dr. Brian McCall of Northwest Orthopedics.

Petitioner testified that he had an "a real hard time" from the date of the accident through the first visit with Dr. McCall. He stated that he had not been treated with attentive care at the hospital and that he had great left-wrist pain, his cast was ill-fitting and that many of his pain complaints were ignored. He had cracked his incisor tooth and loosened another tooth during the fall. He testified that he had pain in his right shoulder, right elbow, right wrist, neck and face from the fall. He has no prior problems with any of the areas of his body.

Petitioner was examined by his Dr. McCall shortly after his release from hospital. The doctor noted "marked displacement" of the fracture fragments of the left radius, a contusion to the left eyebrow, and that "his left bottom incisor tooth has also cracked off." Other descriptions of the fracture were "a dinner fork deformity of the wrist," and "...marked displacement. This is shortened. It has 30 degrees of dorsal tilt and marked dorsal comminution." "This is quite a bad fracture pattern." Regarding the right shoulder, Dr. McCall found "pain with any ROM away from his body or forward. He is able to demonstrate 4+/5 strength to drop arm..." (Px2, p.14) Dr. McCall noted as follows: "...as he recovers from the left wrist we will start him into treatment of his right shoulder as a presumed strain to the rotator cuff..." He found Petitioner incapable of work. (p.15) After pre-operative testing, Petitioner underwent an open reduction internal fixation of the left distal radius, performed by Dr. McCall on 11-15-2012. Seven screws and a plate were used. (Px4) Petitioner's left upper extremity was immobilized for several weeks thereafter.

After surgery, Petitioner began a course of physical therapy at ATI. On December 31, 2012, Dr. McCall noted the condition of Petitioner's left wrist was improving; however, Petitioner complained the right shoulder was the main problem, he could not raise the arm whatsoever and he felt a clicking sensation when he moved the arm into certain positions. On examination, Dr. McCall noted Petitioner complained of pain with any range of motion, but range of motion was full. Dr. McCall felt Petitioner's effort on strength testing was "variable." He recommended a right shoulder MRI to rule out a rotator cuff tear. (PX. 2)

Dr. McCall opined the MRI study demonstrated no tearing of the supraspinatus or infraspinatus tendons and the biceps tendon was intact. Dr. McCall noted a diagnosis of right shoulder strain with weakness and pain

out of proportion to radiograph and physical findings. Dr. McCall opined the pain at the base of the neck was likely coming from the shoulder because there is no evidence of radicular symptoms or neurologic compromise and he did not have mechanism for injury to the neck. He recommended an injection to the shoulder and continued physical therapy. Petitioner also asked Dr. McCall whether he should consider applying for Social Security Disability benefits because he was off work for nearly a year due to an ankle sprain. (PX. 2—Dr. McCall's office note of January 21, 2013)

Around this time, Petitioner sought dental care at City Smiles. There, the fall was cited, and causal connection was found. (PX6, p.8) Fractures of teeth numbers 21, 22 and 23 were found. Extraction of the same was suggested (pp. 5 & 6) "for this prosthetic plan." This was to provide temporary relief in preparation for implants to be placed by an oral surgeon. (p.12) On 4-22-2013, after workers' compensation coverage was established, said teeth were extracted. (p.8) Oral surgical services were later rendered by Dr. Mlynski, and also paid by Respondent. (PX10; RX1)

Petitioner was referred to physical therapy. The ATI Physical therapy notes were admitted into evidence. (PX5) Initially Petitioner's complains were confined to Left wrist and right shoulder. Beginning January 9th, 2013, the records of ATI Physical Therapy noted Petitioner's complaints of neck pain. (Px5, p.8) On January 16, 2013, Petitioner complained of left shoulder pain at that same facility. (p.27)

In the progress note following the January 16, 2013 session, the therapist noted Petitioner "often display[ed]/report[ed] self-limiting behaviors/attitudes and compliance with [home exercise program] as instructed is questionable." She though pain was a limiting factor and recommended Petitioner complete two weeks of occupational therapy and then undergo an FCE. Throughout therapy, ATI noted the following:

- 12/20/2012: "Upon instruction, [Petitioner] was unable to correctly demonstrate [home exercise program exercises] today."
- 12/27/2012: Petitioner asked "Is it possible to feel worse today than yesterday?"
- 1/2/2013: Petitioner stated "Things are neither here nor there today. My MD ordered an MRI – I have yet to schedule it."
- 1/9/2013: "Questionable compliance [with home exercise program due to] inability to correctly demonstrate when periodically asked."

- 1/16/2013: Petitioner stated "Maybe I need to be on disability; it might be over a year before I am better."
- 1/24/2013: Petitioner was very argumentative.
- 1/30/2014: Petitioner stated "I refuse to do an FCE. I am not even discussing it."
- 1/31/2013: "I'm not going to do anything that might make me hurt."

(PX. 5) Petitioner testified the first therapist seemed to be pretty good, but he did not feel he improved as time went by. Petitioner expressed disagreement and dissatisfaction with the treatment he received at ATI.

On January 29, 2013, Dr. McCall documented a conversation with Petitioner's therapist. The therapist reported Petitioner often stated he could not lift a 1 lb. weight, will gesticulate and fail to perform a 1 lb. curl. She then observed Petitioner freely grab the entire coffee pot and comfortably pour a cup of coffee (documented by the therapist in the note for the January 28, 2013 session). The therapist recommended an FCE, and Dr. McCall agreed. (PX. 2) Petitioner refused to schedule the FCE until he spoke with his attorney. (PX. 5)

ATI noted on February 4, 2014 Petitioner called and stated he would schedule the last two appointments once he was ready and directed them not to call him. The therapist discharged Petitioner from the therapy program for non-compliance and decreased participation without maximum effort. (PX. 5)

When Petitioner returned to Dr. McCall on February 6, 2013, Petitioner presented Dr. McCall with a list of questions from his lawyer to go over his injuries, prognosis and treatment plan. No mention was made of the neck or left shoulder. Dr. McCall noted the right shoulder seemed to be Petitioner's greatest concern, but again noted the complaints were out of proportion to the previous physical findings and the radiographic findings. Dr. McCall noted Petitioner did not have adhesive capsulitis in the right shoulder. On February 25, 2013, Dr. McCall again noted the right shoulder was the most pressing issue for Petitioner. Dr. McCall questioned whether pain avoidance resulted in the isolated restriction to forward flex. Because Petitioner was unlikely to regain full function without formal physical therapy, Dr. McCall returned Petitioner to physical therapy. (PX. 2) Petitioner did not return to ATI. Instead, he presented to Athletico for physical therapy. Petitioner testified he argued with the therapist about what treatment was to be provided. He began physical therapy on March 18,

2013, requiring frequent rest breaks while completing the home exercise program and sighing heavily after most repetitions. At Athletico, the following was noted throughout treatment:

- 4/2/2013: Petitioner stated "he would like more treatment. You know that I have issues with both shoulders. I had trauma enough to snap my wrist so my shoulder obviously has pain."
- 4/5/2013: Petitioner responded with "no comment" when asked how he felt about the day's therapy session. When asked whether he would return for additional sessions, Petitioner replied "We'll see."
- 4/9/2013: Petitioner stated "My doctor thinks I'm better, but I am not." Petitioner refused to try a new exercise, stating "I'd better quit while I'm ahead."
- 4/22/2013: The therapist noted Petitioner had not been to therapy for over a week due to illness and flooding in his basement. Petitioner told the therapist he would call Dr. McCall and get the left shoulder added to his case.
- 4/24/2013: Petitioner reported moving boxes and soggy carpet after flooding in his basement
- 4/30/2013: Petitioner reported no pain in his shoulder "when something else is hurting me more" and was frustrated he was not being treated for the left shoulder and right wrist because "it sustained trauma too and it's broken."
- 5/2/2014: Petitioner reported he did not make an appointment with Dr. McCall, as he was previously directed. He also continued to groan loudly with all exercises.

(PX 7)

In his office note of May 8, 2013, Dr. McCall noted Petitioner was dismissed from ATI and had difficulty with Athletico. The therapists "noted some clinical inconsistencies in his exams, discord between subjective reports and clinical observations and are recommending an FCE at this time." Petitioner was concerned about residual pain, but Dr. McCall felt that 6 months post-injury much greater function and fewer complaints of discomfort were expected. Dr. McCall noted a paucity of findings on physical examination and imaging. He also noted the pathology in Petitioner's cervical spine is degenerative and not related to the fall. Dr. McCall recommended an FCE. (PX. 2) Petitioner represented to Athletico on May 20, 2013 for the FCE, but refused to complete it. He stated it would not benefit him in any way. (PX. 7)

Upon recommendation from a friend, Petitioner sought treatment with Dr. Vasquez on May 29, 2013. He previously saw her on both March 26, 2013 and May 24, 2013. The records are difficult to read, but she appeared to note complaints to the left wrist and right shoulder only at the first appointment. At the appointments in May, she noted complaints of bilateral shoulder pain with limited range of motion. She

diagnosed adhesive capsulitis. On June 13, 2013, she provided Petitioner with the names of three orthopedic physicians: Dr. Ellis Nam, Dr. Chadwick Prodromos and Dr. Roberto Levi. (PX. 18)

Petitioner chose Dr. Roberto Levi and saw him for the first time on August 5, 2013. Petitioner complained of pain to shoulders, the right wrist and the neck. On examination, Dr. Levi noted pain in both shoulders with resisted elevation in the direction of the supraspinatus, good strength and pain with abduction and external rotation. He also noted pain with range of motion to the cervical spine, but no neurologic findings. For the right wrist, Dr. Levi noted no deformity, swelling and full range of motion, but complaints of pain. Dr. Levi diagnosed a left distal radius fracture, right wrist sprain and tendinitis to both shoulders. He recommended medication management and physical therapy. (PX. 19)

Petitioner continued under Dr. Levi's care through November 13, 2013. Petitioner testified treatment initially seemed to help the pain. Petitioner testified the treatment never progressed beyond whirl pool session, stretching and manipulation. Petitioner testified the pain remained. On examination, Dr. Levi noted Petitioner complained of pain with every movement of the neck and both shoulders. He suggested an FCE, but Petitioner did not want for one to be done. Dr. Levi noted no significant improvement despite extensive physical therapy. Because Petitioner refused to undergo the FCE, Dr. Levi discharged Petitioner from care and released him to return to work without restrictions. (PX. 19) Petitioner admitted he refused to do the FCE because he did not want to strain himself.

Pursuant to Section 12 and at Respondent's request, Petitioner presented to Dr. Pietro Tonino for evaluation on October 17, 2013. Dr. Tonino diagnosed bilateral shoulder pain and cervical discomfort. He related the condition of Petitioner's right shoulder to the November 9, 2012 injury because the complaints were immediately documented after the fall. He opined the left shoulder condition is not related to the fall because Petitioner made no such complaints until April of 2013 and had otherwise been using the left shoulder normally. Dr. Tonino recommended a 10 lb. lifting restriction until Petitioner completed a functional capacity evaluation,

which would determine whether additional treatment is necessary and determine his physical capabilities. (PX. 20)

In the meantime, Petitioner presented to the Midwest College of Oriental Medicine as well as Heartland Health Center for treatment. Without returning to Dr. Vazquez, Petitioner presented himself to Dr. Ellis Nam on June 5, 2014 for treatment. To Dr. Nam, petitioner complained of pain and stiffness to the neck, numbness in the fingers of both hands, decreased grip strength, shoulder pain and decreased range of motion and weakness. Dr. Nam opined the pain was coming from Petitioner's neck, but noted shoulder pain as well. Dr. Nam referred Petitioner to Dr. Song (a neck specialist), concluding the cervical condition/findings were the source of Petitioner's complaints. (PX. 23) Petitioner never scheduled an appointment with Dr. Song. After the evaluation with Dr. Nam, Petitioner then returned to Dr. Vazquez on June 27, 2013. Dr. Vazquez recommended a cervical MRI study be obtained and recommended Petitioner continued under the care of an orthopedic physician. (PX. 25)

The cervical MRI of July 22, 2014 demonstrated findings hypertrophy at C5-6 and C6-7 with significant foraminal compromise of the bilateral C6 and C7 nerve roots and 4 mm broad based posterior bulging disc ostepohyte complex at C5-6 with compression of the dural sac and mild flattening of the anterior surface of the spinal cord. (PX. 28)

Petitioner presented to Dr. Daniel Laich on September 18, 2014 for evaluation. He complained of increasing cervical and bilateral left greater than right upper extremity pain, numbness/tingling to the middle, ring and small fingers, increased functional weaknesses with dropping items an everything falling part since the November 9, 2012 work injury. Petitioner told Dr. Laich he had never had any MD, DO or chiropractor visits, an x-ray, MRI or missed days from work before November 9, 2012. Dr. Laich interpreted the MRI study to demonstrate cervical degenerative joint disease with segmental instability at C5-6 and C6-7. He recommended Petitioner give consideration to cervical intervention and referred him to psychology for evaluation and treatment. (PX. 33)

Petitioner testified he was unsatisfied with treatment he received from Dr. McCall, ATI, Athletico and Dr. Levi. He testified he was satisfied with treatment provided by Dr. Nam because he examined his neck and was forthright. He was also happy with the treatment Dr. Laich provided. Petitioner testified he is currently looking to secure a 2nd opinion with a cervical specialist and for treatment for his arms. Petitioner testified he has going neck and shoulder pain. He testified he cannot do anything that requires exertion, but he is fine when he stays still.

ANALYSIS/FINDINGS

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO F, WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

The Accident is uncontested and the Petitioner, John Pikor, suffered a fall from a ladder causing multiple injuries including a fracture to his left wrist, right shoulder strain and injuries to his mouth and teeth. The Respondent does not contest the facture injury to the left wrist or sprain injury to the right shoulder. The injury to the teeth and mouth is also noted and supported by the medical documentation. The initial emergency room records as well as the subsequent medical notes document Petitioner's complaints regarding these areas. The issue at bar is the causal connection between Petitioner's current cervical and left shoulder complaints.

Petitioner argues that the work accident have also caused injuries left shoulder and neck either due to aggravation of pre-existing condition or due to favoring the left wrist and right shoulder during the recovery. Petitioner takes objection with the documented medical history from the emergency room and from Dr. McCall stating that both records are incorrect and failed to note Petitioners complaints regarding these additional body parts. The first recorded mention of complaints regarding these contested injuries is from the physical therapy notes from ATI from January, 2013 and next from Dr. MCall's notes from February, 2013.

The medical history and hospital notes, therapy notes, doctor's notes and findings from x-rays, MRI and other tests have been submitted into the record. In brief, after extensive medical treatment that included setting and healing of his fractured wrist, dental implant work, extensive physical therapy, lab work and x-rays,

Petitioner returned to Dr. MCCall, his treating physican in May, 2013. Dr. McCall examined Petitioner and diagnosed him with a healed left wrist fracture, cervical spine degenerative joint disease and bilateral shoulder complaints consistent with tendinoisis. PX He noted a paucity of findings on physical examination and imaging relating to the causal connection between the left shoulder and the cervical complaints by the petitioner. He opined that the pathology in Petitioner's cervical spine is degenerative and not related to the fall. He directed to undergo an FCE. Petitioner represented to Athletico on May 20, 2013 for the FCE but refused to complete it, stating that it would not benefit him in any way. PX7. Two other physicians, including treating physician Dr. Levi and IME, Dr. Peitro found Petitioner to be at MMI relating to his left wrist and right shoulder injuries causally connected to the work accident and also recommended an FCE.

Petitioner proposes that under Illinois law, a competent person has a common law and statutory right to refuse all types of medical treatment of any kind, including life-saving and life-sustaining procedures. In Re Estate of Longeway, 133 Ill.2d 33, 44-45, 139 Ill.Dec. 780, 549 N.E.2d 292, 297 (1989). 755 ILCS 40/5 (West 1996). This same principle holds true for non-physician health care professionals. See Prairie v. University of Chicago Hospitals, 298 Ill.App.3d 316, 327, 698 N.E.2d 611, 619, 232 Ill.Dec. 520, 528. Therefore, his refusal to submit to the FCE should not affect his rights under the Act. Additionally, Petitioner argues, that in spite of the no causal connection opinions of the doctors, it is obvious and apparent that the severity of the fall caused and aggravated the injuries to the left shoulder and the neck. In support he points out that he had no documented complaints to these body parts prior to his accident of 11/9/12 and that the medical records from physical therapy document his complaints to these body parts in early January, 2013.

The Arbitrator recognizes and agrees that the Petitioner had wide latitude in directing his own medical treatment, including refusing treatment. However, he still bears the burden of proof to show that his current condition is causally related to his work accident. The Arbitrator finds that there is no causal connection between the current left shoulder and cervical complaints and the work accident. In so finding, the Arbitrator notes significant inconsistencies between Petitioner's testimony and the medical records, the lack of objective

medical findings to support causal connection the large gap in time between Petitioner's injury and his complaints relating to these body parts and based on the credibility assessment of the Petitioner.

To infer causation from the nature and/or severity of the fall in spite of the well-reasoned, credible findings of Dr. McCall and Dr. Levi is speculative. Illinois Courts have repeatedly held that the standards in decisions must not be contingent, speculative or merely possible, but there must be such a degree of probability as to amount to a reasonable certainty that such causal connection exists. Manion v. Brant Oil Co., 85 Ill.App.2d 129, 229, N.E.2d 171, 175 (4th Dist. 1967). The evidence in this case does not support such a finding as there is a long gap between the accident and the reporting of the injuries. The MRI and films all point to long degenerative changes in the cervical spine and Petitioner's argument of the left shoulder injury being caused by favoring the right shoulder is speculative.

Even if the Petitioner's condition is pre-existing, the issue of aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Industrial Commission. *Roberts v. Indus. Comm'n*, 93 Ill. 2d 532, 538, 67 Ill. Dec. 836, 445 N.E.2d 316 (1983); *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d at 36-37; *Caradco Window & Door v. Indus. Comm'n*, 86 Ill. 2d 92, 99, 56 Ill. Dec. 1, 427 N.E.2d 81 (1981). The Arbitrator finds that the Petitioner has failed to show sufficient support for such a determination either through his testimony or through medical records or opinions.

It is Petitioner's burden to prove by a preponderance of the credible evidence there is a causal connection between his current condition of ill-being and the November 9, 2012 work injury. *See, Rambert v. Industrial Commission*, 133 Ill.App.3d 895, 477 N.E.2d 1364, 87 Ill.Dec. 836 (1987). Petitioner has failed to meet this burden as there are no complaints of neck pain at either the emergency room or to Dr. McCall. In fact, Dr. McCall's records make reference to Petitioner presenting to him with a list of questions in February 6, 2013. Complaints of left shoulder or of neck pain were again not noted. The Arbitrator finds Dr. McCall's subpoenaed medical records reliable and Petitioner's argument unpersuasive.

Instead the Arbitrator is persuaded by Dr. McCall's finding that there is a lack of corroboration between Petitioner's subjective complaints of pain and the objective findings. He noted a lack or paucity of clinical findings on May 8, 2013. He therefore concluded Petitioner should be capable of much greater function and be less pain focused 6-months post injury. He previously commented Petitioner might have residual complaints that could not be addressed with treatment, suggesting secondary gain motivations were behind Petitioner's complaints. The therapists at ATI and Athletico noted the same inconsistencies as Dr. McCall and also recommended an FCE, likely to determine the extent of effort put forth by Petitioner and establish a valid determination of his physical capabilities.

The Arbitrator finds Petitioner was focused on disability. His repeated injury to ATI regarding getting Social Security Disability at a very early juncture in his recovery is noted. The therapist and several physicians indicate that the Petitioner's efforts towards his recovery were lack-luster. To note just a few points, in addition to Petitioner being dissatisfied with most of his physicians and therapist, he is unable to demonstrate the home therapy program on 12/20/12 and states that "I'd better quit while I'm ahead" when asked to try a new exercise on 4/9/13 by ATI, PX5, PX5. On the other hand, the the therapy notes clearly document that on January 29, 2013 Petitioner was comfortable lifting and pouring a full coffee pot after stating that he could not list a 1 lb. weight during his therapy and on 4/24/13 Petitioner reported moving boxes and soggy carpet after flooding in his basement. The therapist's finding of non-compliance and the documentation of Petitioner 'unusual' behavior weighs heavily in the Arbitrator's assessment of Petitioner's credibility as does his court room testimony regarding his current subjective complaints stemming from his work accident.

The preponderance of the credible evidence established Petitioner sustained injuries to the left wrist (distal radius fracture) and right shoulder (strain) as a result of the November 9, 2012 work injury. The evidence further established Petitioner reached maximum medical improvement and was discharged from care as of May 20, 2013 when he refused to participate in the FCE recommended by both the Athletico therapist and his

treating physician Dr. McCall. Petitioner has failed to meet his burden that he continues to suffer a disability from his work accident or that this accident required further medical treatment after May 20, 2013.

The Arbitrator finds the opinions and recommendations of Dr. McCall, Dr. Tonino and Dr. Levi more credible than those of Dr. Vazquez, Dr. Nam and Dr. Laich. Dr. Tonino did not relate the condition of the left shoulder to the November 9, 2012. There is no opinion to the contrary in the records. Dr. McCall did not relate the cervical condition to the November 9, 2012 injury. There is no opinion to the contrary in the record. The preponderance of the credible evidence established Petitioner sustained injuries to the left wrist (distal radius fracture) and right shoulder (strain) as a result of the November 9, 2012 work injury. The evidence further established Petitioner reached maximum medical improvement and was discharged from care as of May 20, 2013 when he refused to participate in the FCE recommended by both the Athletico therapist and his treating physician Dr. McCall. There is no evidence to support continued disability and the need for medical treatment after May 20, 2013, especially when Dr. Levi and Dr. Tonino also recommended the FCE. Based on the foregoing, the Arbitrator finds Petitioner failed to prove his current condition of ill-being is causally related to the November 9, 2012 work injury.

Based on the foregoing, the Arbitrator finds Petitioner failed to prove his current condition of ill-being is causally related to the November 9, 2012 work injury.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO J, WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner reached maximum medical improvement and an FCE was recommended by Dr. McCall on May 8, 2013. Petitioner presented to Athletico on May 20, 2013 and he refused to complete the FCE, stating doing so would be of no benefit to him.

The Arbitrator finds that the treatment Petitioner sought after May 20, 2013 was not medically necessary, reasonable or causally connected to the work accident. Specifically, regarding the treatment provided by Dr. Vasquez, Dr. Levi, Dr. Nam, and Dr. Laich the Arbitrator finds that same. When Dr. Levi evaluated

Petitioner on August 5, 2013, he made no mention of the treatment Petitioner received under the direction of Dr. McCall to date. Therefore, the Arbitrator assigns far lesser weight to the opinion of Dr. Levi as he is lacking complete and crucial medical history. He appeared unaware of the physical therapy at either ATI or Athletico. He appeared unaware of Dr. McCall's and the therapist's recommendation for an FCE. He appeared unaware of Petitioner's lack of cooperation with therapy at ATI and Athletico. Additionally, Petitioner complained of pain to both shoulders and the neck, conditions unrelated to the work injury at this point and conditions for which Dr. Levi provided treatment.

As for related treatment, the following providers reflected a $0.00 balance on the exhibits submitted into evidence by Petitioner: (1) Resurrection Healthcare; (2) Northwest Orthopedics & Sports Medicine; (3) Resurrection Healthcare; (4) Belmont Surgery Center; (5) City Smiles; and (6) Athletico. The Arbitrator notes ATI Therapy reflected an unpaid balance of $2,964.36. Respondent's Exhibit No. 3 was the Fee Schedule Analysis for the ATI bills. Based on the fee schedule analysis, the Arbitrator finds the ATI bill was paid in full and no additional payment is owed to this provider.

Having found a lack of causal connection between the injury and Petitioner's condition of ill-being after May 20, 2013, the Arbitrator need not address the issue of whether Petitioner exceeded his choice of physicians under Section 8(a). The Arbitrator finds, though, that clear evidence of a chain of referral for treatment with Midwest College of Oriental Medicine, Dr. Nam, Heartland Health Center and Dr. Laich is lacking.

Based on the foregoing, the Arbitrator finds Petitioner is not entitled to additional compensation for treatment rendered after May, 2013 or for reasonable and necessary medical expenses incurred prior thereto which are over and above the fee schedule.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO K, WHETHER PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner is seeking prospective medical treatment in the form of a 2nd opinion for his cervical spine and other unspecified treatment for his shoulders. For the reasons set forth above for issues F and J, the Arbitrator denies Petitioner's request for prospective medical treatment.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO L, TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner was temporarily and totally disabled beginning on November 10, 2012 through May 20, 2013 when he refused to undergo the FCE for a period of 27-3/7 weeks and was entitled to and paid TTD for the same period.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO M, WHETHER PENALTIES AND FEES SHOULD BE IMPOSED ON RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

Penalties and fees are denied. Respondent denied liability based on the opinions and recommendations of Dr. McCall, Dr. Levi and Dr. Tonino. The Arbitrator finds that their opinions are credible, well-reasoned and supported by objective medical findings. The facts that all three physicians reached a similar conclusion further strengths their voice. Respondent's reliance on their opinions is also found to be reasonable.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO N, WHETHER RESPONDENT IS DUE A CREDIT, THE ARBITRATOR FINDS THE FOLLOWING:

Respondent paid $72,600.67 in benefits. Petitioner was entitled to TTD for a period of 27-3/7 weeks at a weekly benefits rate of $1,106.66. Petitioner was therefore entitled to receive a total of $30,354.58. Respondent shall therefore receive a credit of $42,246.09 against any future benefits due to Petitioner.

Signature of Arbitrator

(3/16/15)
Date

(Reused 19f)

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cody Locke,

Petitioner,

vs.

No. 13 WC 05296

16IWCC0074

Great Dane Trailers,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability, vocational rehabilitation, permanent disability, penalties and attorney fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, maintenance, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds that the Arbitrator erred in awarding penalties under sections 19(k) and 19(l) and attorney fees under section 16 of the Workers' Compensation Act (the Act). At the outset of the arbitration hearing, Respondent made clear that it was disputing accident.

Petitioner testified that on July 3, 2012, he felt pain in his back while he was using a crane with an air suction hoist to lift a sheet of metal weighing between 300 and 600 pounds. The parties stipulated that Petitioner gave proper notice of the injury. Petitioner testified that for the next two and a half months he continued to work, although his back condition kept getting worse. On September 25, 2012, Petitioner consulted Physician's Assistant Morland at the office

of his family physician. PA Morland's note shows that Petitioner's primary complaint was sore throat. Petitioner also complained of back pain after twisting it the wrong way. The note states the problem started within the past seven days. It is unclear whether it refers to the sore throat or the back pain. The note does not mention a work accident. PA Morland ordered a lumbar MRI. On September 27, 2012, Petitioner underwent the MRI. The MRI report notes the following history: "Recent onset low back pain seven days ago."

On cross-examination, Petitioner was questioned about that history:

"Q. When you presented to *** St. Mary's MRI on September 27, 2012 you indicated that you had a recent onset of lower back pain 7 days ago; is that correct?

A. If that would have been with Dave Morland, yes.

Q. So, that would have been onset of pain about September 20, 2012, correct?

A. Yes.

* * *

Q. If the records reflect that you gave a history on September 27, 2012, also gave a history of pain onset of 7 days earlier, would that be correct?

A. Yes."

Petitioner appeared confused about that line of questioning and maintained that he sustained a work accident on July 3, 2012. Respondent's counsel asked again:

"Q. But on September 27, 2012 you specifically recall giving a history of an onset of pain 7 days before—on September 27, 2012 you specifically recall giving a history of an onset of pain starting 7 days before, correct?

A. I don't know. I don't recall that."

Petitioner admitted that he continued to work full-duty in July, August and September of 2012. Further, Petitioner agreed that he did not receive any medical care until September 25, 2012. The colloquy continued:

"Q. Your onset of pain was September 20, 2012?

A. What do you mean by onset of pain?

Q. That's the onset of pain you specifically recall telling the doctors about on September 27, 2012?

A. Yeah, I went to the doctor but I don't say the pain started that day. The pain started back on July 3rd."

The Commission finds there was a genuine dispute as to whether Petitioner sustained accidental injuries arising out of and in the course of his employment on July 3, 2012, and Respondent appropriately asserted its due process rights in defending the action. It is well established that the employer's reasonable and good faith challenge to liability does not warrant an imposition of penalties. Matlock v. Industrial Comm'n, 321 Ill. App. 3d 167, 173 (2001). Accordingly, the Commission vacates the award of penalties and attorney fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 9, 2015, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of penalties under sections 19(k) and 19(l) and attorney fees under section 16 the Act is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $326.75 per week for a period of 19 weeks, from March 25, 2013, through August 5, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, maintenance, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner maintenance benefits in the sum of $326.75 per week for a period of 70 3/7 weeks, from August 6, 2013, through December 11, 2014.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for vocational rehabilitation for Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay related medical bills in evidence in the sum of $19,280.40 that Petitioner incurred from July 3, 2012, through January 30, 2014, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $43,500.00. 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.

Stephen J. Mathis

DATED: JAN 2 9 2016
o-12/10/2015
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

LOCKE, CODY
Employee/Petitioner

Case# **13WC005296**

16IWCC0074

GREAT DANE TRAILERS
Employer/Respondent

On 2/9/2015, 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 0.06% 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:

4342 REHN & SKINNER LLC
JOHN REHN
5 E SIMMONS ST
GALESBURG, IL 61401

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0074

Cody Locke
Employee/Petitioner

v.

Great Dane Trailers
Employer/Respondent

Case # 13 WC 005296

Consolidated cases: _____

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 **December 11, 2014**. 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Is Petitioner entitled to Vocational Rehabilitation?**

FINDINGS

On the date of accident, **July 3, 2012**, 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 $**25,486.24**; the average weekly wage was $**490.12**.

On the date of accident, Petitioner was **22** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**5,134.60** for TTD paid through July 17, 2013.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $326.75 per week for 19 weeks commencing March 25, 2013 through August 5, 2013, as provided in Section 8(b) of this Act, with Respondent receiving credit for $5,134.60.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of all medical bills related to the July 3, 2012 accident up through January 30, 2014 in the amount of $19,280.40, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for vocational rehabilitation for Petitioner and pay Petitioner maintenance of $326.75 per week commencing August 6, 2013 through the date of hearing December 11, 2014 as provided in Section 8(a) of the Act.

Respondent shall pay penalties in the amount of $10,000.00 under Section 19(l) of the Act; 21,588.52 under Section 19(k) of the Act; and attorneys fees in the amount of $9097.03 under Section 16 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

2/7/15
Date

ICArbDec19(b)

FEB 9- 2015

FINDINGS OF FACT:

Petitioner testified that he was a high school graduate with no additional schooling. After finishing high school, he worked at a grocery store and then a meat packing facility before starting at Respondent in 2010. Petitioner worked on a line in a factory that produced trailers for semi-trucks.

Petitioner testified that on July 3, 2012, he was employed as a machine operator for Respondent. On said date, he was performing his job as a press operator wherein he would use a suction hoist to move sheets of metal to a mechanical press. Petitioner used his body to push the hoist and metal towards the press. While moving a piece of metal to the press Petitioner twisted his body and felt pain in his lower back. Petitioner stated that he reported the pain to Respondent and filled out an incident report. Petitioner stated that in the weeks following the incident, he continued to work noticing increasing pain to his lower back.

On September 25, 2012 Locke presented to OSF Medical Group where he was seen by David Moreland, PAC, with complaints of low back pain from twisting his back. (Petitioner's Exhibit 10 p. 540) PAC Moreland diagnosed back pain and ordered a lumbar MRI (PX 10 p 539 & 558). The MRI when performed at OSF St. Mary Medical Center on September 27, 2012 showed a broad-based disc protrusion with slight central prominence at L4-L5 without nerve root effacement. (PX 11 p 603)

According to Petitioner, Respondent then sent him to Princeton Prompt Care. Records submitted show Petitioner presented to Princeton Prompt Care on October 15, 2012. Petitioner saw Dr. Jane Battles with complaints of a work injury to his back that occurred on July 3, 2012 while working a hoist. (PX 14 p 875). Dr. Battles noted low back pain with pain radiating down Petitioner's left leg. (PX 14 p 875) Petitioner was placed on light duty with no lifting over 2-3 lbs. (PX 14 p. 876)

On October 29, 2012, Petitioner returned to Princeton Prompt Care where he saw Dr. Paul Bonucci with continued complaints. Dr. Bonucci reviewed the previously taken MRI and assessed low back pain and L4-5 disc protrusion. The doctor continued Petitioner's light duty restrictions and ordered physical therapy. (PX 14 p 883-884)

Petitioner attended therapy at Advanced Rehab and Sports Medicine from October 31, 2012 through November 28, 2012. (PX 3 p 96) On November 28, 2012, the therapist noted Petitioner conveyed that it felt like someone was jabbing him in his back all day long and his radiating symptoms were constant and traveled to his ankle. (PX 3 p 96)

On November 29, 2012, Petitioner returned to Dr. Bonucci with persistent low back pain. (PX 14 p 890) Dr. Bonucci ordered another MRI of the back, continued light duty and indicated an IME would be necessary if there was no improvement. (PX 14 pgs 890, 895)

Petitioner underwent the prescribed MRI of the lumbar spine at Perry Memorial Hospital on December 4, 2012 which showed an L4-L5 broad-based central disc herniation with abutment of the L5 nerve roots with the herniation also causing thecal sac effacement. (PX 12 p 621)

On December 6, 2012 Petitioner returned to Dr. Bonucci. Petitioner's complaints had not changed. Dr. Bonucci continued light duty and made a referral to an orthopedist. (PX 14 p 900)

On December 14, 2012 Petitioner presented to Midwest Orthopaedic Center with complaints of pain that began in July of 2012 with current left buttock pain which extended to the posterior thigh, posterolateral calf pain and low back pain. (PX 8 p 475) Petitioner saw Dr. Amod O. Sureka who diagnosed him with lumbar radicular pain, ordered restricted work, reordered physical therapy and indicated epidural steroid injections in the future. (PX 8 pgs 475-478)

Petitioner began therapy at Kewanee Physical Therapy on December 17, 2012 (PX 6 p 173). The initial evaluation confirms problems with his low back since an injury at work in July 2012. (PX 6 p 173) Respondent requested a job analysis from Kewanee Physical Therapy that was performed on January 3, 2013. The job analysis showed Petitioner's employment as a general laborer required frequent to occasional lifting, carrying, pushing and pulling of 50 pounds, ½ - 2/3 of a day of reaching, bending, squatting, and walking, 8 hours of standing and 1/3 - 2/3 of the day using his upper extremities. (PX 6 p 192-193). The physical therapist noted the job rated at a heavy physical demand. (PX 6 p 196) The following day the therapist at Kewanee Physical Therapy found Petitioner could perform 58.2% of the physical demands of his job. (PX 6 p 196)

On January 7, 2013, Petitioner returned to Dr. Sureka with complaints of low back pain and leg pain which he rated at 8 out of 10 on a pain scale. (PX 8 p 447) Dr. Sureka discussed epidural steroid injections which the doctor noted Petitioner was not interested in pursuing. Dr. Sureka also indicated a surgical referral could be made on his behalf. Dr. Sureka continued light duty restrictions, therapy and diagnosed Petitioner with lumbar radicular pain secondary to herniation. (PX 8 p 447)

At Respondent's request, Petitioner attended a Section 12 examination with Dr. Singh on January 16, 2013. (RX 9) After performing an examination and reviewing both MRIs, Dr. Singh diagnosed herniated nucleus pulpous at L4-L5. Dr. Singh provided an affirmative causality indicating he believed Petitioner sustained a lumbar disk herniation at the L4-5 level. The doctor indicated that Petitioner's subjective complaints correlated with the objective findings. (RX 9) Dr. Singh indicated Petitioner was not at maximum medical improvement and to continue physical therapy. (RX 9) Dr. Singh also indicated that if therapy did not work, Petitioner would benefit from a L4-L5 laminectomy and discectomy. Dr. Singh further provided that he did not believe epidural steroid injections would benefit Petitioner as too much time had passed since the initial injury. Dr. Singh continued him on restricted work. (RX 9)

Petitioner returned to Dr. Sureka on January 28, 2013 with continued complaints of leg and low back pain. Dr. Sureka continued to recommend epidural injections and advised continued therapy. (PX 8 p 440)

On February 5, 2013, Petitioner presented to Prairie Spine and Pain Institute seeing Dr. Richard Kube II. Dr. Kube continued Petitioner on restricted duty and recommended surgery. (PX 13 pgs 626,627).

Petitioner underwent surgery on March 25, 2013 consisting of a hemilaminotomy with microdiscectomy for decompression traversing and exiting root at L4-L5 on the left. (PX 13 p 628-629) During the surgery there was an incidental durotomy and a repair of the cerebrospinal fluid leak was also performed. (PX 13 p 628-629) Petitioner restarted physical therapy at Kewanee Physical Therapy on April 8, 2013. (PX 6 p 248-252)

Records submitted show that on April 15, 2013, Petitioner called Dr. Kube's office complaining of shooting pains down his leg which woke him at night. (PX 13 p 631) The following day, Petitioner saw Dr. Kube with continual pain in the leg. It was noted that Petitioner never really had a substantial amount of relief. Dr. Kube indicated Petitioner had possible chronic nerve pain or possible post-operative nerve healing. A future visit was scheduled as Dr. Kube wanted to see how Petitioner continued to respond. (PX 13 p 632)

Petitioner returned to Dr. Kube on May 14, 2013. Dr. Kube indicated Petitioner's pain scores had improved by 30-40% and his back scores had marginally improved. (PX 13 p 639) Dr. Kube continued therapy

and allowed Petitioner to return to work on sedentary duty effective May 20, 2013. (PX 13 p 638-640). At Petitioner's visit on May 23, 2013, Dr. Kube noted he was concerned that Petitioner was not making great progress. The doctor ordered another MRI and held Petitioner off work. (PX 13 pgs 641,645)

The prescribed lumbar spine MRI when performed at Methodist Medical Center on May 29, 2013 showed a moderate central disc protrusion which was causing slight compression on the ventral thecal sac at L4-L5. The impression was residual or recurrent central disc protrusion at L4-L5. Also noted was granulation tissue/scar on the left at L4-L5. (PX 7 p 428-429)

Petitioner returned to Dr. Kube on June 4, 2013. Dr. Kube noted the MRI showed a residual central disc bulge but that the deviation of the thecal sac was away from the scar tissue which he believed was causing Petitioner's pain. Dr. Kube believed Petitioner was having an inflammatory reaction and was hoping that an epidural steroid injection would calm down the inflammation. Dr. Kube also noted Petitioner appeared to create quite an abundance of granulation and scar tissue. He was concerned Petitioner would be looking at chronic pain management. At that point, Dr. Kube continued Petitioner off work and referred Petitioner to Dr. Cummings within Prairie Spine for a consultation. (PX 13 pgs 649,651)

Petitioner saw Dr. Cummings on June 18, 2013 with complaints of sharp and severe pain, often in duration in the left lower back which radiated down the lateral aspect of the thigh and into the foot. (PX 13 p 646-648) Dr. Cummings recommended proceeding with left L4-L5 transforaminal epidural steroid injections. (PX 13 p 646)

On July 2, 2013 Dr. Kube noted Petitioner was showing some progress. At that time, the doctor returned Petitioner to work on sedentary duty for 4 hours per day and continue therapy (PX 13 p 656-657).

On July 30, 2013 the therapist at Kewanee Physical Therapy put together a Functional Progress Note which indicated Petitioner demonstrated the ability to perform 22.6% of the physical demands of his job. The therapist noted that based on the Dictionary of Occupational Titles, Petitioner demonstrated the ability to perform within the medium physical demand level. In summary, the therapist indicated that Petitioner continued to have significant pain and limitation of his ability to perform the basic movement patterns required for his normal job at Respondent. (PX 6 p 375-379)

On August 1, 2013, Petitioner returned to Dr. Kube. The doctor noted Petitioner had shown a valid effort and light duty restrictions in what he believed was a functional capacity evaluation (FCE) done by Kewanee Physical Therapy. Dr. Kube discussed a dorsal column stimulator which Petitioner was not enthusiastic about. Dr. Kube placed Petitioner at maximum medical improvement although he felt Petitioner will require chronic medication management and intermittent physical therapy. Dr. Kube placed permanent lifting restrictions consistent with the Functional Progress Note dated August 1, 2013 and referred Petitioner back to Dr. Cummings. (PX 13 p 664)

Records show that on August 5, 2013, Petitioner spoke with a Jack Farrah at the Prairie Spine Institute regarding the FCE. The note indicates, "Cody came into the office today questioning the results from his physical therapy notes that we went over last week…Cody says that Dr. Kube thought he had FCE done. I called and spoke with John @ [K]ewanee [Physical therapy]. [S]aid [patient did not have w/c and [FCE]. He has been doing basic [physical therapy]…" (PX 13 p 665)

On August 8, 2013, Dr. Kube wrote, "…on further review, the functional note we received was like a functional progress report. I cannot really say that I have ever seen this before. We do not work with the Kewanee people that often, and the appearance of the note looked an awful lot like a functional capacity evaluation, but this was not what this note was. I do not know exactly why they are using this note, but it is a

little confusing, so those were not permanent restrictions. I talked to the therapist today, and I guess those were more like goals or what he was hoping to get to. It is the result of an approximately 30 to 45 minutes evaluation, which of course would be, in my estimate, very difficult to project what someone could do for an 8-hour day after only testing someone for 30 to 45 minutes..." Dr. Kube noted that Petitioner was showing "real measurable progress" relying on the report that Petitioner had generated 27% ability to perform his previous job. Dr. Kube felt Petitioner would benefit from additional therapy in the form of conditioning type program. Upon completion of same, the doctor indicated a FCE would be necessary. (PX 13 p 668)

On August 9, 2013, Kewanee Physical Therapy pinned another Functional Progress Note which indicated Petitioner demonstrated the ability to perform 23.5% of the physical demands of his job. The therapist again noted that based on the Dictionary of Occupational Titles, Petitioner demonstrated the ability to perform within the medium physical demand level. The therapist also indicated that Petitioner continued to have significant pain with functional behaviors and activities. It was recommended that Petitioner transition to work hardening. (PX 6 pgs 414-417)

At Respondent's request, Petitioner underwent a second Section12 examination with Dr. Singh on August 12, 2013. In addition to an examination, Dr. Singh reviewed subsequent records generated by Dr. Kube, a surveillance video, and the Functional Progress Note dated August 9, 2013 from Kewanee Physical Therapy, which the doctor categorized as an FCE. Citing the Functional Progress Note ("FCE"), Dr. Singh indicated Petitioner could perform at a medium level which met the physical demand requirements of his job. Dr. Singh opined that Petitioner sustained a L4-5 disk herniation which was appropriately treated and had resolved. Dr. Singh indicated Petitioner had subjective complaints of pain which could not be objectified. He did not feel the referral to pain management was appropriate indicating Petitioner had nonanatomic pain complaints. Dr. Singh felt Petitioner was at maximum medical improvement and able to return to full duty work without restrictions. (RX 9-3)

On September 5, 2013, Petitioner returned to Dr. Kube. The doctor noted Petitioner was not experiencing any additional progress with therapy. As a result, Dr. Kube ordered a FCE to determine permanent lifting restrictions. (PX 13 p 674) Dr. Kube also placed Petitioner on sedentary duty, four (4) hours per day. (PX 13 p 675)

Pursuant to Dr. Kube's referral, Petitioner underwent a FCE at Azer Clinic on January 10, 2014. The FCE found that Petitioner was not capable of performing the physical demands of a 'Fabricator, Industrial.' (PX 4 p 134) The FCE also found Petitioner's current working capacity of light as follows: 10-20 pounds lifting, carrying, pushing and pulling 1/3 of the day, 10 pounds more than 1/3 of the day but not more than 2/3 of the day, a benefit of continued physical therapy to treat the ongoing high levels of pain with activity, work hardening and that Petitioner would perform best in an occupation that allowed frequent postural changes. (PX 4 p 134)

Petitioner returned to Dr. Kube on January 30, 2014. Dr. Kube noted the FCE demonstrated Petitioner at a fairly light level of activity and that he was not able to perform his previous job. Dr. Kube indicated the work restrictions from the FCE were permanent and that Petitioner was at maximum medical improvement. (PX 13 p 867)

Petitioner testified that he had made attempts to find employment but was having difficulty finding employment. Petitioner provided that he met with a vocational rehabilitation counselor, Mary Andrews, and indicated he would be willing to work with her as she tried to assist him in finding employment.

Petitioner testified that currently he has difficulty standing for long periods of time. Petitioner indicated that he experiences pain down his leg with extended standing. Similarly, he has difficulty sitting for long

periods of time. He is currently using Advil and a gel rub to address his pain. He has difficulty walking long distances and/or for more than 15 minutes. He has difficulty riding in a car for more than 30 minutes and has trouble lifting more than 20 lbs.

At Respondent's request, a labor market survey was performed by Triune Health Group. In a report dated April 7, 2014, it was noted that a survey was conducted exploring employment opportunities as an Office Worker, Maintenance Worker and Sales Associate/Customer Service type positions. The labor market survey concluded that Petitioner could acquire employment in the $9.50 to $11.50 per hour range. Petitioner testified he was a Union member while working for Respondent. He was earning $14.60 per hour at the time of his injury and that he would have been making $14.90 per hour if he were still working at Respondent as of the time of the hearing.

Dr. Kube was deposed in this matter. Dr. Kube provided that he first treated Petitioner on February 5, 2013. Petitioner provided a history that he had been working with a lift and a large piece of metal in July 2012 and as he was trying to swing a piece of metal he felt pain in the low back. Dr. Kube explained that Petitioner's history included complaints of leg pain which got worse over time. (PX 2 p) Dr. Kube's examination on February 5, 2013 found positive straight leg raise. Dr. Kube noted numbness and tingling in about the L5 or S1 dermatome pattern on the left side. (PX 2 pgs 4-6) After reviewing a MRI, Dr. Kube diagnosed a disc herniation at L4-5 left side with radiculopathy. (PX 2 pgs 6-7)

Dr. Kube testified that he ultimately performed a micro-decompression on the left side at L4-5 doing a hemilaminotomy and micro-discectomy. (PX 2 p 9) Post surgery, Petitioner continued to have substantial pain in his leg. Dr Kube indicated he was concerned that Petitioner possibly had chronic nerve damage and chronic nerve irritation. (PX 2 p 11) Dr. Kube ordered an additional MRI. The MRI showed scar tissue on the left side at L4-5 and Dr. Kube ordered an epidural steroid injection. (PX 2 pgs 14-16) Dr. Kube testified that he held Petitioner off work from the surgery until July 2, 2013 when he placed Petitioner on sedentary duty. (PX 2 pgs 10-17) In September 2013, Dr. Kube ordered an FCE to determine Petitioner's permanent lifting restrictions. Dr. Kube provided that he reviewed the FCE report prepared by Azer Physical Therapy and agreed with the recommendations in said FCE report. (PX 2 pgs 21-23)

Dr. Kube explained that when he last saw Petitioner on January 30, 3014, he felt Petitioner had chronic pain secondary to a trauma along with radicular complaints. (PX 2 p 23) Dr. Kube explained that Petitioner's injuries were permanent and that the restrictions identified in the FCE are permanent. Dr. Kube further explained that Petitioner's injuries were related to his injury at work in July 2012. (PX 21 pgs 27-28)

Dr. Singh was also deposed in this matter. Dr. Singh testified that he examined Petitioner on two separate occasions, January 16, 2013 and August 12, 2013, pursuant to Section 12 of the Act. At the conclusion of his first examination, Dr. Singh diagnosed Petitioner with herniated nucleus pulposus, L4-5. Dr. Singh provided that he felt Petitioner's disk herniation was causally related to his work injury and that a L4-5 laminectomy and discectomy would be appropriate. (RX 8 pgs 8-14)

Dr. Singh testified that he examined Petitioner again on August 12, 2013. The doctor provided that after performing an examination, reviewing the records of Dr. Kube and the records from Kewanee Therapy Center, as well as surveillance video, he felt Petitioner was status post L4-5 laminectomy. He reiterated that the disk herniation was causally related and was appropriately treated. Dr. Singh stated that he could not objectify Petitioner's complaints during his second examination and felt his condition of ill-being had resolved. (RX 8 pgs 21-23) The doctor also stated that he believed Petitioner was at maximum medical improvement and was capable of returning to work "at least at the medium demand level." (RX 8 pgs 24-26)

On cross-examination, Dr. Singh testified that part in parcel of his August 12, 2013 Section 12 examination, he reviewed a FCE from August 9, 2013 which was in fact was a progress note and not a full functional capacity evaluation. (RX 8 pgs 34-35) D Singh acknowledged that there was a difference between a functional capacity evaluation and a progress report from a physical therapist. Dr. Singh agreed that a functional capacity evaluation is a more detailed evaluation than a progress report from a physical therapist. Dr. Singh testified that he could not state for certainty whether he would have known at the time of his August 12, 2013 IME report that the note from Kewanee Physical Therapy (referred to in the IME report as an FCE) was in fact a physical therapy progress note instead of an FCE report. (RX 8 p 35)

Dr. Singh testified that he was aware that subsequent to his August 2013 IME report, Petitioner had gone through an FCE at Azer Physical Therapy. The doctor provided that he was not aware that the FCE report indicated that Petitioner could not go back to his job at Respondent. (RX 8 p 36) Dr. Singh stated that he classified Petitioner's job as "medium, heavy category of work." (RX 8 p 37)

Dr. Singh was questioned about the therapy record functional evaluation/physical therapy progress record from August 9, 2013. The doctor agreed that the physical therapy progress report found that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Petitioner's job at Respondent. Dr. Singh conceded that said progress report noted that Petitioner did not have the ability to perform or match his job in regards to bending and job lifting. Similarly, he agreed the report provided Petitioner did not match the job in regards to occasional power lifting. (RX 8 pgs 41-43) Dr. Singh ultimately agreed that the therapist's assessment in the August 9, 2013 report was that Petitioner could not meet the job requirements with Respondent's job. (RX 8 pgs 48-49)

Dr. Singh also testified that he observed a video of Petitioner. (RX 8 p 49) Dr. Singh noted the video showed Petitioner getting in and out of a car and carrying groceries. (The Arbitrator also reviewed the surveillance video and concurs that same depicts Petitioner getting out of a car and carrying what appeared to be groceries.) Dr. Singh did not have any idea how heavy the groceries were, did not have any idea regarding the time length of the video or how close up the video was to showing Petitioner's face and body. (RX 8 pgs 49-50) Lastly, Dr. Singh confirmed that the MRI image after the surgery showed that Petitioner still had some protrusion and/or minimal evidence of residual disc herniation. He felt same was an incidental finding that did not cause any nerve root compression. (RX 8 pgs 56-57)

Mary Andrews prepared a vocational assessment of Petitioner in September 2014. Ms. Andrews also testified in this matter. Ms. Andrews testified that she is a certified rehabilitation counselor. She provided that she reviewed Petitioner's medical records and met with him to perform a vocational assessment. Ms. Andrews opined that vocational rehabilitation would be appropriate and beneficial for Petitioner. Ms. Andrews noted that Petitioner previously worked in a grocery store unloading trucks and stocking shelves, cleaning aisles and bathrooms and running the register while earning $7.75 per hour from 2007 through 2008. She noted that he also worked at a Bob Evans facility in 2008-2009 earning $14.10 per hour boxing rolls of sausages. She also noted he began working at Respondent in October 2010 earning $11.75 per hour. He was making $14.60 per hour the last time he worked at Great Dane. (Also See PX 1)

Ms. Andrews testimony and her report noted that the physical therapy evaluation by the Kewanee physical therapist, the functional capacity evaluation performed by Azer Physical Therapy and the opinion of Dr. Kube all supported a finding that Petitioner was unable to perform the job functions for his position at Respondent. Ms. Andrews noted that Petitioner did not have a resume and he had done some job searching but had not been able to find a job within his restrictions. Ms. Andrews noted that the constant stress and straining of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding. She felt Petitioner's capabilities did not match the job demands and if Respondent could not accommodate

Petitioner's permanent restrictions, vocational rehabilitation should be considered. She noted he had a good work history which was a positive in his employability and that he had yet to reach his vocational potential since he was only 25 years old. She noted that vocational rehabilitation would be of value to aid in generating vocational options. She provided that vocational rehabilitation would involve development of a rehabilitation plan with a probable inclusion of obtaining computer skills, educational on job seeking skills and provision of job placement services. She noted that the development of computer skills should improve his employability and job search capability. She also noted that given Petitioner's age and degree of physical restrictions, it may also be reasonable for him to pursue additional formal education if it is determined he would have a good likelihood of success in obtaining and maintaining a job in the chosen major of study. (Also see PX 1)

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:

On July 3, 2012, Petitioner was employed as a machine operator for Respondent. On said date, he was performing his job as a press operator wherein he would use a suction hoist to move sheets of metal to a mechanical press. In order to move the hoist, Petitioner must use his body to push and turn the hoist. Petitioner's testimony shows that when using his body to maneuver the metal, he felt pain in his lower back. Petitioner reported the pain to Respondent and filled out an incident report. Petitioner stated that in the weeks following the incident, he continued to work noticing increasing pain to his lower back. As such, he chose to see a doctor and began treating for same. The medical records are consistent with his recitation of the occurrence.

Based on Petitioner's unrebutted and credible testimony, the Arbitrator finds that Petitioner sustained an accidental injury which arose out of and in the course of his employment with Respondent on July 3, 2012.

With respect to (F.) Is Petitioner's condition of ill being causally related to the accident, the Arbitrator finds as follows:

Petitioner was in a state of good health prior to July 3, 2012 and did not have any complaints of back pain prior to his work injury. After the injury he required extensive treatment for his back including a hemilaminectomy with discectomy.

Petitioner's treating physician, Dr. Kube, opined that Petitioner's condition of ill-being is related to his injury at work in July 2012. At the behest of Dr. Kube, Petitioner underwent a FCE. The FCE performed at Azer Clinic on January 10, 2014 found Petitioner was not capable of performing the physical demands of a 'Fabricator, Industrial.' The FCE found Petitioner's current working capacity of light as follows: 10-20 pounds lifting, carrying, pushing and pulling 1/3 of the day, 10 pounds more than 1/3 of the day but not more than 2/3 of the day, a benefit of continued physical therapy to treat the ongoing high levels of pain with activity, work hardening and that Petitioner would perform best in an occupation that allowed frequent postural changes. When Petitioner last saw Dr. Kube on January 30, 2014, the doctor noted the FCE demonstrated Petitioner at a fairly light level of activity and that he was not able to perform his previous job. Dr. Kube indicated the work restrictions from the FCE were permanent and that Petitioner was at maximum medical improvement. Dr. Kube explained that he felt Petitioner had chronic pain secondary to a trauma along with radicular complaints.

Respondent's Section 12 examiner, Dr. Singh, agreed that a causal relationship exists between Petitioner's condition of ill-being and the work incident; however, felt that Petitioner's condition of ill-being had resolved as of his second IME in November 2013. The doctor believed Petitioner was at maximum medical improvement and was capable of returning to work "at least at the medium demand level." Dr. Singh relied in part on a FCE from August 9, 2013 which was in fact was a progress note and not a full functional capacity evaluation. Dr. Singh acknowledged that there was a difference between a functional capacity evaluation and a progress report from a physical therapist. Dr. Singh agreed that a functional capacity evaluation is a more

detailed evaluation than a progress report from a physical therapist. Dr. Singh testified that he not could state for certainty whether he would have known at the time of his August 12, 2013 IME report that the note from Kewanee Physical Therapy was in fact a physical therapy progress note instead of an FCE report. Dr. Singh testified that he was aware that subsequent to his August 2013 IME report, Petitioner had gone through an FCE at Azer Physical Therapy. The doctor provided that he was not aware that the FCE report indicated that Petitioner could not go back to his job at Respondent. The Arbitrator notes Dr. Singh stated in his August 12, 2013 IME report that Petitioner could return to full duty without restrictions citing the August 9, 2013 Kewanee Physical Therapy report that said in part that Petitioner tested at a medium demand level which met the requirements of his occupation. When queried about the therapy record functional evaluation/physical therapy progress record from August 9, 2013, the doctor agreed that the physical therapy progress report found that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Locke's job at the respondent. Dr. Singh conceded that said progress report noted that Petitioner did not have the ability to perform or match his job in regards to bending and job lifting. Similarly, he agreed the report provided Petitioner did not match the job in regards to occasional power lifting. Dr. Singh ultimately agreed that the therapist's assessment in the August 9, 2013 report was that Petitioner could not meet the job requirements with Respondent's job.

Relying on the opinion of Dr. Kube and to a lesser degree, the opinion of Dr. Singh, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident sustained on July 3, 2012.

With respect to (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, the Arbitrator finds as follows:

The Arbitrator incorporates the findings noted above in Paragraphs C and F.

Respondent offered no evidence or testimony to dispute the reasonableness or necessity of Petitioner's medical treatment. When offered into evidence at trial, Respondent had no objection to the medical bills contained in Petitioner's Exhibit 15.

Dr. Kube testified that all of the medical treatment rendered to Petitioner was a result of his injury at work in July 2012. Additionally Respondent's doctor, Dr. Singh, testified the surgery Dr. Kube performed was appropriate. Petitioner's Exhibit 15 shows a total outstanding balance of medical expenses of $19,280.40 for medical treatment rendered to Petitioner as a result of his work injury. (A fee schedule adjustment was taken after the hearing and the correct outstanding unpaid balance is $19,280.40 not the $30,473 listed in Exhibit 15 due to an adjustment to the March 25, 2013 date of service of Prairie Spine and Pain Institute.) After reviewing all evidence and testimony in this matter, the Arbitrator hereby finds that all of Petitioner's back treatment to date has been reasonable and necessary to cure Petitioner of his conditions of ill-being. Respondent shall pay all reasonable and necessary medical costs as reflected in Petitioner's Exhibit 15 pursuant to the fee schedule.

With respect to (K.) What temporary total disability benefits and maintenance benefits are in dispute, the Arbitrator finds as follows:

Dr. Kube and the full FCE support a finding that Petitioner has permanent restrictions that prevent him from returning to his work at Respondent. On August 5, 2013 Dr. Kube saw Petitioner for a post FCE consultation and placed Petitioner at MMI on permanent restrictions. Prior to that Petitioner was on light duty restrictions imposed by Dr. Kube for which the employer did not accommodate. Petitioner performed light duty work until March 25, 2013. He has not worked since March 25, 2013. Respondent denies Petitioner is entitled to TTD but if he is, Petitioner is entitled to TTD from March 25, 2013 through July 17, 2013 (see Arbitrator's

Exhibit 2). Respondent's Exhibit 10 shows that a letter was sent to Petitioner telling him he had been released to full duty on August 12, 2013 and that no further light duty was available and that he should return to work. (RX 10) Petitioner testified that he returned to work and informed Respondent of the restrictions prescribed by Dr. Kube. Respondent refused to accommodate him and Petitioner has not worked since August 2013.

As such, the Arbitrator finds Petitioner was entitled to TTD benefits from March 25, 2013 through August 5, 2013, or a period of 19 weeks. Respondent is entitled a credit for TTD paid from March 25, 2013 through July 17, 2013.

Respondent stopped paying Petitioner TTD benefits as of July 17, 2013. It wasn't until August 9, 2013 Petitioner saw Respondent's IME physican for a second IME in which Dr. Singh relied upon what he believed was a FCE and found Petitioner could return to work although the report relied upon actually concluded Petitioner could not do his job. Dr. Singh testified and agreed that the functional evaluation/physical therapy progress record from August 9, 2013 by Kewanee Physical Therapy noted that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Petitioner's job. Dr. Singh conceded that the functional capacity evaluation/physical therapy progress report noted that Petitioner did not have the ability or match his job in regards to bending and job lifting. Similarly, Petitioner did not match the job in regards to occasional power lifting. Dr. Singh ultimately agreed that if he relied upon the therapist's assessment in the August 9, 2013 report, Petitioner could not meet the job requirements. Dr. Singh's opinion is undermined by Dr. Kube, the full Azer FCE and the therapy report from Kewanee Physical Therapy.

Based upon the findings in the FCE wherein Petitioner could only perform a light duty job, and Petitioner's request for vocational rehabilitation, the Arbitrator finds that Petitioner is entitled to maintenance in the amount of $326.75 from August 6, 2013 through the date of the hearing.

With respect to (O.) Whether Petitioner is entitled to Vocational Rehabilitation, the Arbitrator finds as follows:

Based upon the FCE testing, Petitioner cannot return to his job as a general laborer. Dr. Kube testified that the restrictions put in place in the FCE are permanent. In order to allow Petitioner to return to the work force with the same earning capacity he had with Respondent, Petitioner would need assistance in job placement and potentially additional training. On October 27, 2014, Petitioner met with Mary Andrews, a rehabilitation specialist, for evaluation on vocational rehabilitation. Based on her assessment, Ms. Andrews concluded that if Respondent could not accommodate Petitioner's permanent restrictions, given his background, Petitioner would benefit from formal vocational rehabilitation services with a certified rehab counselor.

Section 8(a) of the Illinois Worker's Compensation Act provides in part that the employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. A claimant is generally entitled to vocational rehabilitation when he sustains a work related injury that causes a reduction in his earning capacity and there is evidence that rehabilitation will increase that capacity, see *National Tea Company v. Industrial Commission,* 97 Ill. 2d 424, 432 (1983). Pursuant to Section 8(a) of the Illinois Worker's Compensation Act, vocational rehabilitation may include but is not limited to counseling for job searches, supervising a job search program and vocational retraining including education at an accredited learning institution, 820 ILCS 3035/8(a). Any vocational rehabilitation counselors who provide service under this act shall have appropriate certifications which designate the counselor is qualified to render opinions relating to vocational rehabilitation. A written vocational plan is required under Section 7110.10.

A review of the factors in *National Tea* supports the award of vocational rehabilitation. Factors to be considered in *National Tea* include proof that the injury has caused a reduction in earning power. Here Petitioner testified that if he was still working at Respondent he would earn $14.90 per hour. Respondent put into evidence a labor market survey. This labor market survey ultimately concluded that if claimant conducted a diligent job search he could acquire employment with an anticipated starting salary range in the $9.50 to $11.50 per hour range. Thus, the labor market survey report shows that Petitioner without retraining and/or assistance in getting a job would have a significant reduction in pay.

The second *National Tea* factor has evidence that rehabilitation would increase earning capacity to restore the employee to his previous earning level. The vocational rehabilitation counselor testified that vocational services would assist the employee and improve his chances of increasing his earning capacity to restore him to his previous earning level. Petitioner's relative young age and the duration of his work life expectancy are other factors to be considered and further support the granting of vocational rehabilitation services. Petitioner also testified that he was both able and motivated to undertake vocational rehabilitation. There is no evidence that prior rehabilitation services have been unsuccessfully undertaken by Petitioner which further supports the award of rehabilitation services.

The last *National Tea* factor is whether the employee had sufficient skills to obtain employment without further training or education. In this case, Petitioner is a high school graduate who has performed manual labor and now has significant restrictions in regards to his lifting. Petitioner does not have a resume and does not have job search skills. Vocational rehabilitation would be appropriate and is further supported by this *National Tea* factor.

Therefore, the Arbitrator hereby orders Respondent to provide vocational rehabilitation to Petitioner.

With respect to (M.) Should penalties or fees be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator finds that Respondent's conduct in this matter was unreasonable and vexations and subject to penalties under section 19(k) of the Act.

In this case, Respondent's IME doctor clearly related the injury and the need for surgery to the accident in July 2012. However, the worker's compensation carrier has failed to pay for all of the medical bills for treatment. Similarly, the IME doctor received a functional evaluation report from a physical therapist. This report when read in full clearly shows that Petitioner could not perform his job. Despite the finding of the report and the conclusions of the therapist, the IME doctor used it as a basis for finding Petitioner could return to work. As noted above, Dr. Singh acknowledged that there was a difference between a functional capacity evaluation and a progress report from a physical therapist. Dr. Singh agreed that a functional capacity evaluation is a more detailed evaluation than a progress report from a physical therapist. Again, Dr. Singh could not state for certainty whether he knew at the time of his August 12, 2013 IME report that the note from Kewanee Physical Therapy was in fact a physical therapy progress note instead of an FCE report. Dr. Singh testified that he was aware that subsequent to his August 2013 IME report, Petitioner underwent a FCE at Azer Physical Therapy that indicated Petitioner could not go back to his job at Respondent. Dr. Singh stated in his August 12, 2013 IME report that Petitioner could return to full duty without restrictions citing the August 9, 2013 Kewanee Physical Therapy report that said in part that Petitioner tested at a medium demand level which met the requirements of his occupation. When queried about the therapy record functional evaluation/physical therapy progress record from August 9, 2013, the doctor agreed that the physical therapy progress report found that Petitioner was unable to achieve successfully during his evaluation the occasional shoulder lifting, the occasional power lifting, walking, forward reaching, bending and total standing functions of Locke's job at the respondent. Dr. Singh conceded that said progress report noted that Petitioner did not have the ability to

perform or match his job in regards to bending and job lifting. Similarly, he agreed the report provided Petitioner did not match the job in regards to occasional power lifting. Dr. Singh ultimately agreed that the therapist's assessment in the August 9, 2013 report was that Petitioner could not meet the job requirements with Respondent's job. Dr. Singh's full duty work conclusion is inconsistent with his testimony.

Respondent's argument in opposition to the vocational rehabilitation is disingenuous. Respondent argues that Petitioner could acquire employment with a salary of $9.50 to $11.50 per hour. It is undisputed that Petitioner was making $14.60 per hour when he last worked at Respondent and he would likely be making $14.90 per hour if he was currently working for Respondent. Despite the significant difference in hourly wage, Respondent suggests that Petitioner has failed to show he would incur a reduction in earning capacity while Respondent's own documents show the reduction in earning capacity. Respondent refusal to provide rehabilitation services is in bad faith

820 ILCS 305/19(k) provides that in a case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation which do not present a real controversy, but are merely frivolous or for delay, then the commission may award compensation additional to that otherwise payable under this act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of the Act, shall be considered unreasonable delay.

Illinois courts have established a test of 'objective reasonableness' to determine whether 19(k) penalties should be awarded, *Board of Education of the City of Chicago v. Industrial Commission,* 91 Ill.2d 1 (1982). There is no objectively reasonable basis for denying the payment of benefits and medical expenses. At a minimum, Petitioner's TTD benefits and medical expenses should have been tendered through August 2013.

Based on the above, the Arbitrator finds that Petitioner is entitled additional compensation in the amount of $10,000.00, the maximum allowed under Section 19(l) of the Act; 21,588.52 [$443.45 (50% of TTD owed, $11,504.87 (50% of the maintenance owed) and $9,640.20 (50% of the outstanding medical expenses)] under Section 19(k) of the Act; and attorneys fees in the amount of $9097.03 (20% of the TTD and maintenance owed and 20% of the 19(k) awarded) under Section 16 of the Act.

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF KANE	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tommy Sauls,

Petitioner,

vs. NO: 13 WC 06961

16IWCC0049

Vision Logistics,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, prospective medical expenses, causal connection, temporary total disability, 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. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the Arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

The Commission affirms and adopts the Arbitrator's decision in all respects, except with regard to the award of prospective medical treatment. For the reasons set forth below, the Commission modifies the Arbitrator's decision and denies the prospective medical treatment that was awarded by the Arbitrator, including the cognitive testing and lumbar surgery. The Commission orders that Petitioner undergo a functional capacity exam ("FCE"). The Commission further orders that this case be remanded for a determination of permanent partial disability and/ or further temporary total disability.

The Petitioner was injured while working as a truck driver on December 21, 2012 when he fell while climbing down from the cab of a truck. The Petitioner testified that he was unconscious for an unknown, but brief period of time. He went to the emergency room the next day and was diagnosed with a concussion, a cervical strain, and a lumbar strain. The Petitioner treated with approximately ten different physicians before undergoing two separate Section 12 examinations for his head injury and spinal issues, respectively. (Tr. 6-13, Px1-Px15, Rx3, Rx4).

Dr. Russell Glantz, a board certified neurologist, conducted the Section 12 examination on July 9, 2013 for the Petitioner's head injury. Dr. Glantz opined in his report that the Petitioner did not exhibit evidence of having a cognitive dysfunction, and that he does not need a neuropsychological exam because he does not have any objective residual cognitive or neurological abnormalities. He also noted that the Petitioner's facial drooping and hearing loss were not related to his fall. Dr. Glantz wrote that the Petitioner claimed that he did not experience facial drooping prior to his December 21, 2012 work accident; however, there is a medical record dated December 26, 2012 that indicates that the Petitioner had facial drooping prior to his work accident. Dr. Glantz testified that for the Petitioner to have experienced a traumatic hearing loss, there would have had to be an injury to the hearing nerve on one side that would be explained by a fracture or an injury in the ear canal. This injury would have been visible on a brain scan; but, the Petitioner's scan did not exhibit such an injury. (Rx4).

Dr. Glantz wrote in his report that there was no evidence from Petitioner's vestibular testing that the Petitioner had an inner ear abnormality. He also opined that Petitioner's post concussion syndrome injury would result in headaches for some weeks post accident, but his current complaints of headaches, dizziness, and trouble focusing would not be connected to the accident at the time of the Section 12 exam. Dr. Glantz wrote: "His symptoms may have been present for some weeks after the injury, but there is no physiological reason for them to be persisting. He never had any fracture of the skull, never had any bleeding in the brain. There was never any bleeding in the ear canals either." Dr. Glantz opined that the Petitioner does not require additional medical treatment for his brain symptomatology: "[Petitioner] does not have objective abnormality related to any injury to his brain that occurred as a result of the December 21, 2012 injury." (Id.)

Dr. Glantz also reviewed surveillance footage of the Petitioner. Dr. Glantz observed the footage from May 10, 2013 of the Petitioner moving approximately eighteen (18) pieces of wood without pausing. Dr. Glantz noted during his deposition that the Petitioner then proceeded to

walk normally to his house without exhibiting any pain behaviors after moving the wood. He also testified that the Petitioner had an appointment with Dr. Salehi later that day and reported his back pain to be eight out of ten on a ten-point scale and complained of limitation of back motion. Dr. Glantz opined that those complaints do not correspond to the Petitioner's behavior in the surveillance footage. Dr. Glantz wrote in his report that the surveillance footage of the Petitioner handling the wood is not consistent with the Petitioner exhibiting pain in his back during the Section 12 exam. According to Dr. Glantz, the footage also does not depict evidence of someone that claims instability and dizziness issues or that informs him that they do not do much around the house. He found Petitioner's veracity to be suspect with regard to claims of continued symptoms because of all of the inconsistencies noted above. (Id.).

Dr. Glantz testified via deposition that, from a neurological standpoint, the Petitioner is at maximum medical improvement ("MMI") for his brain condition and that the Petitioner was capable of returning to work as of the July 9, 2013 exam. (Id.).

Dr. Martin Herman, a board certified neurosurgeon, conducted the Section 12 examination on July 16, 2013 for the Petitioner's spinal issues. Dr. Herman testified via deposition that he believed that the Petitioner was malingering and capable of much more than what he demonstrated during his Section 12 exam based on the following: Dr. Herman's examination of the Petitioner and his demonstrated inconsistencies, the surveillance footage of what the Petitioner was capable of doing in comparison to the results from Dr. Salehi's examination of Petitioner, and the Waddell's signs that Dr. Herman observed. Dr. Herman noted in his Section 12 exam report that the Petitioner was observed bending, lifting, and walking outside of his home in the surveillance footage; however, the Petitioner's range of motion was very limited, he walked very slowly, and he had difficulty rising up from his chair when he was examined by physicians. (Rx3).

Dr. Herman also opined that the Petitioner was at MMI as to his lumbar spine as of the July 16, 2013 exam. Dr. Herman testified that the Petitioner did not need treatment for a condition caused by an injury, but instead needed treatment for his degenerative conditions in his cervical and lumbar spine. He disagreed with Dr. Salehi's recommendation that the Petitioner undergo a spinal fusion. Dr. Herman did not think that surgery was indicated and because the Petitioner is at a high level of function. (Id.)

Dr. Herman recommended that the Petitioner undergo an FCE because it would be useful to determine what restrictions, if any, will be necessary for the Petitioner since he believes that the Petitioner is capable of working. An FCE would also be helpful from a validity standpoint in this case, according to Dr. Herman, because an FCE examiner would have a better opportunity to evaluate a patient for a longer time period and with more tests. (Id.)

The Petitioner's lack of credibility is also a factor in the Commission's decision. The Commission reviewed the videotape evidence of the Petitioner, particularly when he was moving approximately twenty (20) boards off of a trailer in his driveway on May 10, 2013. The

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Commission concurs with Dr. Glantz's assessment that the Petitioner's actions do not correspond to Petitioner's complaints of chronic instability and dizziness issues, or his complaint of back pain at a level of eight out of ten (on a ten-point scale) when he saw his physician later that day. (Rx5a, Rx6a, Rx7, Rx7c).

The Petitioner testified at trial that he was not taking any prescribed pain medication and had not been taking any for awhile. He could not recall when he last took any. However, he also testified that his pain level was an eight out of ten (on a ten-point scale) the day of the hearing (a 'ten' necessitating a trip to the emergency room), and that his best pain level is between four and six. He further stated that he will take between two and six Tylenol as needed per day for pain, but that they do not alleviate his pain. The Commission further questions the Petitioner's veracity as it does not seem probable that the Petitioner could tolerate such a high level of pain for so long without seeking relief through prescribed medication. (Tr. 49-55).

Based upon the totality of the evidence and the factual findings above, the Commission finds that the Petitioner failed to prove entitlement to prospective medical treatment for his head injury or for surgery to his lumbar spine.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary total disability benefits of $715.06 per week for a period of 91 and 4/7 weeks, commencing December 22, 2012 through September 23, 2014, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner failed to prove entitlement to prospective medical treatment for his head injury or surgery for the lumbar spine.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner undergo a functional capacity exam ("FCE").

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,000.00. 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.

DATED: JAN 2 2 2016

TJT/ gaf
O: 11/9/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

SAULS, TOMMY
Employee/Petitioner

Case# **13WC006961**

VISION LOGISTICS
Employer/Respondent

16IWCC0049

On 11/5/2014, 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 0.06% 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:

1315 DWORKIN & MACIARIELLO
ADRIAN CHERIKOS
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

1886 LEAHY EISENBERG & FRAENKEL LTD
JAMES P TOOMEY
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0049

TOMMY SAULS
Employee/Petitioner

v.

VISION LOGISTICS
Employer/Respondent

Case # 13 WC 6961

Consolidated cases: N/A

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 **GERALD GRANADA**, Arbitrator of the Commission, in the city of **GENEVA**, on **9/23/14**. 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS 16IWCC0049

On the date of accident, **12/21/2012**, 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 $**55774.68**; the average weekly wage was $**1072.59**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**21,451.80** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**21,451.80**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $715.06/week for 91-4/7 weeks, commencing 12/22/12 through 9/23/14, as provided in Section 8(b) of the Act.

Respondent shall pay all reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. This includes the related prospective medical treatment recommended by Petitioner's medical providers.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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 Granada — **10/30/14** Date

NOV 5 - 2014

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FINDINGS OF FACT

On December 21, 2012, Petitioner, Tommy Sauls, was a truck driver in the employ of Respondent, Vision Logistics. On said date, Petitioner testified that as he was climbing out of the cab to fix a frozen door latch, his right boot got stuck in a large hole in the step of the truck and while trying to remove his right foot from the step, his left foot slipped. After slipping, Petitioner fell backward, striking his back and the back of his head on the pavement. (Testimony of Petitioner, hereinafter "TX," at 9).

Following the accident, Petitioner testified that he "was unconscious for a short period of time," but did not know how long. (TX at 9). After he woke up, he pulled himself up, got back into the truck, noticed his head was bleeding, and regrouped, waiting to feel better. (TX at 10). Petitioner did not immediately report the accident, hoping that he would feel better. After he began to drive to his destination, Petitioner began to feel worse and reported the accident to a dispatcher, one of Vision Logistics four co-owners. He reported the accident and was encouraged by Respondent to complete his assignment, despite reporting that he was "getting dizzy and sick" during the drive. Petitioner testified that he got sick "three times" throughout the day. (TX at 12). Petitioner was ultimately unable to pick up the trailer in Iowa, due to weather, and drove back to pick up a trailer in Joliet before ending his ten hour day on the road. He also testified that he drove no more than 25-30 miles per hour due to the snowy conditions. In further testimony, Petitioner explained that he was "too tired and sick" to go to the doctor the evening of the accident. (TX at 13).

The next morning, December 22, 2012, Petitioner presented to Provena St. Mary's Hospital where he was diagnosed with a concussion, cervical strain, and lumbar strain. The intake sheet memorialized that Petitioner complains that his head was 'still swimming' and that he had pain radiating down his right leg. A CAT scan of the lumbar spine showed no fracture, but noted moderate degenerative changes at the L4-L5 and L5-S1 levels. A CAT scan of the cervical spine similarly revealed no fracture, but noted severe degenerative changes of the C6-C7 level with moderate bilateral neural foraminal stenosis. A final diagnostic, CAT scan of the head, was normal. Petitioner was also treated by Dr. Edwin Hinton of St. Mary's Occupational Health Center, who discharged him with a variety of instructions: prescriptions for Norco and Motrin, no driving for one week, no lifting over ten pounds, avoid working at heights, no bending, no stooping, no twisting, and to follow up with Dr. Panuska in one to two days in the Occupational Health Clinic. (PX 1).

Petitioner next followed up at St. Mary's Occupational Health Clinic, under the care of Dr. Panuska. At follow up visits on December 26, 2012 and December 31, 2012, Petitioner complained of lumbar pain radiating to his leg. Additionally, complaints of blurred vision, dizziness, nausea, and numbness to the right ear persisted; along with pain when rotating his neck. Petitioner was taken off of work on December 26, 2012 and prescribed ThermaCare for the neck and back, as well as Ultracet and brain rest, including no TV or computer work. At the December 31, 2012 follow up appointment, the concussion symptoms were still present, and the doctor indicated a ventral hernia that pre-dated the accident was larger. Petitioner was continued off of work, and a CT scan was ordered for the abdomen. (PX 1)

On January 4, 2013 Petitioner presented to St. Mary's Hospital with chest pain. A CT scan of the chest revealed a nondisplaced anterior left rib fracture. A CT scan of the abdomen yielded imaging of bilateral inguinal hernias and kidney cysts. Petitioner next followed up with Dr. Panuska in Occupational Health January 7, 2013 where he was continued off of work and referred to Dr. Orozco for an evaluation of a

right hand tremor that had developed. On follow up visits January 11 and 18, 2013, Petitioner's symptoms remained the same and he was kept off of work. At the January 11, 2013 appointment, Petitioner's wife noted personality changes characterized by emotional ups and downs. At the January 18, 2013 appointment, Petitioner reported a ringing in his ears was not helped by one of the medications he was taking. (PX 1).

Petitioner presented for a neurological evaluation with Dr. Daniel Orozco on January 21, 2013 at Riverside Neurology Specialists. After an evaluation for ringing in the ears, headaches, and dizzy episodes, Dr. Orozco prescribed Elavil and referred Petitioner to be seen at an ENT clinic. A follow up was planned after four weeks. (PX 2)

Petitioner followed up with Dr. Panuska January 25, 2013 with the same symptoms of back pain and vertigo with nausea. An MRI of the lumbar spine was ordered and Petitioner was kept off of work for an additional month. (PX 1)

On February 4, 2013, Petitioner presented to St. Mary's Hospital with headaches which persisted daily since the accident. Petitioner also complained of problems focusing and was told to follow up with Panuska. (PX 1).

On February 6, 2013, Petitioner presented to Dr. David Krause to evaluate Petitioner for vestibular dysfunction and hearing loss. Dr. Krause diagnosed post-concussion tinnitus, headaches, and intermittent vertigo. Petitioner was instructed to follow up with Panuska and a full battery hearing test was ordered. (PX 3).

On February 8, 2013, Petitioner presented to Accelerated Open MRI for an MRI of the Lumbar Spine. Degenerative changes were found at the L4-L5 and L5-S1 levels. There was an annular tear in the left foraminal aspect of the disc at L2-L3 level. At L3-L4 a 2.5 mm bulge was found. From L4-L5 and L5-S1, paracentral inferior herniations were indicated with 6 mm and 5 mm herniations, respectively. (PX 4).On February 14, 2013, Dr. Panuska added the diagnosis of situational anxiety. The doctor's note indicated a statement by Petitioner's wife indicating she noticed he was becoming more depressed and withdrawn. (PX 1).

On February 15, 2013, Petitioner had a follow up appointment with Dr. Orozco, still complaining of daily headaches. Dr. Orozco changed the treatment plan, instructing Petitioner to discontinue the Elavil and was instead prescribed Neurontin. That same day, Petitioner presented to Riverside ENT Hearing and Balance where he treated with Dr. Sadie Braun for his hearing trouble. Dr. Braun performed a Complete Audiologic Evaluation, after which she recommended binaural hearing aids to improve his hearing and reduce the tinnitus. (PX 2).

On February 27, 2013 Dr. Panuska ordered a STAT brain MRI to evaluate left facial drooping that had begun "several days ago." A history of facial drooping was first discussed with Panuska in a January appointment, but was not treated until the symptom developed late in February. At trial, Petitioner's ex-wife, Dala Sauls, testified that the Petitioner always "smiled crooked" but that Petitioner never received treatment for a facial droop prior to Petitioner's work accident. (Testimony of Dala Sauls at 71). Dala Sauls further testified that the facial droop was not merely more pronounced, compared to the "crooked smile." Rather, Petitioner's face "was different" and the "left side was lower than ever," "the left side

drooped." (Ibid. at 72). Petitioner remained off of work and the brain MRI revealed areas of T2 FLAIR abnormality. Petitioner followed up with Dr. Panuska on March 1, 2013, was told the results of the MRI were essentially within normal limits and was advised the newest diagnosis, left facial palsy, would likely resolve. Petitioner was continued off of work. (PX 1).
On March 18, 2013 Petitioner followed up with Dr. Orozco and reported that his headaches had improved. However, the dizziness, nausea, inability to concentrate, and memory loss were worse. Dr. Orozco increased the dosage of Neurontin at this point, to further improve the headaches and associated symptoms. (PX 2).

On March 21, 2013 Petitioner presented to Dr. Harvey at Neurosurgery Consultants for back pain. After reviewing the Petitioner's symptoms, Dr. Harvey recommended four to six weeks of physical therapy, opining that Petitioner would not require surgical intervention. On March 29, follow up with Dr. Panuska, Petitioner's March treatment history was reviewed, and he was continued off of work as symptoms had neither improved nor resolved. (PX 2).

On April 1, 2013 Petitioner sought out a second choice and presented to Beverly Park Medical Center to be seen by Dr. Michael Foreman. Dr. Foreman treated all symptoms, and referred him to a pain specialist for the lumbar pain and a neurologist for a second opinion on the facial paralysis. Physical therapy was ordered three days a week for four to six weeks. Only two visits were completed in April, at ATI Physical Therapy. Additional sessions were not completed due to Petitioner's inability to tolerate the sessions. (PX 7).

On April 17, 2013 Petitioner followed up with Dr. Orozco. By now, Petitioner had been treating with Dr. Foreman. Dr. Orozco for the first time diagnosed Meniere's disease. (PX 2).

Petitioner's final appointment with Dr. Panuska was April 22, 2013. At this visit, Petitioner reported an inability to complete physical therapy because he got dizzy and threw up. Dr. Panuska kept him off work pending approval for further treatment. (PX 1).

On April 29, 2013, Petitioner was re-evaluated by Dr. Foreman and reported his inability to tolerate physical therapy. Dr. Foreman kept Petitioner off of work until he was cleared by the specialists. (PX 7).

On May 10, 2013, Petitioner presented for an initial evaluation with Dr. Sean Salehi. Dr. Salehi prescribed a combination of physical therapy and injections. Specifically, one or two epidural steroid injections were prescribed at the L4-L5 level and bilateral facet injections were recommended from L4-S1. Dr. Salehi kept Petitioner off of work due to his inability to drive. (PX 10).

On May 28, 2013, Petitioner presented for his initial evaluation with Dr. Neil Allen at Consultants in Neurology. Dr. Allen noted that Petitioner sustained an obvious concussion with cognitive impairment. After reviewing Petitioner's symptoms and treatment history, Dr. Allen recommended neuropsychological testing and kept Petitioner off of work. (PX 5).

Throughout May 2013, Petitioner treated for renal stones, unrelated to the work injury.

On June 4, 2013, Petitioner presented to Accredited Ambulatory Care and received bilateral L4-L5 transforaminal epidural steroid injections and nerve root block. The injections gave minimum relief, as

Petitioner reported at a June 12, 2013 follow up with pain specialist, Dr. Axel Vargas. (PX 12). Petitioner also treated with Dr. Tian Xia on June 21, 2013, who performed additional injections to address Petitioner's headaches. Dr. Xia expressly disagreed with Dr. Vargas' treatment plan with regards to radio frequency ablation. Dr. Salehi agreed and Dr. Xia took over Petitioner's pain management. (PX 13).

At a follow up visit on June 25, 2013 with Dr. Allen, memory and concentration problems were reviewed and new glasses and neuropsychological testing was recommended. (PX 5).
Throughout June and July 2013, Petitioner completed ten physical therapy sessions at Accelerated Rehabilitation. (PX 9). Petitioner also followed up with Dr. Xia, on June 28, 2013 appointment, who performed additional sphenopalatine ganglion nerve blocks to address the headaches. Dr. Xia also confirmed the herniations in the lumbar spine and wanted to perform additional steroid injections which were never approved. (PX 13).

On July 9, 2013, Petitioner presented to Dr. Russel Glantz for a Section 12 examination. Dr. Glantz, a neurologist of Parkview Orthopaedic Group, examined Petitioner for the symptoms related to his head injury. In his report, Dr. Glantz's opinion was that Petitioner's current condition of ill-being was subjective. The doctor also reviewed video surveillance taken of Petitioner on May 10, 2013. Based on the history reviewed by Dr. Glantz and the video surveillance, the doctor believed the symptoms related to the work accident and post-concussion syndrome was resolved and there was no reason they should persist. Dr. Glantz reported that no further treatment was needed, that Petitioner was capable of working without restriction and at maximum medical improvement with regard to his brain condition.

On July 16, 2013, Petitioner presented to Dr. Martin Herman for a Section 12 examination. Dr. Herman, a neurosurgeon at the Center of Brain and Spine Surgery, examined Petitioner for his lumbar spine injury. Herman also reviewed the May 10, 2013 video surveillance. Dr. Herman's opinion, based on his exam and the video surveillance was that Petitioner's symptoms were related to degenerative disease and arthritis. In his report, Dr. Herman wrote that Petitioner did not need additional treatment for his lumbar spine, other than to treat his chronic degenerative spine condition. Dr. Herman also determined Petitioner was capable of working and recommended a Functional Capacity Evaluation to determine the level Petitioner is able to work at.

On follow up visits in July 2013, Dr. Salehi recommended another course of injections before considering a fusion surgery. In September 2013, after failure of conservative treatment, Dr. Salehi recommended the fusion. Petitioner testified at trial that he would like to proceed with the fusion if awarded. (TX at 35).

On an August 6, 2013 follow up visit, Dr. Allen recommended neuropsychological evaluation because of the possibility of loss of self-esteem, loss of self-worth, and posttraumatic stress disorder secondary to the injury. Approval for this treatment was denied throughout, although Petitioner continued to see Dr. Allen for follow up visits on October 29, 2013, February 27, 2014, and June 19, 2014. (PX 5).

The deposition of Respondent's Independent Medical Examiner, Dr. Russell Glantz, was taken on October 31, 2013. The doctor testified that Petitioner's complaints were subjective and could not find any objective evidence that was related to the accident on December 21, 2012. Dr. Glantz did, however, testify that Petitioner was subjectively complaining of a lot of back pain and "might have aggravated his underlying degenerative disease." Dr. Glantz further testified that Petitioner had reached Maximum

Medical Improvement "from the point of view of his brain condition" and did not need additional treatment for his brain condition. In Dr. Glantz's opinion, symptoms of post-concussive symptoms resolve after six months, and the IME was taken seven months after the accident. Of note, Dr. Glantz did not disagree with the reasonableness and necessity of the treatment from the date of accident until the IME. Rather, the doctor's opinions of current condition of ill-being were based in large part on surveillance video that the doctor reviewed prior to the deposition. This video was not reviewed at the time of the deposition and was not provided to Respondent until the date of trial. (RX 4).

The deposition of Petitioner's treating physician, Dr. Sean Salehi, was taken on November 12, 2013. Dr. Salehi testified that Petitioner had a disk herniation at L5-S1 and stenosis at the L4-L5 level. He testified that the herniation was causing radiculopathy. Dr. Salehi testified that Petitioner's symptoms were related to his work accident of December 21, 2014 and recommended a lumbar fusion surgery, as all conservative treatment options had been exhausted. Dr. Salehi testified that if Petitioner was lifting boards for approximately ten to twenty minutes, while taking pain medication, this would not change his opinion on the need for further treatment and surgery. (PX 11).

The deposition of Respondent's Independent Medical Examiner, Dr. Martin Herman, was taken on December 10, 2013. Dr. Herman testified that he performed a breakaway strength test based on a concern Petitioner was feigning weakness and when "coached," Petitioner was able to perform with normal strength. Additionally, the doctor testified at the deposition that he performed an axial loading test on Petitioner's head, which induced low back pain, however, Dr. Herman admitted that this finding was not included in his IME report that was published to both the Petitioner and Respondent. Dr. Herman testified that he saw surveillance video from May 10, 2013 of Petitioner "loading" wood into a trailer for "a period of three to four minutes." This video was not reviewed at the time of the deposition and was not shared with Petitioner until the day of trial. Dr. Herman testified that there was a bulge at the L4-L5 level, rather than a herniation. Dr. Herman further testified that Petitioner was at Maximum Medical Improvement, did not require further treatment, and was "essentially malingering." The doctor admitted that he based his opinions off of the Waddell test and the video surveillance. Herman opined that Petitioner would not be at MMI until a Functional Capacity Evaluation was performed to determine the level at which Petitioner might be able to work. On cross-examination, Dr. Herman testified that "it is possible" that the degenerative condition was aggravated by the work accident and that aggravation might be keeping him from returning to work full duty. (RX 3).

The evidence deposition of Petitioner's treating physician, Dr. Neil Allen, was taken on December 23, 2013. Dr. Allen testified that the myriad symptoms Petitioner presented with and had been treated for, prior to Dr. Allen's care, were consistent with a concussion. Dr. Allen testified that he performed the Montreal Cognitive test, which is designed specifically for patients with concussions. Dr. Allen testified that Dr. Glantz had not performed such a test. Dr. Allen testified that Petitioner had a mild level of impairment based on the results of the Montreal test. Dr. Allen recommended neuropsychological testing and that Petitioner was not able to perform his job duties as a truck driver with his level of impairment. Dr. Allen testified that if petitioner was on sufficient pain medication, he could perform work consistent with what was reported in Dr. Herman and Dr. Glantz' IME reports, as Dr. Allen did not view the surveillance video from May 10, 2013. Dr. Allen's further testified that Petitioner's current condition was related to the work accident of December 21, 2012. (PX 6).

Petitioner testified at trial that on May 10, 2013, his wife brought home a trailer with a few pieces of lumber in it. Petitioner was "feeling less of a man and pretty rotten" about himself. (TX at 21). Petitioner testified that he went outside to "move a few boards off that trailer and lay them down right next to it." To prepare for this activity, Petitioner testified that he took a "handful" of pain pills that morning, more than the recommended dosage. Petitioner further testified that he took the medicine early enough so that by the time he went to his doctor's appointment, the medicine had worn off, and he could accurately describe his pain for the doctor. (Id. at 22).

At trial, Petitioner testified that he never received treatment for pain to his back, neck or head prior to his work accident. He testified that he is receiving Social Security Disability benefits. Petitioner further testified that he has extreme anxiety, noise in his ears, back pain, and headaches. These symptoms have prevented him from enjoying the company of family and friends, as well as activities like boating, camping, gardening, and maintaining a swimming pool. Petitioner testified that he mows his lawn, although he does not do it as often, or as well as he should. Since his divorce, Petitioner testified that he does his own laundry and cooking because he is on his own. He may put off doing laundry, and gets confused while grocery shopping for himself. (TX at 66, 67)
Petitioner testified that his wife filed for divorce in early 2014. He testified that their marriage of thirty years ended because their quality of life suffered and Petitioner's mood swings and anxiety were intolerable.

At trial, Petitioner had one witness, his ex-wife, Dala Sauls. Dala testified that she accompanied Petitioner to nearly all of his doctor appointments after the work accident. Her undisputed testimony was that prior to the work accident, Petitioner had never been treated by a physician for the facial droop, and his facial features in relation to the droop were different after the accident, not merely more pronounced. Dala further testified that she had not contemplated divorcing Petitioner before the accident. However, her testimony was that after the accident Petitioner's demeanor changed. There were mood swings, loss of home, and loss of social life that led her end their 30 year marriage. She testified that Petitioner could not be in large groups of over 3 to 4 people, as the noise would aggravate Petitioner. She testified that Petitioner was unable to perform sexually after the work accident. (Testimony of Dala Sauls at 69, 70, 75, 76).
At trial, Respondents had three witnesses: Tim Dillow, Joe McKay, and Brian Lukasiewicz. All three were field investigators for Sedgwick Factual Photo who conducted surveillance of Petitioner.
Mr. Dillow conducted surveillance on August 21, 2014 and testified that on that date he recorded six minutes of Petitioner leaving his home on bicycle. Mr. Dillow testified that he remained at Petitioner's residence and thirty-five minutes late, Petitioner returned home on bicycle. On cross-examination, Mr. Dillow testified that he mailed in the raw video footage to an address on a pre-labeled Fed-Ex package and had never spoke with the team that handles the editing of the CD. Mr. Dillow testified he conducted surveillance for eight hours on August 21, 2014 and only had six full minutes of footage from those eight hours. (Testimony of Tim Dillow at 80, 91)

Mr. McKay conducted surveillance over four days in July 2013. He testified that he viewed Petitioner out in his yard, not wearing a brace and performing activities such as getting the mail and walking in his front yard. Mr. McKay testified that Petitioner bent at the waist once. Review of the surveillance footage reveals that over July 9, 10, and 11, 2013, Mr. McKay recorded roughly five minutes of activity over twenty-three hours of surveillance.

16IWCC0049

Mr. McKay also conducted surveillance on August 21, 2014. Mr. McKay testified that he was alerted to Petitioner's bicycle activity and "picked up the trail" from Mr. Dillow. On cross-examination, it was Mr. McKay's testimony that Petitioner biked 3 miles round-trip, with stops at the post office and grocery store in 38 minutes. (Testimony of Joe McKay at 131) Mr. McKay testified that the video was the complete amount of footage he shot, but could not remember how many segments he shot on August 21, 2014. On cross-examination, Mr. McKay further testified that he had no way of knowing that the correct number of video segments was returned on the disc viewed in court from the raw footage he sent in.

Mr. Lukasiewicz conducted surveillance in May 2013, including May 10, 2013. Mr. Lukasiewicz testified that he conducted surveillance over four days – May 2, 3, 10, and 11 – for a total of thirty-five hours. Over the course of the thirty-five hours, the footage was stopped and started every hour on the hour, unless Petitioner's activity was observed. Over the course of thirty-five hours, less than ten minutes of Petitioner's activity was recorded. The activities included Petitioner getting the mail, taking out the garbage, and driving. On May 10, 2013, he recorded four minutes of Petitioner removing wood from a trailer. It was not four concurrent minutes, but three segments of video totaling 4 minutes. Petitioner is seen taking repeated breaks after lifting wood. Mr. Lukasiewicz testified that on May 10, 2013 he observed Petitioner remove wood from the trailer, enter his garage, and use a power tool. All of this activity was over the course of approximately four minutes.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. In support of this finding, the Arbitrator relies on the Petitioner's credible testimony and the supporting medical evidence from his treating physicians. The Arbitrator acknowledges the video evidence depicting the Petitioner performing a number of physical activities, but notes that this evidence was not sufficient to show a break in the chain of causation between Petitioner's undisputed accident and his current condition of ill-being. In the video where Petitioner is picking up wood, he is only seen doing this for less than four minutes and the wood does not appear that heavy. As for the video of Petitioner riding his bicycle, the arbitrator notes that the Petitioner did not appear to be riding very fast and sat in an upright position while riding slowly through town. The Arbitrator also finds persuasive the opinions of Petitioner's treating physicians with regard to this issue. These records show that the Petitioner was diagnosed with a brain injury, a lumbar spine injury and the aggravation of a pre-existing hernia. Based on a review of the medical evidence and the Petitioner's uncontroverted testimony, the Arbitrator concludes that these conditions are related to the Petitioner's December 21, 2012 work accident.

2. Based on the Arbitrator's findings with regard to the issue of causation, the Arbitrator finds that the Petitioner is entitled to temporary total disability from the date of his initial medical appointment on December 22, 2012 through the date of the arbitration hearing. Accordingly, the Arbitrator awards the Petitioner TTD commencing December 22, 2012 through September 23, 2014, a period of 91-4/7 weeks, as provided in Section 8(b) of the Act. Respondent shall receive a credit for any TTD or disability benefits it has paid thus far.

3. Based on the Arbitrator's findings with regard to the issue of causation, the Arbitrator finds that the Petitioner's medical treatment thus far has been reasonable and necessary to address his conditions stemming from his work related injury. Accordingly, the Arbitrator award the Petitioner all related medical expenses as set forth in the arbitration exhibits and Respondent shall pay the same, subject to the fee schedule in accordance with Sections 8(a) and 8.2 of the Act. Respondent shall receive a credit for

any expenses that it has paid to date . Respondent shall also authorize the prospective medical care recommended by Petitioner's treating physicians, relating to the Petitioner's work injuries. This includes further cognitive testing and lumbar surgery.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD COLUZZI,

Petitioner,

16IWCC0097

vs. NO: 13 WC 12376

TREMCO, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, temporary total disability, prospective medical, vocational rehabilitation, and penalties and fees, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner appealed the May 4, 2015 19(b) Decision of Arbitrator Steffen finding that Petitioner, a 59 year-old roofer, sustained accidental injuries arising out of and in the course of his employment on October 31, 2012, that Petitioner provided timely notice of the accident, that Petitioner's current condition of ill-being is not causally related to the accident, that Petitioner was temporarily totally disabled for a period of 22-6/7 weeks, from November 1, 2012 through April 9, 2013, at the rate of $637.99 per week under Section 8(b), that Respondent is entitled to a credit of $10,532.39 for temporary total disability benefits paid, that Petitioner's request for

penalties and attorney fees is denied, and that Petitioner's request for an award of prospective medical in the form of a lumbar fusion, and vocational rehabilitation, is denied.

Based upon a review of the record as a whole, the Commission modifies the Arbitrator's Decision to find that Petitioner is entitled to vocational rehabilitation and maintenance under Section 8(a) of the Act. Section 8(a) of the Act provides that the employer shall "pay for treatment, instruction, and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." (820 ILCS 305/8(a) (West 1992).

The Commission affirms the Arbitrator's finding that Petitioner reached maximum medical improvement on April 9, 2013 based upon the reasoning stated therein, namely the more persuasive testimony of Dr. Troy, Respondent's Section 12 examiner, and the treating records of Dr. Salehi. However, on March 15, 2013, Dr. Salehi, Petitioner's treating neurosurgeon, recommended Petitioner undergo a Functional Capacity Evaluation ("FCE"), and stated that Petitioner would be released to return to work based upon the results of the FCE. (PX2). On March 25, 2013 FCE, Petitioner underwent the FCE which placed him at the light physical demand level, and noted that he failed to meet the physical demand level required of a roofer. (PX4).

Based upon the results of the FCE and Dr. Salehi's recommendation that Petitioner be released to return to work pursuant to those restrictions, the Commission concludes Petitioner is unable to return to his prior occupation. The record is void of any evidence that Petitioner was ever contacted by his employer regarding a return to work within his March 25, 2013 restrictions set out in the FCE, which clearly indicate Petitioner is unable to return to his prior job with Respondent as a roofer. In addition, vocational rehabilitation was never initiated. Accordingly, the Commission finds Petitioner is entitled to an award of maintenance benefits for the period of April 10, 2013 through the date of hearing, March 4, 2015, at the rate of $637.99 per week, and is entitled to vocational rehabilitation.

Based upon the Petitioner's inability to resume his regular work duties in which he was engaged at the time of his injury, the Respondent, in consultation with the Petitioner and Petitioner's attorney, shall prepare a written assessment of the course of medical care and rehabilitation required to return the Petitioner to employment, as mandated by Section 7110.10 of the Rules and pursuant to Section 8(a) of the Act.

With regard to the issue of prospective medical treatment, the Commission affirms the Arbitrator's denial of an award for the low back surgery contemplated by Dr. Lorenz and Dr. Slack, based upon the treatment notes of Dr. Salehi, the opinions of Dr. Troy, as well as the November 7, 2013 and December 3, 2013 office visit notes of Dr. Lorenz, which clearly indicate Petitioner did not wish to proceed with the lumbar surgery proposed at that time. (PX5).

Following his October 31, 2012 work injury, Petitioner sought treatment with Concentra Occupational Health, was diagnosed with a lumbar strain, and began a course of conservative care consisting of physical therapy, pain and anti-inflammatory medication, and restricted duty. Petitioner began a course of physical therapy on November 7, 2012, and underwent 33 sessions of physical therapy through February 28, 2013. On December 21, 2012, Petitioner began treating with Dr. Salehi, a neurosurgeon. Dr. Salehi diagnosed lumbar degenerative disc disease, recommended continued physical therapy and one to two epidural steroid injections at L5-S1, as well as light duty. At the time of his February 28, 2013 physical therapy visit Petitioner reported pain of 2 on a scale of 1 to 10. On January 18, 2013, Dr. Salehi noted Petitioner had undergone the epidural steroid injection and reported reduced right-sided radicular pain, but subsequent left sided low back pain. At the time of Petitioner's March 1, 2013 office visit with Dr. Salehi he complained of low back pain across his back and down into his right buttock, rated as 1 on scale of 1 to 10, and that went up to 1.5 when leaning backwards or putting pressure on his right leg or when pushing a 50 pound sled in physical therapy. Petitioner described his pain as an "annoying ache." Dr. Salehi noted that Petitioner's symptoms had improved secondary to his lumbar degenerative disc disease at L5-S1 and foraminal stenosis at L5-S1, that Petitioner rated his pain as 1 on scale of 1 to 10, and that because Petitioner's pain was no longer significant he did not require an additional epidural steroid injection.

Dr. Salehi recommended a 2 to 4 week course of work conditioning, 5 times per week, followed by a FCE to determine if permanent restrictions would be required. At the time of Petitioner's follow up visit with Dr. Salehi on March 15, 2013 he reported that following one session of work conditioning about 10 days ago, he felt sharp pain in his low back, with pain of 4 on scale of 1 to 10. Dr. Salehi examined Petitioner, diagnosed lumbar degenerative disc disease and lumbar spondylosis at L5-S1, and opined that Petitioner had sustained an exacerbation of his lumbosacral spondylsosis during work conditioning. He recommend that Petitioner discontinue additional work conditioning, that he proceed with the FCE, that he follow-up afterwards for a release based on the FCE if a valid evaluation, and that Petitioner continue light duty work and his medications. (PX3). Petitioner subsequently underwent a FCE on March 25, 2013, which indicated he did not demonstrate the ability to return to work as a roofer, as he was functioning at the light physical demand level. (PX4). The Commission notes the record is void of any surgery recommendation from Dr. Salehi subsequent to the March 25, 2013 FCE.

Petitioner subsequently underwent as Section 12 examination with Dr. Troy, on April 9, 2013. Dr. Troy testified that Petitioner sustained an exacerbation of pre-existing degenerative changes to his lumbar spine, that he underwent appropriate treatment with epidural steroid injections and physical therapy, and that he required no addition treatment or testing. (RX1, T9-12, 14-15). Dr. Troy testified that Petitioner sustained a lumbar strain, that had resolved, and that presently Petitioner has subjective symptomatology secondary to a pre-existing, longstanding, degenerative disc disease at L5-S1. (RX1, T12-17).

The Commission is also persuaded by the November 7, 2013 and December 3, 2013 office visit notes of Dr. Lorenz, both of which clearly document that Petitioner did not wish to

proceed with the lumbar surgery proposed by the doctor at that time. At the time of Petitioner's November 7, 2013 office visit, Dr. Lorenz recommended an FCE, and recorded: "The patient, at this point in time, has decided that he was not going to contemplate surgical intervention, which is absolutely fine." At the time of Petitioner's December 3, 2013 office visit, Dr. Lorenz recorded: "He does not want surgery at this time. He will continue to follow with pain management. He is given a work note with restrictions based on the FCE. He will return p.r.n." (PX5).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 4, 2015, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $637.99 per week for a period of 22-6/7 weeks, 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, in consultation with Petitioner and Petitioner's attorney, shall prepare a written assessment of the course of medical care and rehabilitation required to return the Petitioner to employment, as mandated by Section 7110.10 of the Rules and pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay maintenance benefits for the period of April 10, 2013 through March 4, 2015, the date of hearing, at the rate of $637.99 per week under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for vocational rehabilitation pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for medical expenses, itemized in AX1, for medical treatment incurred after April 2013 under §8(a) of the Act is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for prospective medical care in the form of lumbar surgery under §8(a) of the Act is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for an award of penalties and fees under Sections 19(k), 19(l) and 16 is denied.

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 $67,400.00. 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.

DATED: FEB 3 - 2016
KWL/kmt
O-12/07/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0097

COLUZZI SR, RICHARD
Employee/Petitioner

Case# 13WC012376

TREMCO INC
Employer/Respondent

On 5/4/2015, 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 0.09% 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:

0274 HORWITZ HORWITZ & ASSOC
MARK WEISSBURG
24 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0445 RODDY LAW LTD
JOHN MAGIERA
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

STATE OF ILLINOIS)

)SS.

COUNTY OF Cook)

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

☐ Rate Adjustment Fund (§8(g))

☐ Second Injury Fund (§8(e)18)

☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

19(b)

16IWCC0097

Richard Coluzzi, Sr.

Case # 13 WC 12376

Employee/Petitioner

v.

Consolidated cases: n/a

Tremco 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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **3/4/15**. 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. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☐ TTD

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☒ Is Respondent due any credit?

O. ☐ Other

FINDINGS

On the date of accident, **10/31/12,** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**47,834.93**; the average weekly wage was $**956.99**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**10,532.39** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**10,532.39**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $637.99/week for weeks, commencing 11/1/2012 through 4/9/13, as provided in Section 8(b) of the Act.

Respondent shall receive credit for TTD payment made to date.

Penalties

Request for Penalties is declined.

Medical benefits

Petitioner's medical care from October 31, 2012 relating to the treatment for his back is found to be reasonable and necessary. Petitioner does not seek payment of those bills. The medical bills that are requested by the Petitioner and attached as an exhibit to AX1 are denied.

Request for prospective care in the form of back surgery and request for vocational rehabilitation is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Kelli Steffen — Signature of Arbitrator

5/4/15 — Date

ICArbDec19(b)

MAY 4 – 2015

FACTUAL HISTORY

Petitioner, Richard Caluzzi Sr., was 59 years old at the time of his injury. He had worked as a roofer for over 40 years. He testified that he was working as a roofer for his employer, Respondent Tremco Incorporated, on October 31, 2012 and was injured on the job. He stated that he was attempting to install was attempting to use a 4 foot length of pipe to pry a duct and felt pain in his back.

On October 31, 2012 Petitioner consulted with Dr. Charlotte Albinson at Concentra Medical Center. Petitioner was diagnosed with a lumbar strain and Dr. Albinson noted a history of prior cervical spine injury form the late 70's. Petitioner was released with restrictions and pain medication and went back to work within his restrictions. Subsequently Petitioner was sent for physical therapy and reported that his symptoms were improving.

A few days following that, Petitioner's wife filled out an accident report for him.

On December 21, 2012 Petitioner had a consultation with neurosurgeon Dr. Sean Salehi. Petitioner reported shooting pain with tingling and pain in his groin area. Dr. Salehi diagnosed him with lumbar degenerative disk disease and stated that his mechanical pain and right radicular pain was secondary to his degenerative condition. He prescribed physical therapy and steroid injections.

At a follow up appointment on March 1, 2013, Dr. Salehi, noted that the Petitioner's pain on that date was only 1/10. Petitioner described his condition as an "annoying ache". Dr. Salehi diagnosed lumbar degenerative disc disease and lumbosacral spondylosis and noted that the Petitioner's pain complaints were "not significant". Dr. Salehi did not believe that the Petitioner required another epidural steroid injection, and he suggested an FCE.

The physical therapy notes from Concentra indicate that Petitioner had undergone 33 sessions and stated that his pain was a 2/10. Petitioner started work conditioning at NovaCare Rehabilitation in March, 2013 but cancelled after the 1st session due to pain. In March, 2013 Petitioner also underwent a FCE at NovaCare which showed that Petitioner was unable to continue heavy physical demand work as a roofer.

On April 9, 2013 Petitioner underwent an IME with Dr. Daniel Troy. Dr. Troy reviewed his prior medical history with included chronic bilateral shoulder pain followed by surgical intervention.

Dr. Troy also reviewed Dr. Salehi's report from March 1, 2013 noted his findings in his report dated April 9, 2013 (RX2) In Dr. Troy's opinion the Petitioner had returned back to his pain free status and had, at that time, returned to "baseline". Dr. Troy was of the further opinion that the Petitioner was at MMI as of March 1, 2013.

At his deposition (RX1), Dr. Troy testified that when he examined the Petitioner, there were no objective findings, only subjectively-based complaints. (RX1 at Page 8). Further, he

testified that the Petitioner's MRI disclosed end-stage degenerative changes at L5-S1, and that there were no acute traumatic findings. (PX1 Pages 8-9).

Dr. Troy also testified that the Petitioner had suffered an exacerbation of his pre-existing degenerative changes to his lumbar spine (RX1 at Page 9). Dr. Troy, based on the Petitioner's MRI films, thought that the Petitioner "most probably had a high probability of having pain prior to his injury because of his profound pre-existing degenerative changes at the L5-S1 disc space. (RX1 at Pages 10-11).

Dr. Troy further testified that, in his opinion, the Petitioner was able to return to full time full duty work as of March 1, 2013. (RX1 at Page 11). Dr. Troy also testified that the Petitioner, following the accident, was treated appropriately with physical therapy and an epidural steroid injection, and that he was returned to his pre-injury level as of the March 2013 visit with Dr. Salehi (RX1 at Page 12).

Dr. Troy further testified that the Petitioner had suffered an injury to his back in the accident, but that there was no way to prove whether it was just a strain or if it was an exacerbation of pre-existing degenerative changes. He further testified that the Petitioner had subjectively-based pain after the back injury, that Petitioner was treated appropriately and aggressively with physical therapy and epidural steroid injection, and that as of March 2013, Petitioner had returned back to his pre-injury status. (RX1 at Pages 20-21).

Petitioner was examined by Dr. Mark Lorenz who diagnosed his with degenerative disc disease that was aggravated by the lifting work accident.

Petitioner also went to a pain management specialist in May, 2013 who opined that he cannot return to work as foremen and noted a reported pain level of 2/10.

Petitioner continued to treat with steroid injection and medication.

In July, 2013 he underwent a discogram procedure with Dr. Anas Alzoobi at the L3-L4, L4-L5 and L5-S1 level. The discogram revealed mild bulge, narrowing of the right neural foraman and some stenosis.

On a follow-up visit at Hinsdale Orthopaedics, Dr. Monica Strand noted that the extension of the lumbar spine is causing the right leg pain. She recommended surgery at the L5-S1 but wanted to see the report from the discogram to make a recommendation regarding the L4-5 level.

Petitioner underwent a MRI at Chicago Ridge Radiology which showed mild to moderate stenosis at the L3-L4, L4-L5 and L5-S1 level.

On February 3, 2014 Petitioner was examined by Dr. Charles Slack of the Illinois Bone and Joint Institute. His assessment and findings are as follow:

Assessment: He has a persistent symptomatic aggravation of his degenerative lumbar disc disease at the L5-S1 level. It appears that he was asymptomatic prior to his incident on the job of 10/31/2012 and subsequent at that time, his preexistent DDD became symptomatic and has continued to cause pain and limitation of his activity without any pain free intervals since that time up into the present.

Plan: At this point he has exhausted conservative treatment options but has ongoing pain response. Consider for lumbar spine surgery for nerve decompression and instrumented fusion at the L5-S1 level in attempt to stabilize that level and attempt to decrease his pain and upward his functional abilities. The treatment he has had to date has been reasonable and necessary for his condition and has been related to the incident on the job of 10/31/2012. He is a good candidate.

Following the surgical recommendation Petitioner also continued on going treatment for pain management.

Petitioner is seeking prospective medical care in the form of spine surgery per the recommendation of his physicians. Petitioner has also requested vocational rehabilitation.

FINDINGS/ANALYSIS

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 THE FOLLOWING:

The Petitioner testified that he was working for the Respondent as a roofer on the day of his accident. He testified that he hurt his back when while using a pipe to raise up ductwork on a roof. He sought treatment at Concentra and the medical reports corroborate the accident. Petitioner's wife also filled out an accident report for him to document the accident. In light of the above, the Arbitrator finds that the Petitioner sustained an accident arising out of and in the course of his employment with the Respondent on October 31, 2012.

WITH RESPECT TO "F", IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

The medical records and evidence from Concentra Occupational Health (PX2), Rush Oak Park Hospital (PX3), and Nova Care (PX4) support both the Petitioner's underlying degenerative low back condition, but also an aggravation of that underlying condition in the accident of October 31, 2012. However there is no acute injury and Petitioner received extensive and appropriate treatment to alleviate his sprain/aggravation. In fact, Petitioner received 33 physical therapy sessions, medication, and a steroid injection and reported a marked improvement in his condition. On March 1, 2013, Dr. Salehi noted that the Petitioner's pain on that date was only 1/10.

To give some perspective to the matter, Petitioner was 59 years old at the time of the accident. He had been in a heavy duty physical laborer for most, if not all, of his working life. The documentation of a severe chronic degeneration of his spine is well documented as is his

prior back injury from a fall. Petitioner's body is showing signs of his long and distinguished but labor heavy work life. He had prior surgeries in his right shoulder, left shoulder and his left elbow (2003-2005). His medical condition in this regards was chronic.

Based on this reasoning as well as a review of the medical evidence the Arbitrator finds that Petitioner's current condition is not causally connected to his work accident. The Arbitrator finds that Petitioner did suffer a temporary aggravation of his symptoms but that his condition had returned to the baseline on or about the IME exam by Dr. Troy on April 9, 2013

The Petitioner claims that his condition did not return to baseline but rather progressed as a result of the accident to the point where there are now surgical recommendations from Petitioner's doctors, Dr. Slack and Dr. Lorenz. The Arbitrator disagrees and notes as follows:

The March 1, 2013 report of neurosurgeon, Dr. Salehi, lists Petitioner's pain on that date as 1/10 and notes that Petitioner described his own pain as an "annoying ache". Dr. Salehi diagnosed lumbar degenerative disc disease and lumbosacral spondylosis and noted that the Petitioner's pain complaints were "not significant". Dr. Salehi did not believe that the Petitioner required another epidural steroid injection, and he suggested an FCE.

Respondent's IME doctor, Dr. Troy, per his report dated April 9, 2013 (RX2) read Dr. Salehi's report from March 1, 2013, and determined that the Petitioner was, in Dr. Troy's opinion, returned back to his pain free status and had, at that time, returned to "baseline". Dr. Troy was of the further opinion that the Petitioner was at MMI as of March 1, 2013.

At his deposition (RX1), Dr. Troy, a board certified spinal surgeon, testified that when he examined the Petitioner, there were no objective findings, only subjectively-based complaints. (RX1 at Page 8). Further, he testified that the Petitioner's MRI disclosed end-stage degenerative changes at L5-S1, and that there were no acute traumatic findings. (PX1 Pages 8-9).

Dr. Troy also testified that the Petitioner had suffered an exacerbation of his pre-existing degenerative changes to his lumbar spine (RX1 at Page 9). Dr. Troy, based on the Petitioner's MRI films, thought that the Petitioner "most probably had a high probability of having pain prior to his injury because of his profound pre-existing degenerative changes at the L5-S1 disc space. (RX1 at Pages 10-11).

Dr. Troy further testified that, in his opinion, the Petitioner was able to return to full time full duty work as of March 1, 2013. (RX1 at Page 11). Dr. Troy also testified that the Petitioner, following the accident, was treated appropriately with physical therapy and an epidural steroid injection, and that he was returned to his pre-injury level as of the March 1, (15?) 2013 visit with Dr. Salehi (RX1 at Page 12).

Dr. Troy further testified that the Petitioner had suffered an injury to his back in the accident, but that there was no way to prove whether it was just a strain or if it was an exacerbation of pre-existing degenerative changes. He further testified that the Petitioner had subjectively-based pain after the back injury that Petitioner was treated appropriately and

aggressively with physical therapy and epidural steroid injection, and that as of March 2013, Petitioner had returned back to his pre-injury status. (RX1 at Pages 20-21).

Following Petitioner's examination by Dr. Troy on April 9, 2013, Petitioner for the first time began treating with his doctors including Dr. Lorenz, Dr. Watson (pain doctor), and ultimately was examined by his Dr. Slack.

The Arbitrator adopts the opinions of Dr. Troy, and finds that the accident caused a temporary exacerbation of the Petitioner's severe pre-existing and underlying degenerative disc disease at L5-S1, and /or that the Petitioner sustained strain injuries in the accident aggravating his underlying degenerative condition, but that that condition had returned to baseline as of March 1, 2013. The Arbitrator finds that the Petitioner did not require further medical treatment or testing in regards to his work accident following Dr. Troy's examination of April 9, 2013. The Arbitrator further finds that the Petitioner was at MMI as of the date of the Dr. Troy exam of April 9, 2013.

WITH RESPECT TO "L" RELATING TO TEMPORARY TOTAL DISABLITY PAYMENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner is requesting temporary total disability benefits of $637.99/week for 122 weeks, commencing 11/1/2012 through 3/4/15, the date of trial, as provided in Section 8(b) of the Act.

Based on the Arbitrator's finding regarding causal connection, the Arbitrator finds that Petitioner was at MMI as of the date of the Dr. Troy exam of April 9, 2013. The Arbitrator is persuaded by Dr. Troy's opinion and finds that the Petitioner was no longer disabled from working due to his work accident as of that day.

Therefore, the Arbitrator declines to award the requested TTD from 11/1/12 through 3/4/15 due to restrictions related to his work accident.

WITH RESPECT TO "M" SHOULD PENALTIES OR FEES BE IMPOSED ON RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Respondent paid $10,532.39 in TTD (RX3), representing 23 weeks of TTD based upon a presumed average weekly wage of $686.90 and a TTD rate of $457.93.

Prior to trial, the parties had agreed that the more proper average weekly wage was $956.99, based upon copies of actual paycheck stubs provided by Petitioner's attorney to attorney for Respondent. Although the Petitioner did not waive or compromise his request for penalties based on this reassessment, both attorneys stated this agreement on the record.

The Arbitrator declines to award penalties based on what clearly was an underpayment of TTD for the initial 23 week period, as the underpayment was apparently inadvertent and based upon the complexities of the manner in which the Petitioner was actually paid by the employer.

Given the Arbitrator's finding with respect to causal connection, as above, Respondent certainly had a good-faith basis to rely upon the opinions of its IME doctor, Dr. Troy, as evidenced in his report and deposition, with respect to claimed TTD and need for future medical after the date of Dr. Troy's examination on April 9, 2013.

Ketki Steffen 5/4/15

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronele DeGroot,

Petitioner,

vs. NO: 13 WC 16104

O'Reilly Auto Parts,

16IWCC0090

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, both incurred and prospective, temporary total disability and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Petitioner sustained a compensable injury to her right leg on December 12, 2012. That injury is being litigated in case number 13 WC 16105. Petitioner alleges that on March 29, 2013, while getting physical therapy on that right knee, she noticed significant immediate pain in her left knee while performing a stool exercise. (Transcript Pgs. 37-40)

The records of Kewanee Physical Therapy do not mention any left knee pain at the March 29, 2013 visit. There is no mention as to the type of exercises performed on that date. John Debord, the certified athletic trainer of Kewanee therapy, prepared a letter on August 22, 2013. He prepared this letter because he was asked to clarify what happened to Petitioner's left knee. He admitted that Petitioner was not in his constant vision during her visits and that Mr. Boss was the individual who directly worked with Petitioner. (Petitioner Exhibit 11 Pgs. 13-16) He testified that he "remembers" speaking with Petitioner on March 29, 2013 after he was informed of the Petitioner complaining of pain in her left knee. He spoke with her, felt that her complaints were a non-finding, and did not merit anything further.

He claimed that was why nothing was mentioned in that day's record. He further admitted that when he prepared the letter for his deposition, all he had was the Kewanee Physical Therapy notes.

The Commission finds the testimony of John Debord not credible or persuasive. The Petitioner mentioned nothing about significant immediate left knee pain on March 29, 2013. However, on April 1, 2013, Kewanee Physical Therapy note indicates Petitioner gave a history that she had really been sore over the weekend but mostly in her non-surgical knee. She stated that she did a lot of stair climbing on Saturday that may have aggravated it. Most importantly, there does not appear to be any history given of the exercises performed on Friday as being the cause of her left knee pain. It also does not appear that any treatment was provided for the left knee. (Petitioner Exhibit 8)

Dr. Stewart offered testimony of a causal connection between the Petitioner's stool exercise and the left knee pain, which began on March 29, 2013. However, Dr. Thomas assumed that the history presented to him was truthful and correct. (Petitioner Exhibit 10 Pg.5) Although he was aware that Petitioner made no complaints of left knee pain on March 29, 2013, he was not aware of the history given Kewanee Therapy on April 1, 2013. The only record he had following the March 29, 2013 date is the records from April 9, 2013. The Doctor admitted that it might or could change his opinion regarding causation if Petitioner made no mention of injuring her left knee on March 29, 2013 during the April 1, 2013 visit. (Petitioner Exhibit 10 Pgs. 20-22)

The Commission finds the Petitioner's and Mr. Debord's testimony lacking in credibility. The Commission finds the Kewanee Physical Therapy records to be credible and therefore reverses the Arbitrator's decision and finds that the Petitioner failed to prove that she sustained accidental injuries on March 29, 2013.

All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision finding that the Petitioner sustained accidental injuries arising out of and in the course of her employment on March 29, 2013 is reversed.

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.

16IWCC0090

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.

DATED: FEB 1 - 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 12/2/15
049

[illegible]

[illegible]

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION
CORRECTED

DeGROOT, RONELE
Employee/Petitioner

Case# **13WC016104**
13WC016105

O'REILLY AUTO PARTS
Employer/Respondent

16IWCC0090

On 4/20/2015, 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 0.10% 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:

0080 WINNE LAW OFFICE LLC
JOSEPH E WINNE
416 MAIN ST SUITE 300
PEORIA, IL 61602

2542 BRYCE DOWNEY & LENKOV LLC
EDWARD JORDAN
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
19(b)

Ronele DeGroot
Employee/Petitioner

v.

O'Reilly Auto Parts
Employer/Respondent

Case # **13** WC **16104**

Consolidated cases: **13 WC 16105**

16IWCC0090

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 27, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

16IWCC0090

FINDINGS

On the date of accident, **March 29, 2013**, 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 $**17,561.96**; the average weekly wage was $**337.73**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**4,056.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**4,056.66**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**253.00**/week for **80 2/7** weeks, commencing **July 15, 2013** through **January 27, 2015** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**4,056.66** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, as provided in Sections 8(a) and 8.2 of the Act and Respondent shall be given a credit for medical benefits that have been paid.

Respondent shall authorize and pay reasonable and necessary medical expenses associated with the left knee arthroscopic surgery prescribed for the Petitioner by Dr. Stewart, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Arbitrator Anthony C. Erbacci

April 10, 2015
Date

13 WC 16104
ICArbDec19(b)

APR 20 2015

16IWCC0090

FACTS:

The Petitioner filed two Applications for Adjustment of Claim and the matters were consolidated for hearing. Claim number 13 WC 16105 alleges an injury to the Petitioner's left ankle and right knee on December 12, 2012. Claim number 13 WC 16104 alleges an injury to the Petitioner's left knee on March 29, 2013. The matters are addressed by separate Arbitration Decisions.

On December 12, 2012 the Petitioner sustained undisputed accidental injuries arising out of and in the course of her employment with the Respondent. The Petitioner testified that she had delivered some parts to a customer and was exiting the customers building when she tripped on the threshold of the exit door and fell forward twisting her left ankle and striking her right shin and knee on the ground. The Petitioner reported her injury to the Respondent and sought medical treatment that same day at Kewanee Hospital.

The records of Kewanee Hospital demonstrate that the Petitioner was seen there on December 12, 2012. A history of the Petitioner's fall is noted as well as complaints regarding her left ankle, and her right shin and knee. X-rays of the Petitioner's left ankle and right knee were performed and were reported to reveal no acute fractures or dislocations, soft tissue swelling, and osteoarthritic changes. The Petitioner was diagnosed with a left ankle sprain and was prescribed an air cast and pain medication. The Petitioner was directed to follow up with her personal physician.

The Petitioner then sought treatment from Dr. Timothy Pratt on December 17, 2012. The Petitioner reported a history of her injury on December 12, 2012 and complained of continuing left ankle pain as well as pain, swelling, and bruising on her right leg from the knee downward to the middle of the lower leg. Dr. Pratt prescribed the Petitioner off work for the rest of the week. The Petitioner followed up with Dr. Pratt on January 11, 2013 and Dr. Pratt noted that the Petitioner's right knee continued to have some swelling, bruising, and soreness. Dr. Pratt returned the Petitioner to light duty work and prescribed an MRI of the Petitioner's right knee.

An MRI of the Petitioner's right knee was performed on January 17, 2013 and was reported to demonstrate diffuse tricompartmental chondromalacia with moderate to severe involvement of the patella and mild involvement of medial and lateral compartments, horizontal tear and mild lateral extrusion of the body of the lateral meniscus, and radial oblique tear of the posterior horn of the lateral meniscus near the meniscal root.

The Petitioner next presented to Dr. Mark Stewart on referral from Dr. Pratt. The Petitioner saw Dr. Pratt on February 12, 2013 and she reported a history of right knee pain since December 12, 2012 when she sprained her left ankle and fell on the right leg. Dr. Stewart's physical examination noted tenderness along the medial joint line of the right knee and a positive McMurray's test. Dr. Stewart indicated that the Petitioner's MRI was consistent with a medial meniscal tear of the right knee and he recommended that the Petitioner undergo an arthroscopy of the right knee.

The Petitioner testified that she returned to work with the Respondent on a light-duty basis beginning January 11, 2013 and that she continued to work in a light-duty capacity until undergoing right arthroscopic surgery with Dr. Stewart on March 14, 2013.

On March 14, 2013, Dr. Stewart performed a right knee arthroscopy with lateral meniscal tear debridement at Hammond-Henry Hospital. Dr. Stewart's postoperative diagnosis was lateral meniscal tear of the right knee. Post surgically, Dr. Stewart prescribed physical therapy 2-3 times a week for 4-6 weeks and on March 18, 2013 the Petitioner began a course of physical therapy at Kewanee Physical Therapy & Rehab Specialists. The Petitioner's physical therapy was performed by physical therapist Jon DeBord and student physical therapist, Miranda Boss.

The Petitioner testified that on March 29, 2013, she was at Kewanee Hospital Physical Therapy performing an exercise that required her to sit on a stool with four wheels and casters and use her heels and feet to slide her chair and body down and back across a room. The Petitioner testified that while she was performing that exercise, she felt pain in her left knee like she had never had before. She testified that she told the physical therapist about her pain and that the exercise was then stopped.

The Petitioner testified that the physical therapy incident occurred on a Friday, and she returned to therapy on a Monday. Petitioner testified that during the week-end following the physical therapy incident, her left knee felt unusual and she had trouble going up and down the stairs of her home. The Petitioner testified that both of her knees hurt, but her left knee was really bothering her. The Kewanee Hospital Physical Therapy records from March 29, 2013 note that the Petitioner reported that her knee was a little sore after last visit from the new exercises, but that she iced it a lot and it was feeling better.

The Petitioner testified that she informed her supervisor, Dave Allensworth, that she hurt her left knee in physical therapy. The Petitioner testified she may have also informed Jen Peed, the assistant Manager for Respondent, that she had hurt her left knee in physical therapy. The Petitioner testified that she continued with physical therapy with therapy concentrating on the left knee after March 29, 2013.

The April 10, 2014 deposition testimony of Jon DeBord was admitted into the record as Petitioner's Exhibit 11. Mr. DeBord testified that on March 29, 2013, the Petitioner was performing a stool walking exercise and reported pain in the posterior aspect of her left knee. Mr. DeBord testified that after the Petitioner complained of pain in the left knee, the exercise was stopped. Mr. DeBord testified that when the Petitioner presented for therapy again on April 1, 2013, she complained of soreness in her non-surgical left knee and reported that she had done more stair climbing over the weekend which she felt may have aggravated it as well. On April 5, 2013, the Petitioner followed up in physical therapy and reported an increase in soreness in her left knee that had been painful and sore since the prior Friday, March 29, 2013. Mr. DeBord testified that the Petitioner indicated to him that she felt that the stool walking performed on the 29th of March had cause the discomfort.

Mr. DeBord testified that it was his opinion that the mechanics of the Petitioner's December 12, 2012 injury were consistent with the findings that he saw in her right leg. Mr.

DeBord further opined that there was a direct relationship between the Petitioner's accident of December 12, 2012 and the right knee condition for which he treated the Petitioner. Mr. DeBord also opined that the mechanics of the Petitioner's March 29, 2013 injury in physical therapy were consistent with her left knee complaints. Mr. DeBord opined that the Petitioner's left knee condition was aggravated by the exercises of March 29, 2013.

On April 22, 2013 the Petitioner returned to Dr. Stewart and reported complaints of left knee pain since March 29, 2013. Dr. Stewart noted that the Petitioner reported that she was pulling herself on a stool across a carpet in physical therapy at Kewanee Hospital when she started developing left knee pain and that the pain was getting worse. The Petitioner was noted to have complaints of constant pain, swelling, weakness, and stiffness. Dr. Stewart's diagnosis was left knee pain and he recommended that the Petitioner remain off work. On May 8, 2013 Dr. Stewart noted tenderness along the medial joint of the Petitioner's left knee and a positive McMurray's test on the left side. Dr. Stewart recommended the Petitioner undergo an MRI of the left knee which was performed on June 25, 2013 and was reported to demonstrate a small partial radial tear of the posterior horn of the medial meniscus, moderate sized irregular radial tear in the anterior junction of the medial meniscus, full-thickness cartilage loss across the medial mid weight-bearing surface tibial plateau and femoral condyle, and moderate subjacent bone stress edema in the medial tibial plateau subjacent to the meniscus tear. The MRI was also noted to demonstrate moderate patellofemoral osteoarthritis.

The Petitioner followed up with Dr. Stewart on July 15, 2013 and reported continued complaints of pain in the left knee as well as some right knee pain in the frontal aspect. Dr. Stewart indicated that the Petitioner's left knee condition was consistent with a medial meniscal tear of the left knee and he recommended the Petitioner undergo a left knee arthroscopy. Dr. Stewart continued the Petitioner off work and the Petitioner testified that Dr. Stewart has not released her to return to work since that time.

The April 10, 2014 deposition testimony of Dr. Stewart was admitted into the record as Petitioner's Exhibit 10. Dr. Stewart opined that the Petitioner's December 12, 2012 accident caused the condition of ill-being in the Petitioner's right knee and the need for the surgery he performed on that knee. Dr. Stewart further opined that the Petitioner's physical therapy activities on March 29, 2013 caused the onset of the Petitioner's left knee condition and the need for the surgery he has prescribed for the Petitioner's left knee. Dr. Stewart testified that when he last saw the Petitioner on July 15, 2013 her right knee had healed but she was still in need of the left knee arthroscopy that he had prescribed for her.

At the request of the Respondent, the Petitioner was examined by Dr. Lawrence Lieber on July 22, 2013. Dr. Lieber authored a report summarizing his examination and findings relating to the Petitioner's December 12, 2012 and March 29, 2013 injuries and, after being provided with additional medical records, he authored an addendum report providing additional opinions relating to the causal relationship between Petitioner's bilateral knee conditions.

The August 21, 2014 deposition testimony of Dr. Lieber was admitted into the record as

Respondent's Exhibit 1. Dr. Lieber testified that the Petitioner's right knee complaints on July 22, 2013 included pain with ambulation and weakness, and she reported that she received no relief from the surgical intervention. Dr. Lieber testified that the Petitioner's right knee had tenderness about the medial and lateral joint line, a positive McMurray and Steinman test, and tenderness about the patellofemoral joint. Dr. Lieber testified that the Petitioner reported that her left knee bothered her with ambulation, stairs, and bending and that she had problems with her left knee giving way and being painful at night. Dr. Lieber noted decreased range of motion due to pain, tenderness to palpation over the medial and lateral joint line, a positive McMurray and Steinman test, and tenderness about the patellofemoral joint. Dr. Lieber indicated that the MRI of the Petitioner's left knee demonstrated evidence of a possible small partial radial tear in the posterior horn of the peripheral aspect of the medial meniscus with some patellofemoral degenerative change.

Dr. Lieber's assessment was status post arthroscopy, partial lateral meniscectomy, of the right knee and internal derangement of the left knee. Dr. Lieber opined that there was no causal relationship between the Petitioner's present complaints and the December 12, 2012 work injury, that the Petitioner had no evidence of any disability or functional impairment, and that the Petitioner was at maximum medical improvement in association with the December 12, 2012 injury and required no further treatment. Dr. Lieber opined that the need for the arthroscopic surgery that Dr. Stewart performed on the Petitioner's right knee, and the appropriate treatment afterward, up to July 22, 2013 was caused by the December 12, 2012 accident but that the Petitioner's present right knee complaints are related to pre-existing abnormalities that were neither caused, aggravated, nor related to the December 12, 2012 event and subsequent treatment.

Dr. Lieber testified that with regard to the Petitioner's left knee condition, he did not believe that the March 2013 therapy event placed significant force across the knee that would cause any symptomatic complaints or any pathology within the knee to warrant the symptoms and any further treatment. Dr. Lieber opined that under no circumstances could the mechanics of the Petitioner pulling herself across the carpet with her heels have caused the condition in her left knee that was diagnosed by Dr. Stewart and for which he recommended surgery.

On cross-examination, the Petitioner acknowledged that she did have pain in her right knee in October of 2010 while she was bowling. On October 6, 2010, the Petitioner was evaluated at Sheffield Family Medical Center where she was diagnosed with right popliteal pain, swelling, and a baker's cyst. Medical records from Perry Memorial Hospital demonstrate that the Petitioner underwent x-rays of her right knee on October 15, 2010 which were reported to demonstrate moderate osteoarthritis with narrowing of the patellofemoral joint. The Petitioner followed up with Sheffield Family Medical Center for her right knee pain on November 3, 2010. At that time, it was noted that the Petitioner might need an MRI if she did not get better and the Petitioner was prescribed a medrol dose pack. On December 9, 2010 the Petitioner followed up with Dr. Pratt of the Sheffield Medical Center complaining of left axillary/chest wall pain for the last 2 days with a history of hypertension and some diffuse arthralgias. There is no mention of right knee complaints in Dr. Pratt's December 9, 2010 record.

The Petitioner testified that she did not recall having had left knee problems prior to March 29, 2013. Medical records from Perry Memorial Hospital, however, indicate that on November 17, 2003, x-rays were obtained of the Petitioner's left knee and were reported to demonstrate moderate joint effusion, moderate degenerative changes, and no acute osseous abnormalities. An MRI of the Petitioner's left knee was also performed on November 17, 2003 and was reported to demonstrate evidence of moderate joint effusion, evidence of narrowing of both joint compartments, and no evidence of meniscal tear. The Petitioner testified that she was never placed on any restrictions after her left knee evaluation in November of 2003 and that she was never placed on any type of restrictions after her right knee evaluation in October of 2010. The Petitioner testified on cross-examination that she did not have left knee pain after her initial fall on December 12, 2012.

The Petitioner testified that currently she continues to have pain in both of her knees, as well as her hips and her back, and that she has difficulty walking on uneven ground. The Petitioner testified that she would like to avail herself of the left knee surgery prescribed for her by Dr. Stewart.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The Petitioner sustained an undisputed right knee injury which arose out of and in the course of her employment with the Respondent on December 12, 2012. That injury is the subject of the Arbitrator's Decision issued in case number 13 WC 16105. The Petitioner treated initially for that injury with Dr. Pratt who ordered an MRI and referred the Petitioner to Dr. Stewart. Dr. Stewart diagnosed the Petitioner as having a meniscal tear and he performed a right knee arthroscopy on March 14, 2013. Dr. Stewart's postoperative diagnosis was lateral meniscal tear of the right knee. Post surgically, the Petitioner underwent a course of physical therapy at Kewanee Physical Therapy & Rehab Specialists.

The Petitioner testified that on March 29, 2013, while she was undergoing post-surgical physical therapy for her right knee, she was performing an exercise that required her to pull herself across a carpeted floor while she was seated on a wheeled stool. The Petitioner testified that while she was performing that stool walking exercise she experienced an onset of pain in her left knee. The Petitioner testified that she advised the physical therapist and the exercise was stopped. The Petitioner also testified that she told her boss, Dave Allensworth, of the physical therapy incident. The Petitioner testified that she did not recall exactly when she notified Dave Allensworth of the incident but she thought it was sometime in the week following the incident.

The Petitioner returned to physical therapy on April 1, 2013 and it was noted that the Petitioner reported that she was sore in her "nonsurgical" knee. The April 5, 2013 record from Kewanee Physical Therapy indicates that the Petitioner reported that her knee had been extremely sore and painful since last Friday and that Petitioner recalled having discomfort with the stool walking exercise. The Petitioner underwent a Functional Progress Examination on April 9, 2013 which reported that she was able to return to work in light or medium duty.

The Petitioner saw Dr. Stewart on April 22, 2013 and complained of left knee pain since pulling herself on a stool in physical therapy on March 29, 2013 Dr. Stewart diagnosed the Petitioner with left knee pes anserine bursitits and restricted her from work activities. Dr. Stewart recommended additional physical therapy and a left knee x-ray. Petitioner testified that she continued to have right and left knee pain during physical therapy but that the focus of her physical therapy shifted to her left knee. The Petitioner's left knee x-ray on April 22, 2013 was reported to show tri-compartamental osetoarhritis. Dr. Stewart then recommended a left knee MRI which was performed on June 25, 2013 and was reported to demonstrate a small partial radius tear of the medial meniscus, osteoarthritis and a large joint effusion.

On July 15, 2013 the Petitioner returned to Dr. Stewart who diagnosed Petitioner with a left knee medial meniscus tear and recommended left knee surgery and work restrictions. The Petitioner testified that she has not seen Dr. Stewart since July 15, 2013 and that she has not had the prescribed left knee surgery. The Petitioner testified that she continues to have right and left knee pain and that that Dr. Stewart has not released her to return to work.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that on March 29, 3013 an accident did occur which arose out of and in the course of the Petitioner's employment with the Respondent. The Arbitrator further finds that timely notice of the injury was provided to the Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner's current condition of ill-being in her left knee is causally related to the accident of March 29, 2013. In so finding, the Arbitrator notes the Petitioner's testimony as to a lack of left knee complaints prior to the physical therapy incident and the corroborative testimony of Petitioner's treating doctor, Dr. Stewart, and Petitioner's physical therapist, Jon DeBord.

Dr. Stewart testified that the act of Petitioner using her heels to move across carpeting while in physical therapy caused the onset of Petitioner's pain and left knee condition. Dr. Stewart testified that his findings from his examination of Petitioner after both of Petitioner's injuries were consistent with the mechanics of the injury itself. Dr. Stewart testified that according to this record, it appears that Petitioner had an onset of pain while engaging in the stool walking physical therapy exercise. Dr. Stewart opined that the Petitioner's physical therapy activities on March 29, 2013 caused the onset of the Petitioner's left knee condition

and the need for the surgery he has prescribed for the Petitioner's left knee. Dr. Stewart testified that when he last saw the Petitioner on July 15, 2013 her right knee had healed but she was still in need of the left knee arthroscopy that he had prescribed for her. Dr. Stewart testified that if the Petitioner's left knee symptoms remained the same as they were in July of 2013, then he would recommend an arthroscopy of the left knee with a mensical tear debridement.

Physical therapist Jon DeBord testified that the Petitioner did not have any left knee problems or complaints prior to her incident in physical therapy on March 29, 2013. DeBord also testified that the mechanics of the Petitioner's March 29, 2013 injury in physical therapy were consistent with her left knee complaints. Mr. DeBord opined that the Petitioner's left knee condition was aggravated by the exercises of March 29, 2013.

While the Arbitrator notes the opinions of Dr. Lieber, the Arbitrator finds those opinions to be less reliable and less persuasive than the opinions of Dr. Stewart in the instant matter. Dr. Lieber's testimony that under no circumstances could the physical therapy incident have caused Petitioner's left condition is not persuasive in light of the credible testimony of Petitioner and her physical therapist regarding the onset of left pain following the March 29, 2013 and the absence of left knee problems prior to the physical therapy exercise. Based on the above, the Arbitrator finds that Petitioner has proven causal relationship with regard to her injury on March 29, 2013 and the condition of ill-being in her left knee. The Arbitrator further finds that the left knee arthroscopy prescribed for the Petitioner by Dr. Stewart is reasonable, necessary and causally related medical treatment for which the Respondent is responsible.

The Arbitrator notes that no medical opinions relating to the Petitioner's back or hip complaints, or evidence of any recommendation or prescription for treatment to the Petitioner's hips or back, was offered into the record. The Arbitrator finds, therefore, that the Petitioner failed to prove any condition of ill-being in her hips or her back which is causally related to either the December 12, 2012 work injury or the March 29, 2013 injury. Additionally, the Arbitrator finds that the Petitioner failed to prove that she is in need of or entitled to any prospective medical treatment for her hips or her back.

In Support of the Arbitrator's Decision relating to (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, the Arbitrator finds and concludes as follows:

The Petitioner introduced as Petitioner's Exhibit 2, evidence of medical expenses incurred as a result of her work related injuries. The Respondent introduced as Respondent's Exhibit 6, evidence of the medical expenses the Respondent has paid on behalf of the Petitioner. The parties stipulated that the Respondent is entitled to credit for any and all of the medical expenses it has paid on behalf of the Petitioner.

The Arbitrator finds that the medical services that were provided to the Petitioner for

her left knee were reasonable and necessary. Based on the Arbitrator's findings with regard to Issue (F), the Arbitrator finds that Respondent is liable for the medical bills included within Petitioner's Exhibit 2 limited to the Illinois Medical Fee Schedule. Respondent shall be given a credit for all medical bills it has paid as indicated in Respondent's Exhibit 6.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Arbitrator finds Petitioner was already being kept off work by Dr. Stewart on March 29, 2013 following her previous right knee arthroscopic procedure on March 14, 2013. The Arbitrator finds that Dr. Stewart continued the Petitioner off work in his follow-up examinations between April 22, 2013 and July 15, 2013. Dr. Stewart testified that Petitioner has been kept off work since his last examination on July 15, 2013 and the Petitioner testified that, as of the date of hearing, Dr. Stewart has not released her to return to work.

Based on the testimony of Dr. Stewart and the Petitioner and in light of the Arbitrator's findings and conclusions relating to the issues of Accident and Causation, the Arbitrator finds that the Petitioner has remained temporarily and totally disabled as a result of her March 29, 2013 accidental injury since July 15, 2013 through the date of the Arbitration hearing on January 27, 2015.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bonnie Stahl,

Petitioner,

vs. NO. 13WC017996
13WC017997

Coil Craft Inc.,

Respondent.

16IWCC0087

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, permanent disability, causal connection, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 23, 2015 is hereby affirmed and adopted.

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

16IWCC0087

No bond is required for removal of this cause to the Circuit Court. 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.

DATED: FEB 1 - 2016
SJM/sj
o-1/21/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STAHL, BONNIE
Employee/Petitioner

Case# **13WC017996**

13WC017997

16IWCC0087

COIL CRAFT INC
Employer/Respondent

On 3/23/2015, 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 0.14% 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:

2489 LAW OFFICE OF JIM BLACK
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

3227 HOLECEK & ASSOCIATES
JAMES M EBERLIN
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

16IWCC0087

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BONNIE STAHL
Employee/Petitioner

v.

COIL CRAFT, INC.
Employer/Respondent

Case # **13 WC 17996**

Consolidated cases: **13 WC 17997**

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 **Robert Falcioni**, Arbitrator of the Commission, in the city of **Rockford**, on **February 24, 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 **7-12-12 and 11-15-12**, 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 not*** sustain an accident that arose out of and in the course of employment.

In the year preceding the injury, Petitioner earned $**31,460**; the average weekly wage was $**605**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **0** dependent children.

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

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

ORDER

AS SET FORTH MORE FULLY HEREIN, THE ARBITRATOR FINDS THAT PETITIONER DID NOT SUSTAIN AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH RESPONDENT. ALL OTHER ISSUES ARE MOOT.

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

March 16, 2015
Date

MAR 23 2015

Bonnie Stahl vs. Coil Craft, Inc.
Court No: 13 WC 17996 and 13 WC 17997

16IWCC0087

STATEMENT OF FACTS

Petitioner testified she worked for Respondent at their Oregon, Illinois location, in their shipping and receiving department. She alleged that in 2012, as she also told Dr. Coe in a Petitioner's Section 12 exam, that she was stacking 100-300 boxes onto pallets regularly, and that these weighed up to 50 lbs. She claimed that part of her job involved quality control, and she had to handle the boxes, opening some, to make sure the right parts were contained in them.

She also testified that her job included lifting boxes, weighing10-50 lbs., up onto racks that extended up over six feet tall, so that she had to climb up a ladder to stack them up and then periodically retrieve them from the top of the racks.

She testified that she at most, had 1 person to help her with these and other duties. Shipments would also come in and go out during the day, and she would have to load and unload the delivery trucks. Boxes weighed up to 50 lbs. On cross-examination, she did admit only one hour of her work day involved lifting items. The other 7 hours were doing computer work.

Sometime in July 2012, she began noticing pain in both arms, from heavy lifting. She testified that she complained of the arm pain to her supervisor, Mr. Scribner, due to her heavy lifting, but she claims he told her to "do her job, and that is part of it." Petitioner described her pain as shooting pain from forearm up to the shoulders, and that they would go numb if she would lay her forearms on the table.

She claimed when she stacked boxes on pallets that she would stack them up to five feet in the air. She claims she reported this bilateral arm pain to her supervisor, and also the HR representative, Pat Seloover, in July 2012. Her first office visit with her first treator, Dr. Gabriel, was on July 12, 2012, and she stated that she had told her employer about her injury before seeing him.

Dr.Gabriel's SOAP notes do show an office visit of July 12, 2012, but they do NOT show evidence of an accident happening at work. (Pet. Ex. 1) She continued to treat with him and also Dr. Gunderson.

Petitioner underwent right and left rotator cuff repair, and a right side revision, in 2013. She was released from care in late 2013.

Petitioner left the employ of the Respondent in December 2012, and was given a severance package. She met with Ms. Seloover at the time the agreement was signed, but did not mention her shoulders were injured at work. She testified on cross examination that she knew she was giving up her right to bring an action against her company as part of the severance payment.

Petitioner was examined by Dr. Jeffrey Coe on February 5, 2014 at her request. She told Dr. Coe that her job involved repeatedly stacking 100-300 boxes, weighing up to 15 lbs. on skids, and mostly without any help. Dr. Coe lists her two injury dates as October 1, 2010 and October 1, 2012, both of which are inconsistent with the dates on Petitioner's Applications for Adjustment of Claim.

Ms. Pat Seloover testified for Respondent, as the HR Manager for Coil Craft, Inc. She was familiar with the Petitioner's past health history. She testified the Petitioner started working at the Oregon location in 2002, working in shipping and receiving. In the Fall of 2009, the Petitioner had been off on FMLA leave for a heart condition but returned with restrictions of no lifting over 10 lbs., which restriction continued until Petitioner left in 2012. Petitioner in 2009 was doing mainly SEDENTARY work, and two other people in Shipping and Receiving did the lifting.

In July 2010, the major shipping duties were moved from the Oregon location where Petitioner worked, to their Princeton plant. At that time, Petitioner was still on light duty restrictions, according to Ms. Seloover. On September 8, 2010, Petitioner brought in a note from her doctor, and in October 2010, Petitioner went out on FMLA again for her knees. She was off for almost a year, returning in September 2011, after having both knees replaced. Petitioner testified these injuries were NOT work related.

Ms. Seloover testified that Petitioner continued to work light duty, which consisted of some light lifting, but the majority of her time was spent at a table, doing work on the computer. That continued from 2009 until July and August of 2012. Ms. Seloover spoke with Petitioner in July or August 2012, who indicated her doctor told her she could not work because of her shoulders. Petitioner indicated to Ms. Seloover that she hurt her shoulders, "from using crutches hauling herself around her house after her knee surgeries," or words to that effect. Ms. Seloover denied that Petitioner told her the bilateral rotator cuff tears were work related during that meeting. She also denied that Petitioner EVER reported her shoulder pain as caused by her work, and she saw her almost daily when doing HR work at the Oregon location.

She also remembered Petitioner coming into the Oregon plant and executing her severance agreement in December 2012, and Petitioner at that last meeting did NOT indicate her shoulder injuries were work related. She testified the Petitioner's last day of work at the Oregon plant was August 9, 2012. The severance agreement was negotiated in the interim period. At no time did the Petitioner ever ask to fill out a written report of injury to her shoulders. Ms.. Seloover testified the first notice of a work injury, was when she received the Applications for Adjustment of Claim from the Law Office of Jim Black, in mid-2013, long after Petitioner had left the company. She also testified that as part of the Petitioner's severance agreement, the company paid her health insurance and disability insurance premiums for six months after December 2012.

Plant manager, Mr. Helfrick, testified for Respondent, and stated the Petitioner never reported a work injury involving her shoulders to him, nor did she submit notice of an accident in writing, using company forms. He corroborated Ms. Seloover, and also testified that the bulk of the heavy s hipping was moved to the Princeton plant in July of 2010.

Shipping and Receiving supervisor, Mr. Scribner, testified for the Respondent. He denied that the Petitioner reported a work injury to him or Ms. Seloover in July 2012, or that he "ordered her back to work," when Petitioner alleges she reported pain in her shoulders. Mr. Scribner also testified that after 2010 the shipping and receiving department at the Oregon plant, was not heavy lifting any more. He also testified that the heavy lifting part had been shifted to the Princeton plant in 2010, and that 90% of the Petitioner's tasks from 2010 till she left in 2012 was desk work on the computer. He stated that Petitioner was provided assistance when packages were delivered and that the delivery schedule was very light at the plant from 2008 to 2012, when she left. (Resp. Ex. 1.) Most days the average delivery to the plant was 1-5 boxes, not

exactly a busy department. The shipments going out largely mirrored the incoming deliveries, according to Mr. Scribner. He also stated that the Petitioner had TWO people to help her in the department. He had daily contact with her, and she never reported arm or shoulder pain to him as a result of lifting or other tasks she performed for her company. She also never submitted written notice of any injury either. The Respondent was accommodating Petitioner, as they had been since 1-31-12, as indicated by Dr. Gabriel in his 1-31-12 SOAP note. (Pet. Ex. 1)

Petitioner had amended her two Applications for Adjustment of Claim prior to this hearing, changing the alleged accident dates to July 12, 2012 and November 15, 2012.

ISSUES AND ARGUMENT RE: 13 WC 17996

1. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Respondent does not dispute that the Petitioner was a full time employee in the shipping and receiving department of Coil Craft, Inc., at its Oregon, Illinois location from 2009 through 2012, when Petitioner alleges two accident dates. Respondent also does not dispute that Petitioner had three shoulder surgeries in 2012-2013. What it does dispute is that any accidents occurred in 2012 that caused injury to both shoulders.

On the contrary, Respondent argues that the Petitioner's job duties from 2009 through 2012 were extremely sedentary, and could not have injured her. Petitioner herself admitted that she worked an 8 hour shift, and 7 of those hours were spent doing sedentary desk work. All three of the Respondents' witnesses testified that the repetitive heavy lifting part of the department had been moved to their Princeton plant in 2010, and Mr. Scribner produced a document and testimony that the average number of boxes entering and leaving the department from 2008 to 2012 was 5-10 on average each day, and some days it was 3.

Petitioner told her examining doctor, Dr. Coe, that part of her duties was stacking 100-300 boxes on pallets, yet the Respondents' witnesses stated that task had also been moved to Princeton in 2010, two years prior to the 2012 alleged injury dates, so she could not have still been doing that type of work in 2012. This testimony was corroborated by Petitioner.

All of the Respondents' witnesses contradicted Petitioners claim of a strenuous busy job in the shipping and receiving department, and that it was understaffed. All three agreed that she was doing largely sedentary work since 2009, with a 10 lb. lifting restriction, since returning from a heart condition in 2009. 90% of her day was spent doing computer work, and Mr. Scribner said she had 2 people to help with lifting. Even her treating doctor makes note of the Respondent honoring her restrictions. Dr. Gabriel, during an office visit of 1-31-12, notes that petitioner has knee pain which resolves itself by her sitting down during her shift. " they do allow her to do this at work so that has been helpful." (Pet. Ex. 1, p. 35)

Petitioner stated that she told Mr. Scribner, her direct supervisor and Ms. Seloover, the HR rep for Respondent in July2012 that she hurt both shoulders at work, and that she had shooting pain from forearm to shoulders. She also testified that Mr. Scribner was less than sympathetic, and

even ordered her to get back to work. She testified she told them both before she saw her doctor about her accident and painful shoulders. It is assumed she was speaking to the July 2012 accident date.

All three of Respondents' witnesses testified that Petitioner never reported orally or in writing to them that she hurt her shoulders working for Coil Craft, as she claims. Even her treating doctor, during a visit immediately after she claims to have told Mr. Scribner and Ms. Seloover of her injuries, on July 12, 2012, does not corroborate the Petitioner's version. To the contrary, Dr. Gilbert notes: "this is a workers comp related visit—no" Under trauma or injury: "does not recall specific injury." (Pet. Ex. 1, pg. 20) This is the very first visit concerning shoulder injury, and the first visit to the doctor and her doctor did not note a work related injury.

Given the facts of this case, and the fact that Petitioner is claiming a repetitive trauma injury, the Arbitrator finds it difficult to come to the conclusion that the job duties that Petitioner performed were repetitive enough to have caused her injuries as alleged herein.

Wherefore, based on the record as a whole, the Arbitrator finds that Petitioner did not sustain her burden of proving that she sustained an accidental injury arising out of and in the course of her employment with Respondent on either of the dates alleged herein. All other issues are moot.

STATE OF ILLINOIS)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
WILLIAMSON		☐ PTD/Fatal denied
	☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Eldaracher,

Petitioner,

vs. NO: 13 WC18297

Bowen Engineering,

Respondent.

16IWCC0077

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, occupational disease, vocational rehabilitation, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 18, 2015, is hereby affirmed and adopted.

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.

16IWCC0077

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.

DATED: JAN 29 2016
TJT:yl
o 1/25/16
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

ELDARACHER, DAVID
Employee/Petitioner

Case# **13WC018297**

BOWEN ENGINEERING
Employer/Respondent

16IWCC0077

On 5/18/2015, 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 0.08% 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:

5404 LAW OFFICE OF FOLEY & DENNY
TIMOTHY D DENNY
PO BOX 685
ANNA, IL 62906

5018 ALLEN KOPET & ASSOCIATES
KATHLEEN ULBERT
33 N LASALLE ST SUITE 2110
CHICAGO, IL 60602

16IWCC0077

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Eldracher
Employee/Petitioner

v.

Bowen Engineering
Employer/Respondent

Case # 13 WC 18297

Consolidated cases: N/A

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin, IL**, on **March 13, 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. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other ___

16IWCC0077

FINDINGS

On the date of accident, **February 6, 2013**, 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 not* 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned $1694.46; the average weekly wage was $1694.46.

On the date of accident, Petitioner was **47** years of age, *single* with **0** dependent children.

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

Respondent shall be given a credit of **$56,615.14** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $56,615.14.

Respondent is entitled to a general credit for any medical bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner sustained an exposure to hydrofluoride on February 6, 2013 that arose out of and in the course of his employment with Respondent but only to his left arm. Petitioner failed to prove he sustained an occupational disease as a result of that exposure or that his current condition of ill-being is causally connected to that exposure. No benefits are awarded.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

May 11, 2015
Date

ICArbDec19(b)

MAY 18 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has filed a claim pursuant to the Occupational Diseases Act. At the present time Petitioner seeks ongoing TTD, medical and vocational rehabilitation services. Petitioner was the only witness testifying at the 19(b) hearing.

The Arbitrator finds:

An Incident Investigation Report was completed D. Cavens of the Respondent on February 7, 2013. (PX 1) According to the incident report Petitioner was working on the 4th floor of the FMB on the Fluorine side. Petitioner was removing his safety harness when debris fell from the beam into his left sleeve and dusted the back of his neck. Petitioner was noted to have "shook" his sleeve out and continued to work. Petitioner noticed an irritation on his arm and he was taken to the medical facility as a precaution. Calgonate was applied for 30 minutes to Petitioner's arm. It was noted that at the time of the incident Petitioner was wearing his hardhat, ear plugs, overalls, gloves and half face respirator. Terry Parner's statement dated "February 6, 2013" references dust going down Petitioner's sleeve. (PX 1)

Petitioner was taken to Occunet on February 7, 2013. Petitioner completed a statement that was signed by him and noted the time of completion to have been 6:46 p.m. (PX 1, p. 6) Petitioner reported that he was on the "NW corner, 4th floor, FMB Fluorine side torqueing bolts [and] hanging a beamer [when he] felt dust go down sleeve and shirt (neck area) [when] he shook his sleeve out [and] continued working." (PX 1, p. 6)

According to Petitioner's Exhibit 11, the time card entry lists, Petitioner worked full duty for Respondent following his alleged work accident of February 6, 2013 until his lay-off on March 24, 2013. Petitioner worked an average of 60 hours per week following his alleged accidental injury at work.

On February 7, 2013, Petitioner was seen at Occunet, 2535 Broadway, in Paducah, Kentucky for a hydrofluoric burn to his left foreman on February 6, 2013 while at work. The burn had been treated with Calgonate for about a half of hour. (PX 2, p. 2) Petitioner complained that the night before he developed a headache and felt nauseated. He noted that he had not vomited. On exam in regard to Petitioner's mouth/throat Petitioner was noted to be negative for difficulty swallowing, hoarseness, tenderness, no change in voice or mouth ulcers. Petitioner was also noted to be negative for asthma, bronchitis, chronic cough and shortness of breath. Petitioner's respiratory effort was noted to be even and unlabored and breath sounds were normal. On percussion Petitioner's lung fields were clear and equal. Petitioner was diagnosed with a muscle contraction headache with associate nausea. The headache was noted to be self-limited and not related to his alleged exposure or treatment. Petitioner was discharged from care and released to return to work. Petitioner was instructed to follow up only if needed. (PX 2, pp. 2-3)

Petitioner did not seek any medical treatment from 2/8/13-4/11/13 or for 2 months and 4 days. Petitioner's employment with Respondent ended on March 24, 2013 and Petitioner began work for a new employer, United Iron Workers.

On April 12, 2013 Petitioner presented to Cape Medical Group and was seen by Dr. Jeffrey Childers. (PX 3) Petitioner presented with sinus symptoms. On exam Petitioner was noted to have normal lips, teeth, gums, mucosa, palate and posterior pharynx. He was specifically noted to be negative for oral sores/ulcer and a sore throat. Petitioner was negative for chronic cough, dyspnea and frequent wheezing. Petitioner was noted to have diffuse expiratory wheezes. Dr. Childers noted that the petitioner had a normal respiratory rate. Dr. Childers assessment was that Petitioner had acute sinusitis, unspecified, GERD and reactive airway disease. Petitioner was given prescriptions for

Prilosec, Albuterol, Qnasl, Zyrtec, and Doxycycline. There was no comment on work ability in the records.

Petitioner did not seek any medical treatment from 4/13/13 to 8/8/13 or 3 months and 27 days. Petitioner did work for United Iron Workers, D&S Fence (DNS), and Rednour Steel Erectors during that gap in time.

Petitioner signed his Application for Adjustment of Claim herein on April 21, 2013. (AX 2)

On August 9, 2013 Petitioner presented to Barnes Jewish Hospital emergency room. (PX 5) Petitioner presented with complaints of shortness of breath. Petitioner presented a history of working at the Honeywell Plant and in January of 2013 was exposed to powder/dust-an unknown chemical. "WMD's are produced at this plant." In later notes Petitioner reported that he had a chemical exposure in February when "some of the machinery used to make weapons of mass destruction fell on him." (PX 5, p. 7) Petitioner stated that since that time he has had symptoms of rash/burn, back pain, flu-like symptoms, knot behind his left ear, and difficulty breathing. (PX 5, p. 5) The triage assessment determined that Petitioner had good air exchange, his lung sounds were clear and his breathing was unlabored. It was recorded that he was not currently taking any medication. A CT scan of his chest was completed. An incidental liver lesion was seen as was an old posterior sixth rib fracture. Petitioner's lungs were noted to be clear, there was no pneumonia or pulmonary edema, no pneumothorax or pleural effusion. (PX 5, pp. 16-20) Petitioner was diagnosed with a shortness of breath. Petitioner was discharged from care and to his home. (PX 5, p. 23) Petitioner was returned to work with no lifting over 20 pounds for the next 4 weeks and no walking greater than two flights of stairs for the next two weeks. (PX 5, p. 41)

Petitioner was examined by Dr. John Engelhart on August 28, 2013 for the purpose of determining the nature of Petitioner's shortness of breath. In a letter addressed to Petitioner's attorney written the same day, the doctor wrote that after seeing some of the material written about the chemicals Petitioner was exposed to in his employment he was concerned that "this exposure" could have caused Petitioner's symptoms and findings of exertional shortness of breath. He did not feel Petitioner could perform his usual duties at that time. (PX 4)

At the request of his attorneys, Petitioner was seen by Dr. Tuteur at Washington University School of Medicine on September 27, 2013. Petitioner presented with complaints of severe breathing problems, coughing up of black phelm with small amount of blood, left lung pain and kidney pain.(PX 6, p 2) On the general screen he checked that he also had frequent headaches, trouble with eyes/vision, ears/hearing, nose, coughing spells, trouble breathing, heart trouble, high blood pressure, trouble with bowels, loose bowels, trouble with liver, aching muscles/joints, sexual difficulties, weight changes and fatigue. (PX 6, p. 2) Petitioner checked the following issues of note on the respiratory screen: wheezing, night sweats, work as a foundry worker and as a welder and exposure to asbestos and wheat dust. (PX 6, p. 3) A pulmonary function test was completed with the following results: 1) flow volume curve-normal; 2) lung volume-no restrictive ventilatory defect with the cause of the decreased ERV being uncertain; 3) diffusing capacity is normal; 4) arterial blood gas was normal; 5) total lung capacity was measured as normal. (PX 6, p. 10) Dr. Tuteur took an additional history from Petitioner. According to that history Petitioner was working as an ironworker using a cutting torch on an elevated I-beam covered with approximately 3 inches of industrial dust and he developed progressive symptoms. Petitioner claimed that 5 other workers were reported to have similar symptoms and were all out of work because of this. Petitioner reported wearing respirator. Petitioner reported that exposure to the dust resulted in first a skin rash and then blisters in his mouth, burning and irritation of his eyes which resulted in blurry vision. Over times his symptoms worsened particularly the burning of his eyes and his headaches. Petitioner also status that 3 to 4 days after exposure he had breathlessness and kidney pain. Petitioner noted that he was laid off from his job. Petitioner reported that he could not walk more than one block without stopping or climb a half a flight of stairs. Petitioner experiences wheezing and chest pain with exercise. Petitioner alleged that symptoms develop suddenly when he is exposed to a wide variety of triggers including diesel exhaust, exercise, heat, smoke from burning trash, perfumes, colognes, and pine-sol. On physical exam no mouth sores were noted and wheezing was heard on forced expiratory volume. Chest x-ray and chest CT scans were reviewed and noted to be within normal limits. In regard to the completed pulmonary function studies the following were

found: 1) spirometry was normal; 2) lung volumes were normal; 3) no impairment of oxygen gas exchange; 4) diffusing capacity was within normal limits. The impedance oscillometry results were indicative of reversible obstruction of small airways. Dr. Tuteur diagnosed Petitioner with irritant induced bronchial reactivity predominantly in smaller airways due to his exposure while at work. Petitioner's condition was noted as chronic and persistent and he was told not to return to work as an ironworker.

Petitioner presented to the Southeast Hospital emergency room on October 2, 2013 for complaints of worsening shortness of breath. His clinical status was noted to be improving. The impression was that Petitioner had chronic asthma/emphysema type of chronic lung disease. A chest x-ray was completed and was normal. Petitioner was discharged. Petitioner was given scripts for Albuterol, and Advair. (PX 7, pp. 18-20)

Petitioner returned to Southeast again on December 11, 2013. He again complained of difficulty breathing andwas diagnosed with COPD. Petitioner was given scripts for methyl prednisone and albuterol. New x-rays were completed and did reveal any change from prior x-rays or any abnormal findings. (PX 7)

Petitioner established care with Dr. Edward Doyle on December 30, 2013 as recommended to him by Dr. Tuteur. Petitioner gave a history of having COPD and had a list of chemicals he had been exposed to. Petitioner was also noted to have pneumonia. (PX 8)

Petitioner had a return visit to Dr. Tuteur on March 28, 2014. (PX 6, p. 19) Petitioner reported improvement with Advair and albuterol. Petitioner last saw Dr. Tuteur on July 25, 2014. Petitioner had a repeat spirometry that was well within normal limits. Petitioner was again diagnosed with chemically induced, irritant induced bronchial reactivity. He has limitations on exercise and activity due to shortness of breath. (PX 6, p. 21)

At the request of Respondent, Dr. Alan Leff performed a records evaluation on Petitioner. A written report was issued on December 24, 2014. (see RX 1)

Dr. Tuteur was deposed on February 19, 2015. (PX 9) Dr. Tuteur is Petitioner's treating physician. Dr. Tuteur is a pulmonary physician board certified in internal medicine and pulmonary diseases. His practice is predominantly pulmonary medicine

with an interest in occupational and environmental lung disease. Petitioner's Exhibit 9, Page 4. Dr. Tuteur's curriculum vitae in included as an attachment to that exhibit.

Dr. Tuteur testified as follows:

p. 7, lines 3-4	A: ...February 6, 2013, when he [the petitioner] was exposed to a dust, so-called industrial dust, when welding on elevated I-beams.
p. 7, lines 12-20	A: He had a skin rash from where the skin was exposed to these materials and he had burning of his nose and blisters in his mouth and irritation of his eyes. So clearly this material got over the facial aspect of his body and obviously was at the distal end – or the proximal end, I should say, of his ventilatory system. And assuming he was breathing, it got into his lungs.
p. 8, lines 22-4	A:...The point is we have prima facie evidence that he was in contact with caustic material that caused his skin to burn, nose and mouth, and burning of his eyes. So, irrespective of what he was wearing, the protection offered by the device as he wore it that day was incomplete.
p. 9, lines 15-21	Q: What were your relevant findings on the exam? A: The exam was pretty normal...The chest exam was normal.
p. 10, lines 15-20	A: Pulmonary functions were performed and I reviewed both graphic and numerical data. The –the standard, quote/unquote, pulmonary function studies of spirometry, lung volumes, diffusing capacity, rest and exercise arterial blood gas were all normal.
p.11, lines 4-6	A:...we also did an exercise study and there was no impairment of oxygen gas exchange induced by exercise...
p. 12, lines 5-10	A; ...indicative of reversible obstruction in smaller airway. And obviously makes a diagnosis of bronchiolar hyper reactivity with reversibility and this has been described in a variety of situations in response to the inhalation of mixed irritants.
p. 13, lines 23-24	A: My overall diagnosis is irritant-induced bronchial reactivity.
p. 14, lines 3-11	A: The treatment recommendations are twofold. One is medication...and good environmental control.
p. 36, lines 1-7	Q:..So if he an exposure on 2/6/13 and he seeks medical treatment at that time and then he no longer—and then doesn't seek medical treatment until September, is it possible that there's additional or new exposures in that time period?

A: Of course it's possible... 16IWCC0077

Dr. Alan Leff was deposed on March 4, 2015. (RX 1) Dr. Leff was retained by Respondent to perform a records evaluation. Dr. Leff is Professor Emeritus of Medicine, Department of Medicine, Pulmonary & Critical Care Medicine at the University of Chicago Hospital. Dr. Leff is board certified in internal medicine (1976) and pulmonary diseases (1979.) Dr. Leff is also a professor at the University of Chicago in seven different departments or committees including medicine, pediatrics, anesthesia, critical care, pharmacology and physiology. Respondent's Exhibit 1, Page 5-6. Dr. Leff's curriculum vitae in included as an attachment to that exhibit.

Dr. Leff testified as follows:

p.9, lines 4-18: A:Petitioner... alleges that he was exposed to dust falling from an I-beam... There were no liquids or gaseous materials reported at this time, just the dust... And between 4:00 and 4:30, he had an irritation on his left forearm which he [petitioner] showed Mr. Crow who thought it was from hydrofluoric acid which is a chemical used in his workplace. So he was seen by a nurse at the plant who also felt it was hydrofluoric acid (HF.)

P 9, lines 21-23: A:Hydrofluric acid can be a liquid, and if its heated, it can be a gas but it is not a powder.

p.10, lines 1-9: Q: And with hydrofluoric acid, what is the reaction time if your exposed ?
A: It's immediate. It's one of the strongest acids. It etches glass in seconds.
Q: And what would be—if you get it on your skin or you're in contact with it, what would be-what would it cause to a person?
A: It would cause immediate inflammation and ulceration of the skin surface that it was touching.

p.10, lines 19-21 A:... But three inches of dust accumulated being hydrofluoric acid is not really – physically impossible—is physically impossible.

p.11, lines 10-17	A:...he was taken to Paducah, Kentucky where he was seen at Occu Med. There, a full exam is recorded. His respiratory exam was normal. There was no wheezing, lung fields were clear, no chemical burns were noted, no ulceration or burning around the mouth was noted. He was discharged... for immediate return to work.
p. 11, lines 20-23	A: Wheezing is a sound. It is just a high-pitched respiratory sound. It usually means accelerated airflow through a somewhat closed space. So it's airflow that- It's turbulent airflow at a high pitch.
p. 12, lines 15-22	A: ...you can have wheezing and have nothing related due to the lung. It can come from the upper airway or because the patient is trying really hard to get the last drop out and close their glottis. You know, a lot of patients I have to tell to do, when they're exhaling, to open their mouth so that they don't produce wheezing in the upper airways.
p. 13, lines 1-6	A:... So he had a CT scan that showed no abnormalities. His diagnosis was hydrofluoric—HF exposure associated with nausea. And by the way, the symptoms that he reported, extreme headache, blurry vision don't occur with respiratory injury of any kind, and his skin rash was not observed.
p.13, lines 18-24	A: I should also point out that that is widely recognized as something that never occurs. It's called lateral spread of a chemical exposure. People who founded that idea were discredited and thrown out of the American Academy of Allergy and Immunology... the clinical portion of the allergy community...
p.14, lines 2-5	A: But those things are recognized not to exist. There is no such thing as lateral spread, allergic spread, nor does hydrofluoric acid cause any allergic process.
p.16,17, lines 22-5	Q: Now, which of those tests, if any, were done on Mr. Eldracher? A: ... he had a pulmonary function test, and he had a spirometry, and he had an exercise test. All of those came out completely normal. Q: And what does that tell you, if anything? A: It tells you that he doesn't have lung disease, not obstructive lung disease.
p. 17, lines 12-14	Q: Does it tell you whether or not the wheezing is significant? A: It tells it's not significant.
p.19, lines 8-9	A: ...You can't get COPD from a single inhalation.

p. 19, lines19-21 A: And, as I've said already, there is no acute exposure here because he was wearing a respiratory and the product was dust, and that's not hydrofluoric acid.

p. 20, lines 17-21 Q: What do the objective findings in Mr. Eldracher's records tell you about his condition, if anything?
A: They tell me he doesn't have a chronic respiratory obstructive disease.

p.21, lines 6-14 Q: What is the significance of his continuing ongoing sensitivity to different elements when he's out in the world?
A: I don't believe—I don't think it's real...I mean, he may experience it. That isn't to say that he doesn't think he has it, but it's something that's been proven not to occur as a consequence of an industrial exposure.

p.21, lines 15-24 Q: ...Mr. Eldracher is taking a series of long-acting and short-acting inhalers for his complaints. What, if anything, does that tell you?
A: Well, that it—he's not getting better. But I can understand why because every pulmonary function test he takes is normal. So to get better from asthma, you have to have it. And to get better from obstructive airway disease, you have to have some airflow obstruction.

p.31, lines 15-24 A: I'm saying that getting a significant burn for hydrofluoric acid and not even feeling anything for three hours or so and then really not much between 11 and 4 o'clock is really not consistent with a significant HF exposure. Furthermore, it was a dust. And getting that through a ventilator, through a respirator, and into his lungs is equally impossible. And there is only one case I could find in the entire literature when, under the optimal circumstances, an airway reactive syndrome was set up by inhalation of hydrofluoric acid. And a lady was holding—squeezing a bottle that said 8% hydrofluoric acid or something.

p.33, lines 2-15 A: By the way, what do you think...Tuteur has diagnosed him to have.
Q: Well, I believe he called it a reactive airway
A: Okay. So let's do reactive airways...He has normal lung function...He doesn't bronchodilate with inhalers on a pulmonary function test, he can exercise, double his heart rate without even desaturation his blood. He does not have reactive airways disease, which is why he is not getting better on treatment.

p. 37-38, lines 3-12 Q: So how would you approach from –if you're treating this patient what exactly is wrong with him and multiple physicians have diagnosed him with some type of respiratory illness?
A: Well, this is a mess. He's been told by learned people … that he has a problem, and he's never going to get better and his problem is just terrible. And how do you dig a patient out of that sort of situation, I don't know.

p. 39-40, lines 23-7 Q: What type of doctor do you believe he needs to see …?
A: I think he needs to see a pulmonologist who is willing to tell Him that this is—that, really he, doesn't have anything. The physiological data suggests he does not have anything.

Petitioner continues to see Dr. Doyle at Cross Trail Medical Center in follow-up for medication management and as his primary care physician. (PX 8) Dr. Doyle continues to keep Petitioner off of work due to "Toxic Effect of Unspecified Noxious Substance" in his lungs. (PX 8)

Petitioner's case proceeded to arbitration on March 13, 2015.

Petitioner testified that he is 47 years old and currently resides in Eminence Missouri. Eminence is a town of about 600 people and he moved there in August of last year. He graduated high school in 1986 and worked various construction type jobs before he became an ironworker in 1993 or 1994. He is a union ironworker who works out of local 782 in Paducah Kentucky.

On February 6, 2013 Petitioner was working as an ironworker for Respondent in the Honeywell plant in Metropolis Illinois. The Honeywell plant is a chemical plant. He was working on the fluorine side of the plant and was attempting to hang a beamer, which is a safety device for his fall arrest system. As he attempted to attach the beamer to the beam, dust fell from inside the beam and came down on top of him. Petitioner testified that it was product made in the plant as he was advised there was no dirt in the building. He also clarified that it was more than just a few traces and more like a pretty good handful of material that fell

on him. He specified some of the dust went inside his mask at the time of the incident.

Petitioner further testified that at the time of the accident he was wearing a half face respirator as well as a hard hat and safety glasses. When the dust fell on him, he turned and the dust got on his body and into his mouth. He raised his mask to spit some of the dust out and tried to brush the rest of it of his clothes. He clarified the respirator only covered his nose and mouth, but not his eyes. The respirator was provided by Honeywell with an elastic strap. They only came in small, medium, and large sizes. The devices had been used so the elastic was stretched so you just had to put it on and try to get it as tight as you could.

After the accident Petitioner continued working, but as the day went on he began to have itching problems. He reported the problem and was taken to the onsite medical facility where they took his clothes and put him in a shower. The itching on his left arm was treated with calgonate.

Petitioner returned to his hotel room after his shift and through the night began having flu-like symptoms. He reported to work the following morning and was taken to Occunet at the local hospital. He did not feel like working so he asked if he could have the rest of the day off.

According to Petitioner, a safety stand down was held at the plant that day wherein the incident was discussed. After this incident the workers were required to use full face masks and war Tyvek suits with hoods on them as well as yellow sleeves to protect their arms.

Petitioner continued to work for Respondent for approximately 4 weeks. When he was laid off by the Respondent he signed up at his union hall for work and did not draw any unemployment. According to Petitioner, he continued to have flu-like symptoms and could not keep up with the other workers. Specifically, he would have to stop and rest when he was carrying materials and he would also cough. In April he went to see Dr. Childers for his ongoing problems and was given an inhaler by Dr. Childers.

Petitioner testified that he continued to work out of his union hall. His next two jobs were outdoors. In June of 2013 he was working for Rednour Steel Erectors. He was required to carry handrail to the 5th floor of a building, but was unable to perform the work because he had trouble breathing. He was laid off because he looked unsafe to the employer. He has not worked since June 30, 2013. After he was laid off, he again signed up to work at the union hall, but he did not draw unemployment. His status with the union hall is that he cannot go back until he has a doctor's release. He still has full membership at the union hall and continues to pay his dues.

Petitioner testified that after leaving the employment of Respondent he continued to work as a union ironworker and to obtain jobs from the union hall. Petitioner's employment with Bowen ended on March 24, 2013 and Petitioner began work for a new employer, United Iron Workers. Petitioner also worked for D&S Fence (DNS), and Rednour Steel Erectors during that gap in time. Petitioner testified that he worked on the roadways or interstate for both D& S Fence and Rednour. Petitioner was gainfully employed through the end of July, 2013. Petitioner testified that he was laid off at the

end of June in 2031 because "they" said he was breathing too hard. Petitioner never filed for unemployment or disability benefits.

Petitioner testified that he tried to find a doctor who would treat him. He was unable to find a physician who knew what was wrong with him so he went and saw Dr. Engelhart who was his family doctor when he was a child. He then went to the emergency room at Barnes-Jewish Hospital

Petitioner testified that he was then examined by Dr. Tuteur at Barnes Jewish Hospital. Dr. Tuteur diagnosed him with irritant induced bronchial reactivity and recommended he obtain a primary doctor to prescribe inhalers and manage his care. Dr. Tuteur also recommended he stay away from Diesel fuel and all the triggers or to stay at home. Petitioner clarified that has had episodes where colognes, perfumes, foods, or gas fumes triggered an episode. When an episode occurs he feels sick, has trouble breathing and needs to get out in the air.

After seeing Dr. Tuteur Petitioner went to Southeast Hospital because he was unable to get the medications recommended by Dr. Tuteur. He later was able to obtain care from Dr. Doyle, with the assistance of a nurse case manager, who has become his primary care physician. Dr. Doyle has prescribed inhalers, a nebulizer, and pain pills. Dr. Doyle has also prescribed anti-depressants for him from time to time. Petitioner clarified that he has never been prescribed or taken pain pills prior to his exposure on February 6, 2013.

Petitioner testified that he continues to have the same symptoms, but some days are better than others. He has trouble keeping up with others, even when just

taking a walk. He is no longer able to mow his own grass or sweep his own floor because the dust causes problems.

Petitioner testified that after Dr. Tuteur recommended he no longer work as an ironworker he began looking for work. Petitioner's job search records were offered into evidence as Petitioner's exhibit 14. At the request of his attorney, Petitioner met with a vocational counselor who asked him several questions about his vocational background and his medical condition. The vocational counsel also gave him a test. Petitioner testified that he does not own a computer and has rarely used one. He does not use a smart phone because he does not know how to use one. The petitioner did graduate high school, but has not attended college. He is a certified welder, and completed his apprenticeship classes at the union hall. He understood the vocational counselor made recommendations that she be perform a labor market survey to assist him with locating appropriate employment and he would like for her to do provide that service. Petitioner testified that he is willing to work if employment is provided within the limitations set forth by Dr. Tuteur because he is not capable of working as an ironworker.

On cross-examination Petitioner was asked what inhalers he was using at the time of Arbitration. He provided one of his inhalers for the Arbitrator to view and it was Ventolin HFA. Petitioner also indicated that he has steroid spray that he uses that is a spray powder. He is also on Doxycycline which is an antibiotic for an infection in his lungs. He was also still using the nebulizer. All of his current medications are prescribed by Dr. Doyle.

The Arbitrator concludes:

C. **Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?**

The Arbitrator notes that Petitioner claims injuries pursuant to the Occupational Diseases Act occurring on February 6, 2013. In regard to Petitioner's left arm injury, the Arbitrator finds that Petitioner did have an exposure to hydroflouride on his left arm on February 6, 2013; however, Petitioner has failed to prove that he suffered an occupational disease on that date. Petitioner has not requested any benefits, either medical or TTD, related to his left arm pursuant to Section 19(b) of the Act and, therefore, no benefits are awarded with regard to the left arm injury. The Arbitrator adopts and incorporates the records of Occunet, Petitioner's Exhibit 2, in making this finding. The Arbitrator also notes that Petitioner was returned to work at full duty as of February 7, 2013 per the Occunet records.

In addition to a lack of objective medical evidence the Arbitrator finds that Petitioner did not seek medical treatment or experience symptoms until after he had left the employment of Respondent and until after he had worked for three additional employers. The Arbitrator finds it significant that Petitioner worked for D&S Fence (DNS), and Rednour Steel Erectors after he left the employment of Respondent. Petitioner testified that he worked on the roadways or interstate for both D& S Fence and Rednour. Petitioner was gainfully employed through the end of July, 2013. Petitioner never filed for unemployment or disability benefits. It appears that Petitioner was capable of gainful employment following his alleged exposure at work and was able to work full duty as an union iron worker. Petitioner presented no testimony or records from his subsequent employers in regard to any claimed inability to work at full duty or to be unable to perform the skills of an union iron worker.

The Arbitrator also finds that Petitioner's testimony concerning several matters was not altogether credible. The Arbitrator finds that Petitioner's testimony in conjunction with his medical records shows a pattern of manipulation/alteration of the facts. In essence, Petitioner's testimony at arbitration was not corroborated by the early treating medical records or employment records. Petitioner told Dr. Tuteur that he had mouth sores as a result of the exposure and Dr. Tuteur based his causal connection opinion on that fact. However, the medical records fail to note any evidence of Petitioner having mouth sores. Petitioner's mouth was noted to be normal in every examination done after his alleged exposure on February 6, 2013. In support of this finding the Arbitrator adopts and incorporates the following: 1) the testimony of Dr. Leff at p.11, lines 10-17 wherein he testified that Petitioner was taken to Paducah, Kentucky where he was seen at Occunet. There, a full exam is recorded. His respiratory exam was normal. There was no wheezing, lung fields were clear, no chemical burns were noted, no ulceration or burning around the mouth was noted. He was discharged... for immediate return to work; 2) The 2/7/13 records of Occunet wherein it was reported that on exam in regard to his mouth/throat Petitioner was noted to be negative for difficulty swallowing, hoarseness, tenderness, no change in voice or mouth ulcers; 3) the records of Cape Medical Group where Petitioner was seen by Dr. Jeffrey Childers and on exam Petitioner was noted to have normal lips, teeth, gums, mucosa, palate and posterior pharynx. He was specifically noted to be negative for oral sores/ulcer and a sore throat. (PX 3) Additionally, the incident report and initial medical fail to reflect that Petitioner reported getting dust in his mouth. The Arbitrator adopts the incident report, Petitioner's Exhibit

1, and the records of OccuNet, (PX 2) in support of her finding that Petitioner did not get dust in his mouth as the time of his incident on February 6, 2013.

The Arbitrator further finds that there is no medical evidence to support any claim of an occupational exposure in the form of a lung injury diagnosed by Petitioner's expert as irritant induced bronchial reactivity as a result of his work accident on February 6, 2013. In making this finding the Arbitrator adopts and incorporates the medical records of Washington University, Barnes Jewish Hospital, the testimony of Dr. Tuteur and the testimony of Dr. Leff. There are many disputes in this matter but all of the preceding agree that there are no objective findings in regard to Petitioner's pulmonary functions. On September 27, 2014, a pulmonary function test was completed with the following results: 1) flow volume curve-normal; 2) lung volume-no restrictive ventilatory defect with the cause of the decreased ERV being uncertain; 3) diffusing capacity is normal; 4) arterial blood gas was normal; 5) total lung capacity was measured as normal. (PX 6, p. 10) Specifically, the Arbitrator adopts and incorporates the testimony of Dr. Leff where he testified that Petitioner "has normal lung function...He doesn't bronchodilate with inhalers on a pulmonary function test, he can exercise, double his heart rate without even desaturation his blood. He does not have reactive airways disease, which is why he is not getting better on treatment." (RX 1, p. 33 lines 2-15) There is no objective medical evidence to support Petitioner's claim of pulmonary illness due to an occupational exposure on February 6, 2013.

F. Is Petitioner's current condition of ill-being causally related to the injury?

It has been established that to recover compensation under the Act, a claimant must prove both that he or she suffers from an occupational disease and that a causal connection exists between the disease and his or her employment. *Anderson v. Industrial*

Comm'n, 321 Ill.App.3d 463, 467, 254 Ill.Dec. 893, 748 N.E.2d 339 (2001). An occupational activity need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 308 Ill.App.3d 578, 586, 241 Ill.Dec. 854, 720 N.E.2d 309 (1999). The Arbitrator finds that a causal connection does not exist for the petitioner's pulmonary condition and his alleged work exposure of February 6, 2013. The Arbitrator adopts and incorporates the above section in regard to this issue.

The Arbitrator finds the causal connection opinion of Dr. Tuteur not to be persuasive in this matter. Dr. Tuteur testified that causal connection existed for a pulmonary injury because there was "prima facie evidence that he [the petitioner] was in contact with caustic material that caused his skin to burn, nose and mouth, and burning of his eyes." (Tuteur transcript p. 8, lines 22-24) Dr. Tuteur opined that the offending chemical/dust or irritant entered via Petitioner's mouth and as proven by the existence of sores. This alleged prima facie evidence is just not supported by the medical records and, in fact, the records are devoid of any medical evidence that would support Dr. Tuteur's statement. Additionally, the incident report and initial medical fail to reflect that Petitioner reported getting dust in his mouth. The Arbitrator adopts the incident report, Petitioner's Exhibit 1, and the records of OccuNet, Petitioner's Exhibit 2, in support of her finding that Petitioner did not get dust in his mouth as the time of his incident on February 6, 2013.

The Arbitrator also adopts and incorporates the following: 1) the testimony of Dr. Leff at p.11, lines 10-17 wherein he testified that Petitioner was taken to Paducah, Kentucky where he was seen at OccuNet. There, a full exam was recorded. Petitioner's

respiratory exam was normal. There was no wheezing, lung fields were clear, no chemical burns were noted, no ulceration or burning around the mouth was noted. He was discharged... for immediate return to work; 2) The 2/7/13 records of OccuNet wherein it was reported that on exam in regard to his mouth/throat Petitioner was noted to be negative for difficulty swallowing, hoarseness, tenderness, no change in voice or mouth ulcers; 3) the records of Cape Medical Group where Petitioner was seen by Dr. Jeffrey Childers and on exam Petitioner was noted to have normal lips, teeth, gums, mucosa, palate and posterior pharynx. He was specifically noted to be negative for oral sores/ulcer and a sore throat. (PX 3)

In regard to causal connection the Arbitrator finds the opinion of Dr. Leff to be more persuasive. Dr. Leff testified that if one works off of Dr. Tuteur's diagnosis that Petitioner has reactive airway disease you cannot come to the diagnosis via the objective testing. Specifically, he testified that "So let's do reactive airways...He has normal lung function...He doesn't bronchodilate with inhalers on a pulmonary function test, he can exercise, double his heart rate without even desaturation his blood. He does not have reactive airways disease, which is why he is not getting better on treatment." (Leff Transcript p.33, lines 2-15)

The Arbitrator also finds the gaps in treatment to be significant in finding that a causal connection does not exist. Petitioner did not seek any medical treatment from 2/8/13-4/11/13 or for 2 months and 4 days. Petitioner's employment with Bowen ended on March 24, 2013 and Petitioner began work for a new employer, United Iron Workers. Petitioner did not seek any medical treatment from 4/13/13 to 8/8/13 or 3 months and 27 days. Petitioner had not worked for the Respondent since March 24, 2013. According to

his testimony Petitioner had worked for United Iron Workers, D&S Fence (DNS), and Rednour Steel Erectors during that gap in time. Petitioner testified that his work for his last two employers was on the interstate which arguably would have exposed him to many fumes.

The Arbitrator gives no weight to the opinion letter of Dr. Engelhart dated August 28, 2013. The letter references materials about chemicals that were not identified and no factual representations as to when, how, and where, these alleged chemical exposures occurred was made a part of the exhibit (nor did Petitioner testify to any of the foregoing).

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?

Consistent with her liability determination as set forth above, the Arbitrator concludes that Respondent is not liable for the medical expenses incurred by Petitioner.

K. Is Petitioner entitled to any prospective medical care? Vocational Rehabilitation?

Consistent with her liability determination as set forth above, the Arbitrator concludes that Petitioner is not entitled to any prospective medical care or vocational rehabilitation. The Arbitrator notes that Petitioner is not in need of vocational retraining because he does not have a pulmonary illness that would limit or prevent his return to work as an iron worker. Furthermore, Petitioner has demonstrated an ability to return to work at full duty by working for three additional employers after Respondent. Petitioner never applied for unemployment benefits or any other type of disability benefits during the time he was not employed.

L. What temporary benefits are in dispute?

Consistent with her liability determination as set forth above, the Arbitrator concludes that Petitioner is not entitled to an award of temporary total disability benefits or maintenance benefits. Petitioner incurred no lost time on account of the burn on his left arm. Petitioner was able to return to continue to work at full duty for Respondent following his alleged occupational exposure at work for a month and a half.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Lynn,

Petitioner,

vs.

NO: 13 WC 18385
(consolidated with 13 WC 02690 & 13 WC 18386)

Hinckley Springs,

16IWCC0083

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident that arose out of and in the course of employment, causal connection, temporary total disability-(causal connection only), medical expenses/prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission, herein, specifically notes that this matter was consolidated with 13 WC 02690 and 13 WC 18386 which, however, were not tried together with this matter, and were, therefore, never subject to Review herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 11, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Review reflected regarding 13 WC 02690 and 13 WC 18386 is hereby dismissed and the matters remanded for hearing to the Arbitrator, as those matters were not even addressed at hearing and were never subject to Review with this present case.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $75,000.00. 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.

DATED: FEB 1 - 2016
o-1/21/16
DLG/jsf

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

LYNN, SCOTT
Employee/Petitioner

Case# **13WC018385**

13WC002690
13WC018386

HINCKLEY SPRINGS
Employer/Respondent

16IWCC0083

On 6/11/2015, 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 0.08% 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:

0598 LUSAK & COBB
RONALD W COBB
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

1296 CHILTON YAMBERT PORTER LLP
DANIEL T CROWE
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

16IWCC0083

STATE OF ILLINOIS)

)SS.

COUNTY OF Cook)

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

☐ Rate Adjustment Fund (§8(g))

☐ Second Injury Fund (§8(e)18)

☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

19(b)

Scott Lynn Case # 13 WC 18385

Employee/Petitioner

v. Consolidated cases: 13WC2690 &

13WC18386

Hinckley Springs

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 Ketki Steffen, Arbitrator of the Commission, in the city of **Chicago**, on **4/1/15.** 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

☐ 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. ☒ Is Petitioner entitled to any prospective medical care?

L. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **3/18/13**, 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 $**63,624.08**; the average weekly wage was $**1,223.54**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $ **4,679.12** for other benefits, for a total credit of $**4,679.12**.

Respondent is entitled to a credit of $ **0** under Section 8(j) of the Act.

ORDER

CREDITS

Respondent shall be given a credit of $4,679.12 for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Prospective Medical

Respondent shall pay reasonable and necessary medical services relative to the prospective Spinal Fusion recommended by Dr. Vivek Mohan, including all recommended pre and post-operative treatment and care as required and as provided in Section 8(a) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary partial disability benefits of $815.70/week for 26 weeks, commencing October 2, 2014 through April 1, 2015 and ongoing, as provided in Section 8(a) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Kethi Steffen 6/9/15

Signature of Arbitrator Date

ICArbDec19(b)

JUN 11 2015

PROCEDUAL HISTORY

This case was tried pursuant to Sections 8(a) and 19(b) on April 1, 2015 before Arbitrator Ketki Steffen. The arbitrator notes that the case has been consolidated with 2 other applications, 13 WC 2690 and 13 WC 18386. The Petitioner elected to proceed to hearing on case number 13 WC 18385 only. The other two matters remain pending before Arbitrator Steffen.

FACTUAL HISTORY

The Petitioner, Scott Lynn, was 55 years of age on the date of the occurrence of 3/18/13. He had been employed by the respondent for 31 years as a route salesman. The duties of a route salesman include delivering water to customers. The water is contained and transported in plastic 5 gallon bottles that weigh 43 pounds. A photograph of the bottle was introduced into evidence and a sample of the empty bottle was brought to court for demonstrative purposes. (PX1) Petitioner testified that he also delivers packaged water cases in which the water is contained in 1 liter bottles. On a typical day, he would deliver approximately 150 to 170 five gallon bottles of water to customers. The method of delivery involved driving the truck to the customer location and withdrawing the bottles from racks on the truck. The racks ranged from above shoulder level to waist level. He would carry the bottles up to two at a time to the drop off zone at the customer's location. When carrying two bottles, the Petitioner would carry one bottle on his shoulder and the other in the opposite hand. Petitioner would regularly perform his delivery duties in all seasons and all types of weather. Petitioner's testimony regarding his work duties was corroborated by Respondent witness, Tom McNamara, who held the position of Branch Manager. The Branch Manager further

testified that the Petitioner was a good and diligent worker.

On March 18, 2013, the Petitioner was making a residential delivery carrying a five gallon bottle of water. The Petitioner testified he was in the process of delivering water to a customer's home when he noticed pain in his lumbar spine. He was carrying a 5 gallon container of water on his left shoulder and a case of liter bottles of water in his right hand down the customer's driveway. When he reached the customer's porch he put the case of liter bottles down and then removed the 5 gallon bottle of water from his shoulder and placed it onto the customer's porch. The Petitioner stated that after he placed the 5 gallon bottle of water on the porch he noticed pain in his low back region. He stated that he felt a sharp pain in his lower back and pain radiating into his left leg. He testified that he did not slip and that the bottle did not slip. He simply placed the 5 gallon bottle of water onto the customer's porch, as he had done thousands of times before in his 31 years with the respondent, when he noticed pain in his lumbar spine region.

Petitioner was cross examined and acknowledged that over the course of his years with the respondent, the petitioner had given notice of having noticed pain in his back on several prior occasions: 6/19/87, 10/27/87, 7/28/88, 2/8/91, 3/1/02, 2/18/08, 2/2/10, 10/29/12, and 1/4/13. Petitioner explained that the pain he experienced in his back and leg was a new pain greater and more intense than from any prior incident.

After the incident, Petitioner contacted his office by the company radio to report the injury, but decided to finish the remainder of the day. Upon his return to the office, he reported the injury to Tom McNamara, who filled out an accident report. This testimony was corroborated by Mr. McNamara.

Following his work incident, Petitioner was treated by his Dr. Michael Hall, his primary care physician at Winchester Medical Group, S.C. in Libertyville, Illinois. (PX 3). Throughout 2011 and into 2012 the petitioner returned to his primary care physician, Dr. Michael Hall, for treatment for his lumbar spine. Dr. Hall's diagnoses during that period were "back pain with radicular pain into the left leg" and "sciatica".

After the initial incident, alleged accident of 10/29/12, Dr. Hall took a history of, "Patient was setting a product (five gallon water bottle) down at work on 03/18/13 and reinjured his back. He notified his supervisor." (PX 3). Dr. Hall ordered an MRI of the lumbar spine and authorized the Petitioner as off work until further notice. (PX 3). The interpreting radiologist stated the following findings from that MRI:

- Asymmetric disk bulge to the left resulting in mild to moderate left foraminal stenosis at L5-S1;
- Asymmetric disc bulge to the right resulting in mild foraminal stenosis, greater on the right at L1-S2;
- Tiny left paramedian disc protrusion indenting the interior fecal sac at L4-5 without significant stenosis;
- Mild degenerative changes throughout the remainder of the lumbar spine.

Following this 2/2/10 episode of back pain, the Petitioner also underwent 2 epidural steroid injections and returned to his full duty employment with the Respondent.

Petitioner was also referred to see Dr. Vivek Mohan at Complete Orthopedic Care on April 13, 2013. Dr. Mohan took a history and described the incident with the water bottle on March 18, 2013 as causing back pain and radiating pain into Petitioner's left foot. The exam noted Petitioner had positive straight leg raising on the left side. Dr.

Mohan placed Petitioner on light duty (PX 4) and (PX 7, Deposition of Mohan, p. 8-10).

Petitioner returned to Dr. Mohan on May 20, 2013 where he had positive straight leg raising and pain and tingling down his left leg even after completing his physical therapy. The records indicate on that day the doctor's plan noted that his current episode was brought on by his work injury that the Petitioner had to consider epidural injections versus surgical decompression and the ultimate plan was to move to decompression surgery as epidural steroid injections would only provide temporary relief. The Petitioner was returned to full duty as tolerated while awaiting surgical approval. (PX 7, Deposition of Mohan, pp. 2 and 3). Petitioner attempted to perform his full job duties but returned on June 20, 2013 to Winchester Medical Group complaining that, "He continues to have back pain and discomfort that is exacerbated by bending and stooping and lifting heavy weights. He has been working but the pain continues to worsen his lower back." and Dr. Hall gave a new restriction of no lifting greater than 10 pounds, no excessive bending, stooping pending surgical intervention. (PX 3, Dr. Michael Hall). The Respondent accommodated the light duty until an independent medical exam dated August 30, 2013 with Dr. Steven E. Mather, M.D. Dr. Mather diagnosed degenerative disc disease with an overlay of a lumbar strain and returned the Petitioner to full duty (RX 1, Dr. Mather Deposition, p. 13) and Dr. Mather returned Lynn to full duty as a route salesman. (RX 1, Dr. Mather Deposition, p. 15). Based on the opinion of Dr. Mather, Petitioner testified that he returned to full duty and made his best effort. Petitioner worked until October 23, 2013 when he returned to Winchester Medical Group wherein he gave a history that he had increased pain in his lower lumbar region and was returned to work with a new lifting restriction of 20 pounds with no

excessive lifting, stooping or bending until evaluated by Dr. Mohan. (PX 2, Dr. Hall). On October 31, 2013 the Petitioner followed up with Dr. Mohan whose history stated "56 year-old M with over five months CO of back and left leg pain that is aggravated by standing and walking. He has done physical therapy without pain relief. He has tried to go back full duty after an IME cleared him and stated that it was a lumbar strain. However, the pain returned soon after again and he is back on light duty. Pain worsens with any lifting or prolonged walking and bending." (PX 4) Dr. Mohan's exam found positive straight leg raising on the left with increased sensation in the left L5 dermatome. Dr. Mohan's plan was to proceed with surgery with light duty continuing until such surgery was approved. The Respondent accommodated Petitioner's light duty with office work and he was paid full salary during this time. Subsequent to this treating Dr. Mohan changed practices to the Spine Center of DuPage Medical Group. (PX 6). Dr. Mohan opined that the work related lifting incident of March 18, 2013 permanently aggravated Petitioner's back to the extent that the extent of his pain has become chronic and that the injury aggravated his back to the point where he now needs surgery. (PX 7, pp. 32-35). Dr. Mohan further testified that, "To a certain degree of medical certainty that this has not gotten better over a year and a half, 18 months or so, and he needs some surgical intervention. This is now chronic pain. This is no longer temporary . . . But once the pain becomes chronic there are other syndromes associated with pain. It is not ideal to allow somebody to be in this much pain a chronic amount of time. He does need some treatment at this point to alleviate him of this pain. To my experience and knowledge, I believe this patient needs the surgery to help him with his pain." (PX 7, pp. 33 and 34). Dr. Mohan further testified that an L5-S1

laminectomy and inter-body fusion was recommended and was related to cure the effects of the injury of March 18, 2013. (PX 7, Deposition of Mohan, pp. 32 and 33).

The respondent retained Dr. Stephen Mather as its Section 12 examining physician. The films of the MRIs that were performed on 2/22/10 and 4/10/13 were tendered to Dr. Mather for his review and analysis. Dr. Mather testified that the films from the 2 MRIs were identical. Dr. Mather testified that the 2 sets of films showed degenerative changes at L5-S1 and degenerative foraminal stenosis at L5-S1 without any nerve root compression. Dr. Mather testified that when he compared the 2 sets of films he noted that there was no structural injury to the petitioner's spine, that the condition was purely degenerative.

Dr. Mather examined the petitioner on 8/30/13. Petitioner reported that his back pain started around February of 2010, that he underwent 2 epidural steroid injections, but still had complaints of left leg and back pain which became worse after 10/29/12. The petitioner told Dr. Mather he had a recurrence of back pain symptoms after putting the 5 gallon water container down on 3/19/13. Dr. Mather performed a physical examination of petitioner. The petitioner complained of pain in the low back region that radiated down his left leg. The motor examination was normal. The petitioner's reflexes were normal, 2+ bilaterally, and asymmetric. There was no atrophy. The straight leg raising tests were negative. Dr. Mather noted that in the seated position the petitioner had a reproduction of back and leg pain, which he could not explain. This, he explained, was a non-organic finding meaning that the maneuver performed should not have caused nerve root compression.

Dr. Mather stated a diagnosis of degenerative disc disease at L5-S1. As to the event of 3/8/13, Dr. Mather testified that the petitioner sustained a lumbar strain.

Dr. Mather testified that the petitioner did not require surgery, especially the procedure that was recommended by the petitioner's treating orthopedic surgeon, Dr. Mohan, in August of 2013. Dr. Mohan was recommending a decompression hemilaminectomy and a foraminotomy. Dr. Mather explained that the petitioner had degenerative disc disease as the source of his pain and that a destabilizing foraminotomy would only make it worse. Dr. Mather explained that the foraminotomy is only indicated in patients with significant facet hypertrophy, which the petitioner did not have. Dr. Mather testified that the proper surgical procedure for a patient with degenerative disc disease is a fusion, but that it would not be good for this petitioner because he had degeneration at several levels. Dr. Mather opined that the petitioner was capable of returning to his job as a route salesman.

Dr. Vivek Mohan testified via deposition. He testified that first saw the petitioner on 4/19/13 he did not believe the petitioner needed surgery. Dr. Mohan testified that the epidural steroid injections worked in the past and he tried to persuade the petitioner to undergo another course of epidural steroid injections at that time. However, the petitioner did not want a temporary solution. Dr. Mohan testified that the degeneration of the petitioner's spine was not caused by his work but that the work accident of March 18, 2013 caused a permanent aggravation to his back, caused his pain to become chronic to the point where he needs surgery. Dr. Mather acknowledged that the petitioner initially did not want surgery and that he preferred to be on light duty. Dr. Mohan initially recommended a decompression and foraminotomy; however, he later

recommended a fusion based on the chronic nature of Petitioner's complains and symptomology.

The Respondent offered the petitioner a job as a sales representative at Costco stores. The petitioner would be selling DS Waters of America, Inc. products at the Costco store. This job would require the petitioner to stand for a prolonged period of time. Ms. Meg Karolczak, the human resources manager for the respondent, testified that she reviewed all of the petitioner's medical data in September of 2014 and found that neither of the petitioner's physicians stated a "standing" restriction. Ms. Karolczak offered the Costco job to the petitioner on 9/22/14 and he accepted it on 9/26/14. The petitioner worked the job for 2 days and then contacted Ms. Karolczak on 10/2/14 and told her he could not physically handle the job duties. On 10/3/14 the Petitioner obtained a note from Dr. Michael Hall stating that he could not stand for more than 2 hours per day.

FINDINGS/ANALYSIS

C: Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? F: Is Petitioner's current condition of ill-being causally related to the injury? and K: Is Petitioner entitled to any prospective medical care? And L: What temporary benefits are in dispute?:

A claimant must prove by the preponderance of credible evidence that an injury arose out of and was in the course of employment in order to receive compensation under the Act. See, e.g. Orsini v. Industrial Commission, 117 Ill.2d 38, 44-45 (1987), Parro v. Industrial Commission, 260 Ill.App.3d 551 (1st Dist. 1993). "In the course of" refers to the time, place and circumstance under which the accident occurred, while

"arising out of" refers to the origin or cause of the accident that gave rise to the injury. Illinois Bell Telephone Co. v. Industrial Commission, 131 Ill.2d 478, 483 (1989). It should be noted that the commission need not award compensation even if the claimant's version of relevant events is undisputed. Smith v. Industrial Commission, 98 Ill.3d 20 (1983).

In the case at bar, the Petitioner testified that the pain started while delivering and a 5 gallon bottle of water that weighs about 43 lbs. Although a claimant's burden of proof requires more than describing an onset of symptoms during employment, Petitioner's testimony that he was delivering the water to a customer when he felt back pain is persuasive and sufficient to meet the burden in this case. Undoubtedly, Petitioner had documented back issues but he was able to work full duty, without restrictions for 31 years. The nature of his job duties requires regular heavy lifting, bending and carrying. His testimony was credible and supported by the medical testimony and opinion of Dr. Mohan. It is sufficient to show that Petitioner suffered a work accident that permanently aggravated his back. The proof and medical testimony makes this conclusion reasonable and probable, not merely possible.

Some of the factors that the Arbitrator finds relevant in reaching this conclusion is that the Petitioner is a long time (31 years) employee that has worked diligently and faithfully for the respondent for many years. The accident that resulted in the aggravation of the back problems is caused by the lifting of heavy bottles and not some smaller, light weight object. The Petitioner's history that he has prior back issues is always supplemented by his return to work duties within a very short time. This shows that the Petitioner is a diligent employee and not a malingerer. Most importantly it is

conceivable and reasonable that a 55 year old male with preexisting back issues could have seriously injured his back while lifting and delivering a heavy object. In summary, the nature, mode and description of accident is not in conflict with the mechanism of the injury.

As to causation and prospective medical care in the nature of fusion surgery, the Arbitrator finds that the Petitioner's current condition is causally related to his work accident and that he is entitled to the requested fusion procedure and the appropriate and recommended pre and post care following the surgery. The Arbitrator is persuaded by the following facts and arguments:

Petitioner suffered a back injury and immediately reports it to his employer and is treated for the same. An MRI shows a degenerative condition and even the IME, Dr. Mather acknowledges that Petitioner has a degenerative back with a sprain overlay from the work incident. Dr. Vivek Mohan, an orthopedic surgeon, treats Petitioner and causally relates his condition to the work accident. He documents the accident history and described the incident with the water bottle on March 18, 2013 as causing back pain and radiating pain into Petitioner's left foot. His exam confirmed that Petitioner had a positive straight leg raising on the left side. (PX 7) Deposition of Mohan, p. 8-10). The May 20, 2013 again had positive straight leg raising and pain and tingling down his left leg even after completing his physical therapy. Dr. Mohan opined that Petitioner's current condition was brought on by his work injury.

The IME, Dr. Mather has opined that Petitioner suffered a lumbar strain but that a fusion is not a good option for the Petitioner as he has degeneration as several levels. Dr. Mather further opined that Petitioner was capable of returning to his job as a route

salesman. The Arbitrator finds the opinion of Dr. Mohan to be more persuasive on the issue of causation and prospective medical care in the nature of fusion surgery. The straight leg test supports Dr. Mohan's opinion as the positive results of the test corroborate and support Petitioner's subjective complaints. Petitioner had prior back issues but the work accident made them chronic and permanent. Petitioner's efforts and attempt to unsuccessfully return back to his job support Dr. Mohan's opinion that the accident was the straw that broke the camel's back. The Arbitrator also finds Dr. Mohan's opinion to be persuasive because it is followed by attempts at conservative care and treatment and where return to work duty further aggravated Petitioner's condition. Lastly Dr. Mather's opinion is weak as he concludes that the degeneration is serve and multi-level but that the Petitioner should not have surgery. He offers no viable options but releases Petitioner to full time work in spite of these findings. The Arbitrator finds his opinion of severe degeneration and full duty release to be inconsistent. The Arbitrator finds causation and awards prospective medical care per the opinion and directive of Dr. Mohan.

In further support of her findings, the Arbitrator notes that Dr. Mohan opined that the work related lifting incident of March 18, 2013 permanently aggravated Petitioner's back to the extent that his pain has become chronic and that he now needs surgery. (PX 7, pp. 32-35) Dr. Mohan further testified that, "To a certain degree of medical certainty that this has not gotten better over a year and a half, 18 months or so, and he needs some surgical intervention. This is now chronic pain. This is no longer temporary . . . But once the pain becomes chronic there are other syndromes associated with pain. It is not ideal to allow somebody to be in this much pain a chronic

amount of time. He does need some treatment at this point to alleviate him of this pain. To my experience and knowledge, I believe this patient needs the surgery to help him with his pain." (PX 7, pp. 33 and 34) Dr. Mohan further testified that an L5-S1 laminectomy and inter-body fusion was recommended and was related to cure the effects of the injury of March 18, 2013. (PX 7, Deposition of Mohan, pp. 32 and 33) His explanation and diagnosis are persuasive and in line that the work accident need not be the primary cause of Petitioner's condition.

It is axiomatic that employers take their employees as they find them. *Sisbro, Inc.*, 207 Ill.2d at 205; citing *Baggett v. Indus. Comm'n*, 201 Ill. 2d187, 199, 266 Ill. Dec. 836, 775 N E.2d 908 (2002). "When workers' physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment." *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 60 Ill. Dec. 629, 433 N.E.2d 671 (1982). Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Indus. Comm'n*, 92 Ill. 2d at 36; *Williams v. Indus. Comm'n*, 85 Ill. 2d 117, 122, 51 Ill. Dec. 685, 421 N.E.2d 193 (1981).Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Indus. Comm'n*, 37 Ill. 2d 123, 127, 227 N.E.2d 65 (1967).

In conclusion, after taking into account the preceding evidence and medical opinions, the Arbitrator finds that the Petitioner suffered an accident which arose out of

and in the course of Petitioner's employment by Respondent on March 18, 2013. The Petitioner is entitled to temporary total disability from October 2, 2014 to the present and ongoing. By competent testimony of his treating physician, Dr. Mohan, Petitioner requires an L-5/S-1 Spinal Fusion to cure the effects of his injury of March 18, 2013. The Arbitrator awards the TTD and prospective medical.

Ketki Shroff Steffen 6/9/15

Signature of Arbitrator Ketki Shroff Steffen Date

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICKY STEVENS,

Petitioner,

vs. NO: 13 WC 21942

CERRO FLOW,

Respondent,

16IWCC0046

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, temporary total disability, 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.

The Commission modifies the permanency award and reduces it to 10% loss of use of each hand. Although we agree with the Arbitrator's analysis of the first four factors under Section 8.1b(b), we find that Petitioner's complaints of pain are not fully corroborated by the medical records.

Petitioner testified that most of the numbness and tingling in his hands went away after the surgeries but he still has some soreness. However, he also testified that he was told by the doctor that it could take up to a year for the soreness to go away. Therefore, it isn't clear whether this soreness is actually a permanent condition. Petitioner also testified that he doesn't think that his grip strength has returned completely but that he returned to work because he knew he was going to retire. We note that the most recent medical record on April 24, 2014, does not mention anything about soreness or diminished grip strength. Petitioner's surgeon, Dr. Beatty, testified that Petitioner had good results from the surgeries, was returned to work full duty on April 28, 2014, and that the hand therapist felt that Petitioner had recovered to resume full duty.

In addition, Petitioner has been diagnosed with bilateral osteoarthritis of the hands so it isn't clear what portion of his current complaints are related to that versus his work-related

carpal tunnel syndrome. On November 12, 2009, Dr. Byler diagnosed Petitioner with widespread degenerative arthritis in the hands and wrists. On January 4, 2010, Dr. Howard diagnosed osteoarthritis of the interphalangeal joints of both hands. Petitioner's Dr. Beatty testified that he was aware of this diagnosis and that Petitioner's work did not cause the osteoarthritis but did cause the carpal tunnel syndrome. Respondent's Section 12 examiner, Dr. Strecker, testified that, in his opinion, Petitioner may have had mild carpal tunnel syndrome but his major complaint was based on his rheumatoid arthritis, which is a progressive disease over time and was not related to Petitioner's work duties.

Although we affirm the finding that Petitioner's carpal tunnel syndrome is work-related, there is no evidence that the osteoarthritis is. As such, it is more likely than not that his current symptoms of soreness and reduced grip strength are also related to his progressive arthritic condition and not due to the carpal tunnel syndrome. Therefore, we find that Petitioner has proven that his work injury has resulted in the loss of use of 10% of each hand.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $447.95 per week for a period of 12-6/7 weeks, 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 pay to Petitioner the sum of $403.15 per week for a period of 38 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the right hand and 10% of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,873.34 for medical expenses 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 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 $30,100.00. 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.

DATED: JAN 2 1 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/2/15
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STEVENS, RICKY
Employee/Petitioner

Case# **13WC021942**

CERRO FLOW
Employer/Respondent

16IWCC0046

On 2/9/2015, 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 0.06% 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:

1312 BEMENT & STUBBLEFIELD
GARY BEMENT
PO BOX 23926
BELLEVILLE, IL 62223

0507 RUSIN MACIOROWSKI LTD
THEODORE J POWERS
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

16IWCC0046

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ricky Stevens
Employee/Petitioner

v.

Cerro Flow
Employer/Respondent

Case # **13** WC **021942**

Consolidated cases: _____

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Belleville**, on **11/25/14**. 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 **Statute of Limitations**

16IWCC0046

FINDINGS

On **4/19/13**, 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 $**32,252.37**; the average weekly wage was $**671.92**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $447.95/week for 12 6/7 weeks, commencing 1/28/14 through 4/27/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit for any amounts that have been paid for Short Term Disability.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,131.34 to Southwestern Illinois Plastic & Hand Surgery, $4,762.00 to Apex Physical Therapy, and $980.00 to Dr. Khan, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $403.15/week for 53.2 weeks, because the injuries sustained caused the 14 % loss of the right hand and 14 % loss of the left hand, as provided in Section 8(e) 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

1/28/15
Date

FEB 9- 2015

FINDINGS OF FACT

The Petitioner was a 62 years of age on the date of hearing. He worked for the Respondent for 29 years, primarily on a set of machines known as Schumag machines. In general, these machines turned rolls of copper pipe into straight lengths of pipe. The Respondent provided two DVD's showing the operation of Schumag machines 2 & 3.(RX 2, 3) The Petitioner agreed that the DVD's accurately show a portion of the job duties, but not all. The operators turn a basket containing copper coils that weighs about 2000 pounds in order to achieve the proper alignment. He then must grab onto a coil of copper and pull it, hammer the end and place a plug in it. He then has to shove the tube into the machine, which requires force to accomplish. If all runs smoothly, the operator will send the copper through the machine with a series of buttons, and the copper pipe exits the machine and rolls into a tray. The operator must guide the coils and straighten them by hand. This is the operation shown in the DVD and in the ergonometric analysis provided by the Respondent.

The Petitioner testified that in reality there are many additional tasks required of the operator which are not included in either the DVDs or the ergonomic evaluation. Most days, the machine does not operate smoothly and the tubing gets jammed. He then must use a hacksaw to cut the tubing out. Some days he will use a hacksaw most of the day, but he always uses one at least 15-20 times a day. He also uses a hammer throughout the day. The hammer is a large brass hammer that weighs 2-3 pounds. This must be used multiple times per hour. He also is required to replace the sheer blade on both machines multiple times a day. This requires him to use wrenches, Allen wrenches, and ratchets to loosen the bolts to remove the old blade and the reverse to install the new one. The use of these tools requires pressure and torque of the hands. The Petitioner was also required to make most repairs on the machines, which required frequent use of hand tools, including wrenches, pliers, and hammers. Part of the job required measuring the tubing with a micrometer, which required him to handle the copper tubes with his hands many times per day. The Petitioner described the job as very difficult and very hand intensive.

In 2009 the Petitioner first complained of pain in his wrists and reported to the company physician. (RX 1,2) He was referred to Dr. Howard, an orthopedic surgeon in January, 2010. Dr. Howard reported that the Petitioner had multi-joint osteoarthritis of his hands, but did not have carpal tunnel syndrome. He reported that the employment was not a cause of the Petitioner's symptoms. (RX 4)

The Petitioner testified that he continued to work full duty, but his hand condition deteriorated. In addition to pain, he developed numbness and tingling in both hands. By April of 2013 the symptoms had gotten bad enough that he sought treatment from his family doctor, Dr. Reid, and was referred to Dr. Khan, who performed a nerve conduction study on 4/15/13 and diagnosed the Petitioner with carpal tunnel syndrome. (PX 2) Petitioner became aware of the diagnosis and that it was related to his employment on 4/19/13. He reported this to his employer at that time.

The Petitioner sought treatment from Dr. Beatty, a hand surgeon from Edwardsville, Illinois. Dr. Beatty confirmed the diagnosis of bilateral carpal tunnel syndrome and recommended surgery. Dr. Beatty released the right carpal tunnel on 1/28/14 and the left on 2/18/14. After post-operative physical therapy, the Petitioner was released to full duty on 4/28/14. (PX 5, p. 12; PX 4, p. 7) He testified that he was able to tolerate the discomfort in his hands while working until his retirement in August of 2014. He testified that he continues to have some slight numbness in his hands, although it is much better that before surgery. He notices a loss of grip strength bilaterally and has pain in both hands. The Arbitrator found Petitioner to be a sincere and credible witness.

Dr. Beatty testified that the Petitioner's job activity would be the cause and the basis for the development of bilateral carpal tunnel syndrome or worsening of preexisting carpal tunnel syndrome. (PX 5, p. 10) Dr. Beatty

had not reviewed the DVD's or job analysis, but relied on the Petitioner's job description. The job described in the form attached to Dr. Beatty's deposition is consistent with Petitioner's description of his job duties at the time of Arbitration. Dr. Beatty also considered it significant that the Petitioner's job activities caused his condition to intensify.

The Petitioner testified that he is diabetic and that in the past he has had difficulty in maintaining the correct blood sugar. It is now under control, however and has been for some time. Dr. Beatty did not believe that the compression neuropathy shown on the NCS/EMG was caused by diabetes, nor was it relevant to his opinion regarding causation. (PX 5, p.18)

The Petitioner was examined by Dr. William Strecker on 5/14/11, pursuant to § 12. He examined the Petitioner and reviewed some prior medical records. His diagnosis was osteoarthritis. He was uncertain whether the Petitioner had carpal tunnel syndrome. (RX 7, p.14) He had reviewed the DVDs and the ergonomic analysis performed by Apex. His opinion was that the Petitioner's job was not a factor in the development of the Petitioner's hand complaints. (RX 7, p. 18) He testified that the Petitioner's BMI and his age were more likely causes of his condition. Dr. Strecker did not review the NCS performed by Dr. Khan. He had not reviewed Dr. Beatty's records. He further did not know that the Petitioner used a hacksaw or hand tools while at work. (RX7, p. 24-25)

The ergonometric analysis was prepared by Apex Physical Therapy. It appears to have been made in conjunction with the DVD recording. The worker was required to push ½" tubing into the machine which required 25 lbs of pushing force and 50 lbs of grip force for 5 repetitions. On the other machine the 7/8" tubing required 45-50 lbs of pushing force and 50-60 lbs of grip force for 5 repetitions. (RX 10) The frequency of the repetitions is unclear. The report measures multiple factors, but it does not represent a complete picture of Petitioner's duties. It does not, for example include using a hack saw, 2-3 pound hammer, and hand tools on a repeated basis.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, the issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission recently noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant

must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

In this case, the evidence shows that Petitioner worked in the Respondent's factory for 29 years, primarily performing the same job duties. The job, as Petitioner described it at the Hearing, is quite hand intensive. He testified that he must pull copper coils off a spool and use a 2-3 lb hammer to strike the end. He must the shove it into the machine, which takes force. Petitioner's testimony in this regard is consistent with the DVDs Respondent offered into evidence. (RX 12, 13) The Petitioner also testified that he was frequently required to use a hack saw to cut pieces of tubing in order to extricate them from the machine when it would jam. Sometimes he would use the hack saw most of the day, other days it would be less, but always at least 15-20 times per day. He also testified that he was required to use wrenches, Allen wrenches, pliers and other tools multiple times throughout the day. His testimony about the frequency of use of these tools was credible and unrefuted.

The Respondent admitted DVDs of the Petitioner's job as well as an ergonometric study. Petitioner agreed that the videos show the machine running. He indicated, however they do not show the operator using the tools as described above. He testified that during the short time of the video the machine was running smoothly, but that was the exception to the norm. The Petitioner was credible in his description of the job activities and his testimony as a whole. The Arbitrator finds the DVDs and ergonomic study do not completely and accurately represent the Petitioner's job duties and therefore give them little weight.

Petitioner's treating doctor, Michael Beatty, testified that he reviewed the detailed job description prepared by the Petitioner which is consistent with the Petitioner's testimony at the hearing. Dr. Beatty had the opportunity to review all of the prior medical records. His clinical examination showed the Petitioner to have bilateral carpal tunnel syndrome. This diagnosis was confirmed by the NCS. Dr. Beatty testified that the job duties as described, taken as a whole with all of the other factors was a cause or at least an aggravating cause of the carpal tunnel syndrome. (PX5 p. 10)

The Section 12 examiner, Dr. Strecker's testified he watched the videos and looked at the ergonomic study. He was unaware, however, that the Petitioner used a hacksaw or any hand tools on the job. He was not even certain that the Petitioner actually had carpal tunnel syndrome, but felt that his problems were caused by underlying osteoarthritis. He had not reviewed the nerve conduction study or Dr. Beatty's reports before his deposition. His testimony that many other issues could be causes of carpal tunnel syndrome, i.e. BMI, age, normal daily life, diabetes; but working 29 years in an industrial setting as described by the Petitioner could not have been a contributing factor is not persuasive. The Arbitrator finds the testimony and opinions of Dr. Beatty much more persuasive.

Based on the above, and the record taken as a whole, the Arbitrator concludes that the Petitioner's condition of ill-being did arise out of and in the course of his employment and is causally related thereto.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?
Issue (O): Was the application for adjustment of claim filed within the applicable Statute of limitation?

The Petitioner first made complaints of hand pain to his employer in 2009. In 2010 he was referred to Dr. Howard who reported that the Petitioner did not have carpal tunnel syndrome, but did have osteoarthritis in his hands which was not related to his work. From 2010 through 2013, the Petitioner continued to work full duty. He testified that his hands gradually got worse during that time and he started to develop more numbness in his hands. His hands were much worse in April 2013, so he sought treatment on his own. He had diagnostic testing on his upper extremities on 4/15/13 which revealed bi-lateral carpal tunnel syndrome. He was informed of his diagnosis on 4/19/13. He immediately reported this to his supervisor. Petitioner's testimony in this regard was credible and supported by the records in evidence. It was not refuted.

Petitioner was justified in relying on the opinion of Dr. Howard in 2010. The Arbitrator finds that Petitioner's condition manifested itself on 4/19/13 which is the date he was advised of his diagnosis and its relationship to his employment. He immediately informed Respondent, and filed his application for adjustment of claim on 7/8/13. Appropriate notice was given to Respondent and the claim was filed well within the Statute of Limitation.

Issue (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?

Respondent did not dispute the reasonableness and necessity of the medical bills. The dispute was based upon the issues of causal connection and accident. Based upon the foregoing findings of the Arbitrator, Respondent shall pay the following medical bills pursuant to the fee schedule:

Southwest Illinois Plastic and Hand Surgery	$3,131.34
Apex Physical Therapy	$4,762.00
Dr. Khan	$ 980.00

Respondent shall be given a credit for any medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Issue (K): What temporary benefits are in dispute?

The only dispute regarding TTD was Respondent's liability there for based upon the issues of causal connection and accident. Petitioner worked up until the date of his first surgery on 1/28/14. He was released to return to work following his second surgery as of 4/28/14. The Arbitrator notes that the parties indicated on the Request for Hearing form that the period of disability ended on 4/14/14. It is clear from the records, however that Dr. Beatty did not release Petitioner to return to work until 4/28/14. (PX 5, p. 12; PX 4, p. 7) The Arbitrator finds Petitioner is entitled to TTD benefits in the amount of $448.17 per week for a period of 12 6/7 weeks for the period of 1/28/14 through 4/27/14. Respondent shall be given credit for any payments made for short term disability.

Issue (L): What is the nature and extent of the injury?

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was able to return to work full duty following his surgeries and subsequently retired in August of 2014. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 60 years old at the time of the accident. The Arbitrator gives *lesser* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner has retired. The Arbitrator therefore gives *lesser* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Because the medical records and testimony of his treating surgeon corroborate the Petitioner's complaints of pain, weakness and loss of function in his hands, the Arbitrator therefore gives *greater* weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 14% loss of use of each hand pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Salazar,

Petitioner,

vs. NO: 13 WC 22337

City Colleges of Chicago,

16IWCC0042

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical expenses, temporary total disability, benefit rate, notice, penalties and fees, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Petitioner testified that she slipped and fell from the third stair of a stairwell in Respondent's facility and slid down fifteen steps on her buttocks to the bottom of the stairs. Petitioner's Exhibit 5(a) of the record includes a photograph of the purported stairwell that Petitioner fell down. The photograph shows that there is a landing in the middle of the stairwell. Petitioner never mentioned the landing during her testimony or in her description of the accident in the Worker's Compensation Initial Medical Report that the Petitioner wrote herself. Petitioner's version of her accident is incredulous given that there is a landing in the stairwell: If the Petitioner slid down fifteen stairs on her buttocks then her momentum would have changed once she hit the landing section of the stairwell, and she would not have continued to keep sliding down the stairwell on her buttocks. Due to the Petitioner's lack of credibility on this issue, the Commission therefore agrees with the Arbitrator's denial of benefits to the Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 19, 2014 is hereby affirmed and adopted.

16IWCC0042

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

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.

DATED: JAN 2 0 2016

TJT/ gaf
O: 11/23/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SALAZAR, MARIA
Employee/Petitioner

Case# **13WC022337**

CITY COLLEGES OF CHICAGO
Employer/Respondent

16IWCC0042

On 11/19/2014, 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 0.07% 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:

3098 MICHAEL L NICHOLSON
7111 W HIGGINS AVE
SUITE 2165
CHICAGO, IL 60656

NYHAN BAMBRICK KINZIE & LOWRY PC
ADAM J COX
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

☐	Injured Workers' Benefit Fund (§4(d))
☐	Rate Adjustment Fund (§8(g)
☐	Second Injury Fund (§8(e)18)
☒	None of the above

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

MARIA SALAZAR
Employee/Petitioner

Case #13 WC 22337

v.

16IWCC0042

CITY COLLEGES OF CHICAGO
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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on August 24 and October 29, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☒ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☒ What is the nature and extent of injury?

M. ☒ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On May 6, 2013, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- At the time of injury, the petitioner was 57 years of age, single with no children under 18.

ORDER:

- The petitioner's request for benefits is denied and the claim is dismissed.

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.

Robert E. Williams

Signature of Arbitrator

November 19, 2014

Date

NOV 19 2014

FINDINGS OF FACTS:

On May 6, 2013, the petitioner received emergency care at Advocate Trinity Hospital for left foot and ankle pain. X-rays revealed a non-displaced fracture through the base of the distal phalanx of her left first toe and the posterior distal aspect of the fibula. She was splinted, given a mold cast and crutches, prescribed medications and discharged. The petitioner saw Dr. Srivastava on May 13th for tailbone pain. A CT scan of her sacrum and coccyx on May 15th revealed a sclerotic area in the last sacral segment. The petitioner reported low back and left knee pain to Dr. Srivastava on July 10th. The petitioner was restricted from work from May 6, 2013, through November 20, 2013, and thereafter, returned to her regular job duties. Dr. Srivastava opined on October 29, 2013, that a lumbar CT scan was negative for fractures but revealed multilevel degenerative changes. On October 2, 2014, the petitioner reported to the University of Illinois that she fell on March 3, 2014, and sprained her left toe and ankle. Also, she reported that her left toe fracture on May 6, 2013, had healed but that her back pain persisted.

FINDING REGARDING WHETHER THERE WAS AN EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE PARTIES:

An employer/employee relationship existed between the petitioner and the respondent on May 6, 2013. The petitioner's testimony that she worked part-time for the respondent was not rebutted.

FINDING REGARDING WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that she sustained an accident on May 6, 2013, arising out of and in the course of her employment with the respondent. The petitioner testified that she was carrying two

sheets of paper in a manila folder in her left hand while descending stairs from the second to the first floor when she slipped and fell about fifteen steps on her buttocks to the bottom of the stairs. She did not know why she fell and did not see any wetness on the stairs. The petitioner testified that after falling, she noticed her hand and the middle side of her left leg was wet.

Although it is felt that there is some intrinsic risk with traversing stairs, the petitioner failed to establish that she was subject to an increased risk due to her work duties, a defect in the stairwell or a special hazard. The petitioner's request for benefits is denied and the claim is dismissed.

FINDING REGARDING THE AMOUNT OF WAGES:

The petitioner's testimony that she averaged 25 hours per week with the respondent was not rebutted; however, there was no evidence of her hourly wage rate.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LORRAINE BLACK,

Petitioner,

16IWCC0055

vs. NO: 13 WC 025334

TRANSPORTATION JOINT AGREEMENT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses and temporary total disabilty 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. The Commission further remands this case to the Arbitrator for further proceedings for a determination 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).

The Decision of the Arbitrator found Petitioner's current complaints of low back pain and leg pain to be causally related to her October 16, 2012, accident. It was noted that "various physicians and physical therapists" diagnosed Petitioner's these pains as being work-related and that "the medical records reflect a consistent and unbroken course of medical treatment . . . ." The Commission views the history contained in Petitioner's medical records differently and, therefore, is unable to conclude that Petitioner's current complaints are related to her October 16, 2012, accident.

Petitioner's medical history reveals no continuous complaints of low back pain with radicular symptoms but a series of acute complaints of low back pain, twice with accompanying radicular symptoms, and is most notable for the abandonment of treatment. The pattern evidenced by the Petitioner's medical history gives rise to the conclusion that the pain and discomfort Petitioner experienced on October 16, 2012, was a temporary exacerbation of a preexisting condition.

Petitioner initially treated her injury at Centegra Occupational Health (Centegra) from the date of the accident, October 16, 2012, through February 7, 2013. Over the course of her treatment at Centegra, Petitioner regularly and repeatedly complained of low back pain and radicular pain into the right lower extremity. On October 19, 2012, while treating at Centegra, she provided a history of having been diagnosed with intravertebral disc disease two-and-a-half years earlier, an injury that resulted, per Petitioner, in daily, low grade back pain. Concurrent with her receiving medical treatment at Centegra, Petitioner underwent physical therapy at Centegra Physical Therapy and Sports Clinic from November 20, 2012, through January 23, 2013. Petitioner's medical treatment was subsequently transferred to Dr. Babak Lami, the physician with whom Petitioner had treated her earlier lumbar complaints with. Though Petitioner's physical therapy was to continue, January 23, 2013, is the last recorded date Petitioner underwent physical therapy.

Petitioner began treating with Dr. Lami on February 27, 2013, and complained of a recurrence of symptoms, namely radiating pain down her right leg in a L5 nerve distribution. Dr. Lami's found no motor deficit but noted Petitioner was made uncomfortable with motion of the lumbar spine and Petitioner's straight leg raise testing reproduced symptoms. Continued complaints of low back pain and the similar findings of no motor deficits were made on April 19, 2013, May 3, 2013, and June 5, 2013. On August 14, 2013, Petitioner again complained to Dr. Lami of low back discomfort but also complained ofnumbness in her feet and of generalized weakness. Concerned with Petitioner's complaint of weakness, Dr. Lami had Petitioner undergo an electromyogram and nerve conduction study of her lower extremities on August 29, 2013. The result of the study was the finding that all of Petitioner's tested muscles were normal. Petitioner returned to Dr. Lami on September 11, 2013. She continued to complain of low back pain but also complained of abdominal pain that radiated into her leg. Dr. Lami ordered thatPetitioner undergo a CT of her abdomen. One was performed on October 2, 2013, that suggested pelvic congestion syndrome. Over the course of treating with Dr. Lami, Petitioner was also seen by Dr. Lami's colleague, Dr. Neema Bayran, for pain management. She, however, did not return to Dr. Lami, or Dr. Bayran, after September 11, 2013. Petitioner offered no explanation as to why she stopped treating with Dr. Lami.

On December 5, 2013, Petitioner completed an intake form for Dr. Anthony LeBario and indicated, in a pain diagram, of experiencing right-sided pain from below her right shoulder blade down to her right foot and along the entire length of the back of her right arm. To Dr. LeBario, Petitioner provided a history of stabbing, shooting, unbearable and constant pain that, at that moment, rated 10/10 in intensity. The resultant physical exam found tenderness to palpation

along multiple areas in the lumbar spine but also pain with mid-line lumbar extension and with right lateral lumbar flexion. The examination elicited no muscle or neurological deficits. Petitioner returned to Dr. LeBario on December 18, 2013, with continued complaints of 8-9/10 pain, pain described as constant, throbbing and radiating into her right leg. The accompanying examination again revealed pain over multiple areas of Petitioner's lumbar spine and resulted in Dr. LeBario administering a lumbar transforaminal epidural steroid injection at L5-S1 as well as a trigger point injection into her right gluteal muscle. Petitioner, upon returning to Dr. LeBario on January 8, 2014, indicated that her symptoms improved a little but still complained of 8-9/10 pain that radiated down her right leg. The examination again elicited findings of diffuse lumbar pain and resulted in Dr. LeBario again administering a lumbar transforaminal epidural steroid injection at L5-S1 as well as a trigger point injection into her right gluteal muscle. Dr. LeBario also indicated that Petitioner should follow-up this appointment no sooner than one week for repeat injections. Petitioner never returned for those injections. Petitioner testified that she did not return to Dr. LeBario due to her insurance company's refusal to cover the recommended injections. Dr. LeBario testified that he was unaware as to why he hasn't seen Petitioner since January 8, 2014.

The above medical history contradicts the assertion contained in the Decision of the Arbitrator of Petitioner partaking in "consistent and unbroken medical care." Per the medical records Petitioner tendered into evidence, she suffered from a continuous low-grade back pain that dated back to her 2009 work injury. On October 16, 2012, she suffered low back pain while attempting to secure a child in a seat on the bus as was her job duty. She then treated with Centegra and, then, Dr. Lami, and his colleague Dr. Bayran, until September 11, 2013. Despite Petitioner's complaints of continued back pain with radiation and Dr. Lami's recommendation for continued treatment, she stopped treating with Dr. Lami. Petitioner did not resume treatment for her low back and radicular symptoms until December 5, 2013, and did so by presenting to Dr. LeBario. She saw Dr. LeBario on two more occasions. Petitioner did not indicate, nor do her medical records, that she sought regular treatment for her low back since she last saw Dr. LeBario on January 8, 2014, despite complaining of 8-9/10 pain with radicular symptoms when she last seen by Dr. LeBario. By the time Petitioner's arbitration hearing was held on December 5, 2014, Petitioner had gone more than eleven months without recorded medical treatment. Given this history, the Commission finds that the Arbitrator erroneously found Petitioner's medical care to have been consistent and unbroken.

The Commission also finds it difficult to reconcile some of Petitioner's as-testified-to claims either with her own testimony or with her medical records. Petitioner testified that she called Dr. Lami sometime after September 11, 2013, but never received a return phone call. No explanation was offered by Petitioner when she did not follow-up that phone call with others, particularly given her claimed level of pain. Petitioner, in explaining why she stopped attending physical therapy first indicated it was because Respondent wouldn't authorize it but then stated it was because Dr. Lami stopped it. Most significantly, Petitioner testified that she had not injured her back or had another injury to her back since the October 16, 2012, accident. On March 13, 2013, Petitioner presented to the emergency department of Sherman Hospital with complaints of

back pain. The history she provided the hospital staff was that she injured her back turning to reach for a television remote control. The history of the incident further states that the onset of her complained-of pain began three hours early. Petitioner, at that time, also provided a medical history that was noted to be "negative." Though she treated her low back pain with Dr. LeBario only two months earlier, Petitioner did not reference that treatment. She was examined and her musculoskeletal range of motion was found to be normal. She was found to exhibit no neurological deficits. Petitioner was discharged from the hospital with instructions to return if her condition worsened. As with her other treatment providers, Petitioner never returned.

It is the cyclical nature of Petitioner's complaints and treatment that lead the Commission to conclude that Petitioner's injury on October 16, 2012, resulted in the aggravation of her pre-existing lumbar condition, an aggravation that resolved as of September 11, 2013, the date Petitioner last treated with Dr. Lami. The Commission further concludes Petitioner failed to prove her claimed radicular symptoms were causally related to her compensable accident. The August 29, 2013, electromyogram and nerve conduction study was negative, and both Dr. Lami and Dr LeBario, and later the emergency room physician at Sherman Hospital, found Petitioner showed no neurological deficits. The inconsistencies noted in Petitioner's testimony gives the Commission pause to accept Petitioner's subjective claim of radicular symptoms. The Commission, therefore, finds Petitioner achieved maximum medical improvement from the October 16, 2012, accident as late as September 11, 2013. Accordingly, the Commission modifies the Decision of the Arbitrator to terminate temporary total disability and medical benefits effective September 11, 2013, and vacate the awarded prospective medical treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is modified to terminate temporary total disability and medical benefits effective September 11, 2013, and vacate the awarded prospective medical treatment on the basis of Petitioner being found to be at maximum medical improvement on said date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $259.22 per week for a period of 18-5/7 weeks, from May 4, 2013, through September 11, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this 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.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $6,794.83 for medical expenses under §8(a) of the Act, that sum being the medical expenses incurred from October 16, 2013, through September 11, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $9,000.00. 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.

DATED: JAN 2 2 2016
KWL/mav
O: 11/23/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0055

BLACK, LORRAINE Case# **13WC025334**
Employee/Petitioner

TRANSPORTATION JOINT AGREEMENT
Employer/Respondent

On 1/9/2015, 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 0.11% 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:

1767 FREEMAN TUTAJ LLC
JAMES P TUTAJ
170 CENTER ST SUITE 2
GRAYSLAKE, IL 60030

0210 GANAN & SHAPIRO PC
AMY TURNBAUGH
210 W ILLINOIS ST
CHICAGO, IL 60654

STATE OF ILLINOIS)
)SS.
COUNTY OF **McHenry**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
XX None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 19(b)

16IWCC0055

Lorraine Black
Employee/Petitioner

v.

Transportation Joint Agreement
Employer/Respondent

Case # **13** WC **25334**

Consolidated cases: _____

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 **Falcioni**, Arbitrator of the Commission, in the city of **Woodstock**, on **December 5, 2014**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **10-16-12**, 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 $**20,219.16**; the average weekly wage was $**388.83**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**2814.39** for TTD paid.

ORDER

Respondent shall pay reasonable and necessary medical services of $22,396.58, as provided in Sections 8(a) and 8.2 of the Act and receive credit for all sums previously paid hereunder.

Respondent shall pay Petitioner temporary total disability benefits of $259.22/week for 83.14 weeks, commencing 5-4-13 through 12-5-14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7-18-13 through 12-5-14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $2814.39 for temporary total disability benefits that have been paid.

Respondent shall provide the medical care prescribed by Dr. Laborio as set forth more fully herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Robert E. [signature]
Signature of Arbitrator

December 23, 2014
Date

ICArbDec19(b)

JAN 9 - 2015

Statement of Facts

On October 16, 2012 while assisting a disabled child into his bus seat, Petitioner injured her low back. Petitioner testified she felt a sharp stabbing pain into her low back.

Petitioner reported the occurrence to her supervisor and was sent by Respondent to its Occupational health Clinic, Centegra Occupational Health in Crystal Lake Illinois.

Petitioner's Exhibit 1 are the records from the Centegra Occupational Health Clinic in Crystal Lake Illinois. On October 16, 2012 Petitioner was seen for an initial triage and assessment. She presented with complaints of low back pain that radiated up the middle of her back and down her right leg to her foot. She also complained of slight bilateral leg tingling while sitting. Petitioner was diagnosed with lower back pain and sciatica, prescribed anti-inflammatories, muscle relaxants and Vicodin for severe pain. She was placed on light duty and instructed to return to the Clinic on October 19, 2012. Her work restrictions included no stooping, bending or twisting; minimal pushing, pulling, caring and squatting; and to avoid extensive kneeling.

Petitioner testified that her duties as a school bus attendant required consistent and extensive stooping, bending, twisting, pushing, pulling, carrying, squatting and occasional kneeling.

On October 19, 2012 Petitioner was seen for follow-up in the Occupational Clinic. An additional diagnosis of muscle spasm was added to the previous diagnosis of sciatica. Physical therapy was ordered, Petitioner was continued on light-duty and medications, and directed to follow-up in two weeks.

On November 2, 2012 the Clinic reported no significant improvement in Petitioner's condition. A Medrol dose pack was ordered and Petitioner is directed to follow-up after physical therapy.

On November 20, 2012 Petitioner is seen for her initial physical therapy evaluation. The physical therapist notes that she was referred for physical therapy on October 16, 2012 but only recently received insurance authorization to begin physical therapy.

Petitioner presented with complaints of back pain of 10/10 at worst; 7/10 at best. Her pain increased with driving, walking, stair climbing. Her pain was decreased with pain medications. She reported weakness in her right lower extremity and sitting and standing tolerance of only 15 minutes. Her physical examination revealed reduced range of motion in all planes, muscle spasms in her low back and moderate tightness in her hamstrings and piriformis muscles bilaterally. The therapists assessment was decreased truncal mobility, gate deviation, poor truncal stability affecting functional and positional tolerances. She recommended physical therapy 2 to 3 times a week for four weeks.

Between November 20, 2012 and January 23, 2013 Petitioner seen for a total of 11 physical therapy sessions. The February 3, 2013 physical therapy discharge summary

reflects a recommendation of continued physical therapy two times a week for four weeks.

Additional physical therapy was not ordered or approved.

On January 23, 2013 the Occupational Clinic ordered an MRI of the lumbar spine.

The report of the lumbar MRI obtained on February 5, 2013 reflects:

> At L3-L4, minor disk bulge indents the anterior thecal sac, resulting in slight inferior foraminal narrowing, greater on the left.
> At L4-L5, minor diffuse disk bulge indents the anterior thecal sac. There is edema in the central annulus. Slight inferior foraminal narrowing is noted.
> At L5-SI, a tiny shallow left paramedian disk protrusion with edema in the annulus questionably abuts the descending left S1 nerve root sleeve. The neural foramen and central spinal canal otherwise appear patent.

On February 7, 2013 the Occupational Clinic reported their diagnosis of vertebral disc tear with sciatica, extended Petitioner's light-duty restrictions, and discharged Petitioner with a referral to spine specialist Dr. Lami for further evaluation and care.

Petitioner is first seen by Dr. Lami on February 27, 2013. Petitioner's Group Exhibit 2. Dr. Lami's impression is low back pain with radiculitis. He ordered a trial of lumbar epidural injections.

On March 26, 2013 Petitioner was seen by Dr. Lami's partner, Dr. Bayran for evaluation and performance of an epidural steroid injection. Dr. Bayran's physical examination revealed reduced muscle strength of -5/5 on right hip and knee flexion, right knee extension, right foot dorsi and plantar flexion, and right inversion and eversion. Sensation to light touch was decreased over the medial and lateral aspect of her right thigh. Straight leg raising test was positive on the right side. Dr. Bayran performed a transforaminal epidural steroid injection at L4-L5 and L5 -S1.

On April 19, 2013 Dr. Lami reported Petitioner had two weeks of significant relief until the right leg symptoms returned. He reported Petitioner had difficulty walking and standing. His physical examination revealed limited range of motion and positive straight leg raising test on the right. Dr. Lami ordered a second lumbar MRI

The MRI was performed on May 3, 2013 at Centegra's facility in Crystal Lake Illinois. The radiologist's report reflects his impression of annular tearing at L4-L5 and L5-S1; Diffuse disc bulging at L4-L5 and L5 S1; facet joint arthropathy at L4-L5 and hypertrophy of the ligamentum flavum at L4-L5 and L5-S1.

On May 3, 2013 Dr. Lami ordeeds a second lumbar epidural steroid injection and plain x-rays of Petitioner's right hip. He also restricted Petitioner from all work.

The second epidural steroid injection was performed by Dr. Bayran on May 14, 2013 at L4-5 and L5-S1 and was returned to light duty work by Dr. Bayran at that time. (PX 2, RX 4) Petitioner admitted at trial she did not return to work despite the light duty release, but also testified that she never learned of the light duty release and that Respondent never offered her light duty work within the terms of the restrictions of Dr. Bayran.

On June 5, 2013 Dr. Lami reported the second epidural steroid injection provided only short-term relief. He refilled her pain medications and referred her for a second opinion.

Petitioner testified Dr. Lami gave her a list of three surgeons he recommended a second opinion with: Drs. Perlmutter, Yuk or Panchal. Petitioner testified that the second opinion recommended by Dr. Lami was not authorized. Rather Petitioner was sent for evaluation by Respondent's independent medical examiner Dr. Citow.

On July 5, 2013 Dr. Citow reported that Petitioner sustained a lumbar strain that should have resolved within six weeks of onset. He did not believe her current symptoms were related to the work injury, opined that she was at maximum medical improvement, that she did not require any further treatment and believed she could return to full duty work without restrictions.

Based upon Dr. Citow's report, Respondent terminated all TTD and medical benefits.

On July 25, 2013 Respondent's workers compensation carrier writes Dr. Lami seeking confirmation that Petitioner is at maximum medical improvement, capable of full duty work, that Petitioner's condition as of that date was not related to the occurrence of October 16, 2012 and that she was not in need of any further medical treatment.

On August 14, 2013 Dr. Lami reported his impression of persistent low back pain with numbness in her legs and weakness. He prescribed the neuropathic pain medication Lyrica and muscle relaxants, ordered an EMG and authorizeed Petitioner to remain off work until further notice.

On August 29, 2013 a nerve conduction study was performed by Dr. Dave' at Mercy Woodstock Medical Center in Woodstock Illinois. The report reflects that there was no electrical evidence of a neuromuscular disease. There is no reference to the presence or absence of a lumbar radiculopathy nor is there any indication that Petitioner was evaluated for the presence or absence of a lumbar radiculopathy.

On September 11, 2013 Dr. Lami ordered a CT of the abdomen and pelvis to rule out intra-abdominal pathology.

The CT scan of the abdomen ordered by Dr. Lami was performed on October 2, 2013 at Centegra's Crystal Lake facility. The report suggests findings consistent with pelvic congestion syndrome.

Petitioner testified that after Dr. Lami received the report of the CT scan he recommended evaluation by a gynecologist due to the suggestion of pelvic congestion syndrome.

On October 16, 2013 Petitioner was evaluated by Dr. Preeti Jhaveri of Barrington Healthcare for Women. Petitioner's Exhibit 3. Dr. Jhaveri's report of her evaluation reflects Petitioner's history of sustaining a work related injury on October 16, 2012 and a summary of the treatment received for her low back injury. After conducting a physical examination and reviewing the CT of the abdomen Dr. Jhaveri concluded:

> Patient's history and physical highly suggestive of neurologic sequelae, most likely resulting from previous back injury/trauma. Given that she has had three MRIs, CT, EMG, consultation with orthopedic surgeon, would strongly recommend urgent follow-up with a neurologist or neurosurgeon to avoid further injury.
>
> **Suspected dilated ovarian veins are a red herring**, as patient denies any specific, or consistent GYN complaints. Name, address, and numbers of local neurologists provided to patient and offered assistance in any capacity we can provide.

On December 5, 2013, Petitioner was seen by Dr. Lebario at the Illinois Pain Institute. Petitioner's Exhibit 4. Petitioner testified that Dr. Lebario was the first physician she treated with who was not chosen by her employer or a referral from a physician chosen by her employer.

After evaluating Petitioner, Dr. Lebario recommended performance of a right L5 and S1 lumbar transforaminal epidural steroid injection and trigger point injections into the right gluteal muscle. Dr. Lebario also authorized Petitioner to remain off work and stated she "will need reevaluation prior to return to work"

Dr. Lebario performed these injections on December 18, 2013 and again on January 8, 2014.

Petitioner testified a third series of injections were canceled due to non-authorization by her husband's group health plan. Petitioner testified that after initially authorizing the injections, both those performed on December 18 and January 8, and the additional injections recommended by Dr. Lebario, the health plan revoked the authorization contending that the treatment was due to a work related injury. Petitioner testified she has been unable to follow-up with Dr. Lebario or obtain any further treatment by him due to lack of insurance authorization. Petitioner testified it is her intention to obtain additional treatment and injections from Dr. Lebario if authorization can be obtained through workers compensation.

Dr. Lebario testified by means of an evidence deposition. Petitioner's Exhibit 5.

Dr. Lebario is a physical medicine and rehabilitation physician who sub-specializes in pain management. He is fellowship trained in interventional pain management.

Dr. Lebario first saw Petitioner on December 5, 2013. His physical exam revealed she had tenderness to palpation along multiple areas of the involved area, pain with midline lumbar extension, and pain with right lateral lumbar flexion. He testified his exam was consistent with her history of having predominantly right-sided symptoms

Dr. Lebario testified that Petitioner's pain upon extension was significant because extension of the spine causes loading upon the facet joints. When loading causes symptoms, it is consistent with some right facet joint pathology.

His assessment of Petitioner on December 5, 2013 was that her history and physical exam findings were consistent with a lumbar radiculopathy. He recommended a lumbar transforaminal epidural steroid injection, as well as injections for the myofacial pain and neuritis.

Dr. Lebario also reviewed the report of the May 3, 2013 lumbar MRI. Dr. Lebario testified the MRI findings correlated with Petitioner's history and his physical exam findings. Dr. Lebario noted that the changes reported by the radiologist on the lumbar MRI are the types of changes that can cause right-sided radiculopathy. Dr. Lebario explained that even though the MRI does not reveal true nerve root compression, patients can have a history and physical exam findings consistent with radiculopathy without noted compression on the nerve root. Chemical irritation of the nerve roots from the disc material itself can also cause radiculopathy

Dr. Lebario testified that Petitioner's complaints of pain with extended sitting and standing noted in his report of December 18, 2013 were also significant because it is consistent with a diagnosis of radicular and discogenic symptoms. He explained that when standing or sitting in a seated position, you have axial loading upon your disks. When you lay down or are in a recumbent position, the axial loading is relieved. Because MRI's generally are taken in a recumbent position without axial loading, you can have changes in the lumbar spine that are not picked up on an MRI because the patient is in a recumbent position.

Dr. Lebario opined that Petitioner's symptoms were related to the work incident of October 2012

Dr. Lebario testified that the injections he performed on December 18, 2013 and January 8, 2014 did not completely eliminate Petitioner's pain. They provided a reduction in her pain, but she still continued to have a considerable amount of pain. His treatment plan as of January 8, 2014 was to repeat the injections and go up or down a vertebral level for the next transforaminal epidural steroid injection. He was unable to go to that next step in his treatment plan because his treatment with Petitioner was interrupted.

Dr. Lebario testified that epidural injections are often part of the conservative treatment plan that is attempted before a surgical option is considered. When his patients exhaust conservative treatment measure, he refers his patients either to an orthopedic surgeon or spine surgeon for evaluation. Not every patient who he sends for surgical evaluation ends up having surgery because the surgeon often does not feel surgery is appropriates. He explained that although patients can have structural issues that are contributing to the patient's symptoms, some neurosurgeons or orthopedic spine surgeons will opt to delay surgery because surgeries can be rather limiting in terms of patient function and have prolonged recovery times. Also some surgeons feel that the pathology is not significant enough that they can guarantee the patient that they will provide some relief. Just because a spine surgeon declines to offer surgery as a treatment option does not mean the patient is not experiencing any pain. Some patients have chronic lumbar pain, but are not surgical candidates.

Dr. Lebario testified that as of the last date he saw Petitioner, he felt that she would benefit from additional treatment.

Dr. Lebario did not observe or elicit any Waddell signs or note any symptoms inconsistent with her history or MRI images during his treatment with Petitioner. He did not see any evidence of drug seeking behavior.

Dr. Lebario confirmed that Petitioner has not been released or discharged from his care. Lebario Exhibit 2 is his script restricting her from work until further evaluation. He testified this script was never changed or modified.

Petitioner's Exhibit 14 are records from a March 14, 2014 admission to emergency room at Sherman hospital. Petitioner was treated for an acute exacerbation of her chronic back pain after turning to reach for the television remote control. Petitioner was prescribed valium for muscle spasms, anti-inflammatories and tramadol for pain, and directed to follow up with her primary care provider

Petitioner testified that she continues to experience low back pain that radiates down her right leg to her foot. She also has numbness in her right leg and foot to the point her foot feels like it is a sleep. She remains limited in her ability to do perform her activities of daily living and household activities. She has not been released to return to work by Dr. Lami or Dr. Lebario.

Dr. Citow authored an addendum report August 22, 2014. Dr. Citow reviewed all of the updated records after the initial evaluation in July 2013. Dr. Citow opined in direct contradiction to Dr. Lebario that the epidural steroid injections Petitioner received on December 8, 2013 and January 8, 2014 were not medically necessary as she had no lumbar pathology that required an epidural steroid injection and there was no pressure on the neural elements at any level based upon the MRIs of Petitioner's spine. He stated Petitioner was at that point malingering and in need of no additional treatment. He

further disagreed with Dr. Lebario's opinions that Petitioner had lumbar radiculopathy at all as the MRI and EMG demonstrates a complete lack of cause or explanation for any radiculopathy Petitioner was complaining of. He disagreed with Dr. Lebario's recommendation for ongoing epidural steroid injections and stated that they should be used to treat pressure on nerves which is obviously not present here. He further opined there were no objective findings to warrant any work restrictions. He disagreed specifically with Dr. Lebario's testimony regarding the interpretation of the MRIs which, in his opinion, clearly demonstrated there is absolutely no lumbar nerve root involvement to warrant ongoing pain management treatment. (RX 4)

In support of issue F, is Petitioner's current condition of ill being causally related to the injury, the Arbitrator finds as follows:

Based upon the records of Centegra Occupational Health Clinic, Dr. Lami, Illinois Pain Institute, Dr. Lebario's testimony, and Petitioner's credible testimony, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accidental injuries sustained on October 16, 2012. Petitioner's complaints, history and physical examinations as documented by numerous different physicians and other medical providers from different practices and facilities, remain consistent throughout the entire course of treatment. The medical records reflect a consistent and unbroken course of medical treatment for Petitioner's complaints of low back and right leg pain from the time of injury forward. There is no record or evidence of an intervening accident, event or medical condition that breaks the causal relationship between Petitioner's current condition of ill being and the October 16, 2012 accident.

The records of the Occupational Health Clinic consistently and repeatedly reflect the conclusion that Petitioner's complaints of back and leg pain and the diagnosis of the various physicians and physical therapists who provided treatment to Petitioner, were "Work-Related". Likewise, Dr. Lami repeatedly attributes Petitioner's complaints of back pain to the October 16, 2012 occurrence. The Arbitrator notes the fact that Petitioner was directed to these providers by Respondent and that they were not chosen or selected by Petitioner. Moreover, Dr. Lami's records contain a copy of Dr. Citow's July 5, 2013 report of his independent medical examination and a July 25, 2013 letter from Respondent's workers compensation carrier soliciting his opinion that Petitioner was at maximum medical improvement, capable of full duty return to work and that Petitioner's condition as of that date was not related to the occurrence and therefore not in need of further medical treatment. Not only did Dr. Lami decline Respondent's invitation to break the causal connection, he continued to treat Petitioner, ordered additional diagnostic studies, and even extended his initial May 3, 2013 no work authorization by virtue of a work status report authored August 14, 2013. The Arbitrator declines to adopt the opinions of Dr. Citow, finding the opinions of Petitioner's treating physicians to be more credible and reliable. Dr. Citow saw Petitioner on one occasion and his opinion is contrary to the entire medical record. His opinion that Petitioner sustained a lumbar strain that should have resolved within six weeks of onset is refuted by the records of Respondent's own Occupational Clinic that clearly reflect Petitioner's condition of ill being extending well beyond six weeks from the date of the accident. Dr. Citow's opinion

is also contradicted by the findings and treatment provided by Dr. Lami and his partner Dr. Bayran.

It's In support of issue J, were the medical services that were provided to Petitioner reasonable and necessary and has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator incorporates by reference as if fully set forth herein, the Statement of Facts and his findings in regard to causal relationship.

The Arbitrator finds that the medical services provided to Petitioner from the date of accident through the emergency room visit on March 13, 2013 where necessary and reasonably required to cure or treat the effects of her accidental injuries. Petitioner's Exhibits six, seven, nine and ten are invoices for medical services provided by or at the request of Dr. Lami. The May 10, 2013 hip x-ray, the August 29, 2013 EMG and October 2, 2013 CT of the abdomen, were diagnostic studies ordered by Dr. Lami in an effort to confirm his diagnosis and rule out other potential causes for Petitioner's low back and right leg pain. Petitioner's Exhibit eight is an invoice from Illinois Pain Institute for services provided by Dr. Lebario in an effort to cure and treat the effects of Petitioner's low back injury. Petitioner's Exhibit 13 is for laboratory blood work, CBC and Sed rate ordered by Dr. Lebario on December 5, 2013. Petitioner's Exhibit 12 is an invoice for services provided at the emergency room of Sherman hospital on March 13, 2014 and is directly attributable to Respondent's refusal to authorize ongoing medical treatment subsequent to July 5, 2013. The Arbitrator finds that all the services were necessary and reasonably required to treat Petitioner's low back condition and therefore are properly the responsibility of Respondent and orders same to be paid by Respondent pursuant to the medical fee schedule, Respondent to receive credit for all sums previously paid hereunder.

In support of issue K, is Petitioner entitled to any prospective medical care, the Arbitrator finds as follows:

The Arbitrator incorporates by reference as if fully set forth herein the statement of facts and his findings in regard to issues F and J.

The Arbitrator finds that Petitioner is entitled to the prospective medical care as testified to by Dr. Lebario. Dr. Lebario testified that he had not finished his course of treatment with Petitioner and that additional injections would be of some benefit to Petitioner. He further testified that due to the interruption in his course of treatment, Petitioner would need to be re-evaluated before further treatment is initiated. Respondent shall authorize and pay for a re-evaluation by Dr. Lebario.

In support of issue L, what temporary benefits are in dispute, the Arbitrator finds as follows:

The Arbitrator incorporates by reference as if fully set forth herein statement the facts, and findings in regard to issue F.

The Arbitrator finds that Petitioner is entitled to temporary total disability benefits from May 4, 2013 through the date of hearing, December 5, 2014. Dr. Lami's records reflect that on May 4, 2013 he restricted Petitioner from all work. Dr. Lami never modified or rescinded this authorization and, in fact, continued Petitioner's no work status on August 14, 2013. The August 14, 2013 no work authorization was likewise never rescinded or modified by Dr. Lami. On December 5, 2013 Dr. Lebario again provided Petitioner with a no work authorization and stated Petitioner would need a re-evaluation prior to her return to work. Dr. Lebario testified that as of January 8, 2014 he felt Petitioner was in need of further treatment and that he had additional treatment options that he felt would benefit Petitioner and that his prior no work order had never expired and would require him to see Petitioner again in order to change her work status. None of Petitioner's treating physicians ever opined or found Petitioner to be at maximum medical improvement.

13WC 28020
Page1

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Kevin Easley,
Petitioner,

vs.

NO: 13WC 28020

16IWCC0059

Continental Tire North America Inc.,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 9, 2015, is hereby affirmed and adopted.

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.

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.

DATED:
o010716
DLG/mw
45

JAN 2 5 2016

David L. Gore

Mario Basurto

Stephen Mathis

IMCC0028

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

EASLEY, DAVID KEVIN
Employee/Petitioner

Case# 13WC028020

16IWCC0059

CONTINENTAL TIRE NORTH AMERICA INC
Employer/Respondent

On 7/9/2015, 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 0.08% 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:

3067 KIRKPARTICK LAW OFFICES
ERIC KIRKPATRICK
3 EXECUTIVE WOODS CT SUITE 10
BELLEVILLE, IL 62226

0299 KEEFE & DePAULI PC
JAMES K KEEFE SR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

16IWCC0059

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David Kevin Easley
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # **13** WC **28020**

Consolidated cases: _____

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 **McCarthy**, Arbitrator of the Commission, in the city of **Herrin**, on **06/12/2015**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Statute of Limitations**

FINDINGS

On the date of accident, **January 16, 2013**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident N/A given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**42,536.78**; the average weekly wage was $**893.63**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner's claim for prospective medical treatment is hereby denied as he failed to prove an accidental injury arising out of his employment causally related to his current conditions of ill being.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

D. Dylan MacCarthy
Signature of Arbitrator

July 3, 2015
Date

ICArbDec19(b)

JUL 9 - 2015

THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner, 46 years of age, has been an employee of Respondent since 1999. Petitioner testified he built beads as an Apex operator from 1999 through approximately May 2010. The Apex job requirements were described as hand and arm intensive. Petitioner subsequently switched to the BAC machine and continues working there without any restrictions. The BAC job requirements are not considered hand or arm intensive.

Lead Supervisor Michael McGuire testified that Petitioner's purported work timeline was not accurate. He testified Petitioner switched to the BAC operator position no later than November 2008, and likely before. He explained the last BAC machine was installed in November 2008. Apex operators switched to the BAC machines in line with seniority. Petitioner had more seniority than 50% of the Apex operators. Mr. McGuire agreed that one Apex machine remains in operation, but to his knowledge, Petitioner does not operate the machine. During the transitions, extra employees were hired to handle the Apex machine.

Petitioner testified that he developed bilateral upper extremity symptoms and sought out treatment no later than 2005. Petitioner testified that he underwent EMG/NCS studies at the direction of Respondent. There was no medical documentation of the study. As early as 2004 or 2005, he believed there was a relationship between his work and his condition of ill-being because other Apex operators developed similar conditions. Petitioner testified that he notified his employer of the condition and need for treatment. There were no records or witnesses corroborating this allegation. He further testified that his symptoms gradually worsened until November 2, 2012, when he went for treatment at an occupational health facility recommended by his employer.

Mr. McGuire testified that he did not become aware of Petitioner's condition until November 2012. Mr. McGuire testified that he is made aware of all injuries in his department. Had Petitioner reported an injury prior to November 2012, Mr. McGuire would have known about it. Petitioner did not file an Application for Adjustment of Claim until August 26, 2013. Petitioner originally alleged a November 2, 2012 accident date that was amended at trial to January 16, 2013.

Records reflect that Petitioner presented to Midwest Occupational Medicine on November 19, 2012. He reported pain, numbness, and tingling to his bilateral elbows and wrists. Nurse Pauline Gregge recorded that Petitioner noticed symptoms to both elbows and wrists six months prior. Petitioner testified that the nurse miss-recorded his symptom onset.

Petitioner was referred to Dr. David Brown on January 16, 2013. Petitioner filled out a new patient questionnaire form stating he first noticed symptoms six to eight months prior to the visit. He acknowledged his handwriting was on the questionnaire. Dr. Brown also documented Petitioner had a six to eight month gradual onset of numbness and tingling in both hands involving all the digits, associated with medial elbow pain right worse than left. Petitioner testified that Dr. Brown miss-recorded his symptom onset. Petitioner was referred to Dr. Daniel Phillips for EMG/NCS studies. The studies confirmed electrodiagnostic evidence for bilateral carpal tunnel syndrome right worse than left as well as bilateral cubital tunnel syndrome. Dr. Phillips recorded Petitioner had an eight-month history of gradually progressive bilateral hand pain with intermittent global numbness. Petitioner testified that Dr. Phillips accurately recorded the history.

Dr. Brown recommended a comprehensive conservative treatment program. Petitioner was permitted to continue working without restriction. Petitioner acknowledged his BAC operating position did not cause him symptoms.

On February 25, 2013, Petitioner returned to Dr. Brown reporting no improvement. Dr. Brown administered a right elbow injection to treat medial epicondylitis. Dr. Brown recommended that Petitioner undergo bilateral carpal tunnel releases. With regards to Petitioner's bilateral cubital tunnel syndrome, he recommended continued conservative treatment. Petitioner received a second elbow injection on June 3, 2013. Petitioner continues to work without restriction to date. He regularly fishes in his free time. He reported fishing causes him wrist symptoms.

Dr. Brown's deposition was taken on January 26, 2015. On direct-examination, Dr. Brown testified that he was provided job videos and a demand analysis of the BAC operator position. Based on that information, Dr. Brown did not believe Petitioner's job activities would be a factor as a cause or even an aggravation in the development of carpal or cubital tunnel syndrome. (Brown deposition p. 12). Petitioner's attorney also provided Dr. Brown a short video of the Apex operator position. Counsel proposed that Petitioner worked in the Apex position from 1999 up to 2010. Dr. Brown opined that if Petitioner's onset of symptoms correlated with the period of time he was performing those activities, then he would consider the Apex position a potential aggravating factor for carpal and cubital tunnel syndrome. (Brown deposition p. 14). However, Dr. Brown also testified that his opinion was dependent on the proposition that the Petitioner's symptoms began when working on the old Apex machine and just never went away, which he said was not the history he received from the Petitioner. (Brown deposition p. 17).

On cross-examination, Dr. Brown confirmed Petitioner reported having a six to eight month gradual onset of numbness and tingling in both hands prior to the initial evaluation. This was also the history recorded in the patient questionnaire and Dr. Phillips' note. Dr. Brown testified that there were no other sources between 1999 and November 2012 that documented Petitioner having symptoms consistent with carpal or cubital tunnel. (Brown deposition p. 25). Dr. Brown agreed that a history taken closest to the time of onset is normally the most accurate. (Brown deposition p. 26).

Assuming the information and history Dr. Brown received was accurate, he did not believe Petitioner's condition of ill-being was related to his job activities at Continental Tire. He confirmed that bilateral carpal tunnel and cubital tunnel syndrome can be idiopathic. (Brown deposition p. 26).

Other than Petitioner's trial testimony, there is no evidence or medical documentation corroborating a symptom onset predating May 2012.

THEREFORE THE ARBITRATOR CONCLUDES:

(1) Accident / Medical Causation

Repetitive trauma claims are claims where a Petitioner does not sustain an accident from an identifiable single trauma but instead is injured from his or her work activities. The issues of accident and causation are considered together because the issue is whether the Petitioner's work activities were a

cause of his conditions of ill being, which in this case are bilateral carpal and cubital tunnel and medial epicondylitis.

Petitioner has the burden of proving this causal relationship. While the parties agree that the Petitioner's work activities while he worked full time as a bead builder using the Apex machine were hand and arm intensive, that fact does not satisfy the Petitioner's burden. He must also prove that the work was a causative factor in the conditions he began treating for in November of 2012 for which Dr. Brown has recommended further treatment. The evidence shows that the Petitioner has not met his burden on that point.

The case really boils down to the Petitioner's credibility concerning his testimony that once he began having symptoms in his hands and elbows while operating the Apex machine, they remained and got progressively worse. If that were the case, he would prevail on the issue of causation, as Dr. Brown testified to in his deposition. Unfortunately for the Petitioner, the histories which he provided to multiple medical providers at the time he began treatment do not corroborate his testimony.

Dr. Brown said that the Petitioner told him on January 16, 2013 that his hand and elbow numbness began six to eight months prior to that visit. The notes from Dr. Phillips, whom the Petitioner saw the same day, show the Petitioner claiming that his symptoms began eight months earlier. When he was initially seen at Midwest Occupational on November 2, 2012, the notes contain a history of symptom onset of six months. The Petitioner also wrote on a questionnaire for Dr. Brown that his symptoms were six to eight months old. (PX 3 at 25)

Based on the above evidence, the Arbitrator must conclude that the Petitioner became symptomatic with the conditions of ill being for which he now seeks care in mid 2012. At that time, even by his own testimony, the Petitioner had been using the non hand intensive BAC bead building machine regularly for at least two years. He also said that he still used the Apex machine when the BAC machine was inoperable, but was unable to estimate how often that occurred. Dr. Brown, the only physician to testify, was not asked whether that scenario would produce causation. Dr. Brown did testify, as referenced above, that working on the BAC machine would not be a causative factor in the development of any of the Petitioner's conditions.

Because the Petitioner has failed to meet his burden of proving that his work was a causative factor in his current conditions of ill being, his claim and request for prospective medical is denied.

All other issues therefore become moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jacqueline Toney,

Petitioner,

16IWCC0066

vs.

NO: 13 WC 28646

Chicago Transit Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident, and being advised of the facts and law, changes 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.

As indicated above, this matter was arbitrated under §19(b) of the Act. The Arbitrator found that Petitioner failed to meet his burden of proving a compensable accident. The Commission affirms that finding. However, in the "ORDER" section of the decision, the Arbitrator included the language that "in no instance shall this award be a bar to subsequent hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any." Because the claim was denied in its entirety, the matter will not be remanded for determination of any additional benefits and therefore the decision does bar subsequent awards. Therefore, the Commission strikes the above quoted language from the "ORDER" section of the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2015 is hereby affirmed and adopted with the changes noted above.

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.

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.

DATED:
o1/20/16
RWW/rm
46

JAN 2 8 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

[redacted]

[redacted]

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0066

TONEY, JACQUELINE
Employee/Petitioner

Case# **13WC028646**

13WC030507

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

On 4/1/2015, 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 0.13% 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:

0274 HORWITZ HORWITZ & ASSC
TYLER BERBERICH
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0515 CHICAGO TRANSIT AUTHORITY
MICHELE D MORRIS
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

16IWCC0066

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jacqueline Toney
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **13** WC **28646**

Consolidated cases: **13 WC 30507**

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 **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **February 6, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0066

FINDINGS

On the date of accident, **August 8, 2013**, 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 not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$64,001.00**; the average weekly wage was **$1,230.80**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$1,276.00** for other benefits, for a total credit of **$1,276.00**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT ON AUGUST 8, 2013 AND FAILED TO PROVE THAT HER CONDITION OF ILL BEING WAS CAUSALLY CONNECTED TO ANY ALLEGED ACCIDENT ON AUGUST 8, 2013, PETITIONER'S CLAIM FOR COMPENSATION IS HEREBY DENIED.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

April 1, 2015
Date

ICArbDec19(b)

APR 1 - 2015

Statement of Facts

16IWCC0066

Petitioner Jacqueline Toney has filed three Applications for Adjustment of Claim against Respondent Chicago Transit Authority which were previously consolidated. Case number 13 WC 04880 alleging accidental injuries arising from an accident on November 15, 2012 was settled with contracts approved on March 3, 2015. Petitioner's remaining two Applications, 13 WC 28646 and 13 WC 30507, both allege accidental injuries with an accident date of August 8, 2013. These remaining two claims have been consolidated for hearing and decision on the Petition for Immediate Hearing under Section 19(b) of the Act.

The medical records admitted include treatment for the prior injury on November 15, 2012. Petitioner was seen at Concentra Occupational Health (Px 2). Their records document treatment beginning on November 15, 2012 for right arm symptoms. On that date, the primary complaints were to the right hand. In her visit with Dr. Munoz at WorkCare on November 16, 2012, she was complaining of pain in the right hand and wrist and also into the forearm and shoulder (Px 5). The examination of the right shoulder on that date records tenderness and limited range of motion with stiffness. She was diagnosed with a right shoulder rotator cuff strain. Petitioner continued with these complaints and findings through January 7, 2013. At that visit her shoulder symptoms had improved with increased range of motion and reduced pain. She still had stiffness. She was continued off work for the wrist condition. She advanced complaints of shoulder stiffness and soreness to the therapist on that date as well (Px 7). She continued to advance similar shoulder complaints on February 11, 2013 and was complaining of severe hand limitations. She was kept off of work (Px 5) Petitioner remained off work through an office visit with Dr. Munoz on May 10, 2013. She reported having an IME with Dr. Medina and being told by the adjuster that she was to lose her benefits. She reported to Dr. Munoz that he hand and arm were now "fine," and was released to return to regular work at MMI (Px 5).

Petitioner testified that on August 8, 2013, she was employed as a bus driver by the Respondent. The petitioner had been employed as a bus driver by the respondent since 2001. On August 8, 2013, Petitioner testified that she was driving a bus 6802. She was driving the route between the Howard Red Line station and the Skokie courthouse.

Petitioner testified that in order to put the bus into gear at the beginning of her shift, she needed to first press down the parking brake valve which sat on her left side, approximately six inches below her legs while seated in the bus driver's seat. She testified that when she pressed the brake valve that morning she found it to be very difficult to get down. She explained that after multiple attempts to press down the valve, she had to use her whole body weight to push it down. The valve, when properly functioning, moves up and down like a button. It does not maneuver more than a few inches in either direction.

Petitioner testified that she began noticing her shoulder toward the Skokie courthouse end of the route. She stopped at the Skokie Courthouse for a restroom break. Petitioner testified that when she stopped the bus, she had to pull the brake valve back up to put the bus into park. Petitioner again found the brake valve very difficult to move. Petitioner testified that while pulling on the valve with her left arm, she experienced a pull in the left shoulder. Petitioner continued her route and reached over to use her right arm to press the brake valve down to begin her route again. Petitioner testified that she continued her route to the Red Line to find a supervisor to report her injury but was unable to locate a supervisor. Petitioner testified she went back to the Skokie courthouse and called in to control to report that she had been injured. She testified that the brake was still hard.

Petitioner was taken by ambulance to Skokie Hospital on August 8, 2013. The ambulance record was admitted as Petitioner's Exhibit 3. The history recorded was that Petitioner was trying to release the parking brake when she felt pain in the left shoulder. The records of Northshore University Health System (Skokie Hospital) were admitted as Petitioner's Exhibit 3. The history recorded is of pain in the left shoulder after pulling a hand brake. Petitioner denied any history of previous shoulder injury. No complaints other than left shoulder pain and decreased range of motion are recorded. The diagnosis was left shoulder strain. Petitioner was also seen at Concentra Occupational Health on August 8, reporting that she applied the brake and felt a pull on her left shoulder. She claimed the pain began immediately (Px 2).

On August 12, 2013, Petitioner was seen by Dr. Luis Munoz at WorkCare Occupational Medicine Center. Dr. Munoz recorded Petitioner's history. The record states Petitioner was manipulated the bus airbrake, but found it very hard to move or release. She stated as she pushed with all her weight, she felt a sharp pain in her right and left shoulders in the attempt to move the airbrake handle. She presented complaining of right and left shoulder pain. Dr. Munoz diagnosed the petitioner with bilateral shoulder rotator cuff sprain injuries. He noted that the shoulder pain was consistent with the mechanism of injury. Petitioner was prescribed medication and physical therapy. She was taken off work (Px 5).

On August 14, 2013, the petitioner began physical therapy at Bucktown Rehab Center. The notes from Bucktown Rehab indicate a history of Petitioner injuring her right shoulder while performing her duties as a CTA bus operator with complaints of right shoulder pain and weakness (Px 7).

Petitioner followed up with Dr. Munoz complaining her right shoulder was very painful and the left shoulder is also painful and tight (Px 5).The physical therapy records confirm that the right shoulder had less strength and range of motion than the left (Px 7). On September 4, 2013, Dr. Munoz recommended that Petitioner undergo

MRI scans of both shoulders, continue therapy and stay off work (Px 5). Petitioner underwent MRI scans of each shoulder on October 18, 2013. The MRI of the right shoulder was read as showing a high-grade partial bursal surface tear involving the distal supraspinatus tendon, spurring of the acromioclavicular joint and subacromial/subdeltoid bursitis. The MRI of the left shoulder was read as showing bursal surface fraying or low-grade partial tear of the distal supraspinatus tendon, infraspinatus insertional tendinosis, mild inferior spurring of the acromioclavicular joint and subacromial/subdeltoid bursitis.

Petitioner followed up with Dr. Munoz on October 23, 2013, reporting a flare up on both shoulders the last few days. He reviewed the MRI scans and diagnosed bilateral rotator cuff sprains and partial tears of the supraspinatus tendon in each shoulder and a right forearm strain. Dr. Munoz kept Petitioner off work, advised that she continue physical therapy and referred her for an orthopedic consultation (Px 5).

On December 9, 2013, the petitioner was seen by Dr. Saul Haskell at Orthopedic Specialists of the North Shore complaining of both shoulders and both wrists. She denied any prior shoulder or wrist symptoms before August 8, 2013. Petitioner described her injury as pulling the lever with her left hand injuring her left shoulder and then using her right hand felt similar pain in the right shoulder. She complained of developing pain and swelling in both wrists. She also complained of problems with her jaw and questioned if this could be related. Dr. Haskell reviewed the MRI studies and referred the petitioner to Dr. Ronald Silver for evaluation of her shoulders. He recommended that she stay off work (Px 6).

On December 18, 2013, Petitioner was seen by Dr. Ronald Silver. Dr. Silver made note of Petitioner's shoulder injuries, which occurred while she was attempting to pull the airbrake on her bus. Petitioner again denied any previous treatment or symptoms. Dr. Silver performed an examination of Petitioner and administered a subacromial cortisone injection into her right shoulder. He kept Petitioner off work and told her to follow up in two weeks (Px 6).

On February 5, 2014, Petitioner followed up with Dr. Silver. She reported temporary relief from the injection. Dr. Silver recommended arthroscopic surgical repair for right rotator cuff partial thickness tear. Dr. Silver stated that at the same time he would administer an injection to the petitioner's left shoulder. Dr. Silver opined that the need for the petitioner's right shoulder surgery was causally related to her August 8, 2013 work injury. Lacking appropriate arthroscopic care, the petitioner would be permanently disabled (Px 6).

From February of 2014, through November 7, 2014, Petitioner followed up with Dr. Silver awaiting approval for the right shoulder surgery. Dr. Silver has prescribed medications to manage Petitioner's symptoms. However, Dr. Silver continues to recommend arthroscopic surgery to the right shoulder and has noted that without

surgical intervention, she will be permanently disabled (Px 6). Petitioner testified that she has seen Dr. Silver every two months though the week before the hearing with no change in his recommendations and that he continues her off work.

Petitioner testified concerning the current condition of her shoulders. She testified that it is hard to sleep due to pain in both of her shoulders. The pain wakes her up at night. She experiences throbbing pain in her shoulders when she attempts to pick up certain objects. The petitioner is currently taking Tramadol and Aleve every day for pain.

Jose Saucedo, testified for Respondent. Mr. Saucedo worked as a Bus servicer, out of Respondent's Forest Glen garage on August 8, 2013. His job duties at the time required him to perform inspections on buses with reported problems. On the date of Petitioner's alleged accident, Mr. Saucedo received a work order to inspect Bus 6802 (Rx 1). Mr. Saucedo testified that he specifically remembers performing the inspection on Bus 6802 because he found it odd that a person reported an injury while engaging the parking release valve. According to Mr. Saucedo, his inspection of Bus 6802 included a test drive, a safety inspection, and a full inspection of the brake release valve. He found no defects. His findings were documented in a Work Order Detail (Rx 1).

Mr. Saucedo testified that all reports from bus inspections and services are stored in a computer system for all servicers to access. Also stored in this system is the history of all inspections and repairs performed on a bus. A printout of the history from Bus 6802 from the August 8, 2013 through September 8, 2013, was viewed by Mr. Saucedo at hearing (Rx 2). Mr. Saucedo testified that no repairs to the brake release valve were performed during that time. Mr. Saucedo testified that the bus underwent multiple safety inspections that included an inspection of the bus' braking system. Although he did not have a copy with him at hearing, Mr. Saucedo stated the prior to hearing he reviewed the entire history of Bus 6802 and the brake release valve has never been reported to have a defect nor has it been replaced.

On cross-examination, Mr. Saucedo, explained how the brake release valve functions. He stated it is not a brake per se. Instead, it allows air to enter or leave a chamber. When air is in the chamber it prevents the bus' brakes from moving. In order to drive the bus, the air must be released. He stated that several systems on the bus operate with air chambers, but each mechanism uses its own air supply.

Mr. Saucedo testified that in his years of repairing buses for the Respondent that he has never seen a brake release valve malfunction in the manner in which Petitioner described. In addition, he stated that when he examined bus 6802, he found it working in the same manner of all buses he ever encountered.

Petitioner was recalled after Mr. Saucedo's testimony. She testified that there were often issues with portions of the bus that were controlled with air systems. Petitioner testified that the drivers' seat, which is air controlled, would be unable to move up or down at least once per week. She also experienced times where the seat would move itself up while driving down the road. She testified that she never saw a brake release valve malfunction in the way she described either before or after her alleged accident.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

Petitioner is seeking compensation for an alleged accident on August 8, 2013 when she alleges an air brake valve lever malfunction causing injuries to her shoulders. After observing the Petitioner's testimony and reviewing the medical records and histories and the reviewing the testimony of Mr. Saucedo, the Arbitrator finds the Petitioner's testimony of accident not credible.

Petitioner's mechanism of injury varies from medical history to history. She alleges she was releasing the brake to the ambulance, but pulling the lever (which is engaging the brake) to the emergency room. She reported pushing the brake to Dr. Munoz and pulling the lever to Dr. Haskell. Petitioner's testimony was that, after initially releasing the brake by pushing on it with her whole body weight, she noticed the pain as she drove to the Skokie courthouse, but the histories include reports of immediate pain. The histories also vary in the description of when she used her right arm to assist. Contrary to her testimony, the history to Dr. Munoz states that she felt pain in both shoulders at the time of the initial effort to release the brake.

Petitioner only complained of left shoulder pain to the ambulance and emergency room. Her complaints to Dr. Munoz included both shoulders, and for the first time described the further use of the right arm. The records of Dr. Munoz, the MRI studies and Bucktown Rehab Center document that the right shoulder is actually the more serious condition. The therapy records do not even mention the left shoulder. When she is seen by Dr. Haskell she is complaining of both shoulders and both wrists. She also adds complaints in the jaw as a possibly related condition.

The Arbitrator finds significant that, despite specific complaints and treatment for the right hand, wrist, arm and shoulder from November, 2012 through May, 2013, that Petitioner denied any prior injuries, symptoms or treatment to the wrists and shoulders before the date of accident to Dr. Haskell. She tells Dr. Silver that her shoulders were normal without previous treatment or symptoms. Although Petitioner was released to return to full duty work and at MMI in May, 2013 from the prior injury, the Arbitrator notes that Petitioner was continuing

to advancing complaints weakness and an inability to open her hand until an IME was performed and she was advised she would lose her benefits and needed to return to work.

Petitioner testified that when operating properly, the brake does not take any significant force. She also testified that the brake mechanism barely moves. Given the description of the mechanism, and the credible testimony of Mr. Saucedo with respect to his personal inspection of bus 6802 and found no defect, the explanation of the workings of the parking brake valve and the lack of any similar occurrences, which are supported by the inspection records on bus 6820, the Arbitrator concludes that the Petitioner's claim of continued and repeated malfunction is simply not credible nor supported by the preponderance of the evidence submitted.

Petitioner has the burden of proving by a preponderance of the evidence that an accident arose out of and in the course of employment. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d, 472, 477, 949 N.E.2d 1151, 1156 (4th Dist. 2011). After review of the record as a whole, having observed the witnesses and reviewed the exhibits submitted, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment on August 8, 2013.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner is seeking compensation and medical treatment for her bilateral shoulder condition. As more fully addressed in the Arbitrator's decision with respect to Accident, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on August 8, 2013 based in large part upon the Arbitrator's finding that Petitioner's testimony as to the activities which she alleges resulted in her shoulder pain, in particular with respect to the onset of her symptoms in the right shoulder, are not credible.

The medical records submitted address causal connection. The opinion of an expert is only as valid as the basis of the opinion. Dr. Munoz statement that the Petitioner's pain is consistent with the mechanism of injury is premised upon the accident description being accurate. As discussed in the Arbitrator's decision with respect to accident, the Arbitrator finds that the greater weight of the credible evidence is to the contrary.

The causal connection opinion of Dr. Silver is based upon an greater inaccuracy, as the history which was provided also included the denial of prior symptoms in the right hand and arm despite the clear treatment following the November, 2012 injury with specific complaints, findings and treatment in the right shoulder. The

opinion of causation for the need for right shoulder surgery is based upon an incomplete and inaccurate history as is therefore not credible.

Based upon record as a whole, including the testimony and the Arbitrator's observation of the witnesses, the exhibits submitted, and in light of the Arbitrator's decision with respect to Accident, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that her condition of ill being is causally connected to the events of August 8, 2013, and particularly with respect to the condition of ill being of the right hand, arm and shoulder in light of the pre existing condition documented by the records submitted.

In support of the Arbitrator's decision with respect to (J) Medical, (K) Prospective Medical, and (L) Temporary Compensation, the Arbitrator finds as follows:

In light of the Arbitrator's decision with respect to Accident and Causal Connection, Petitioner's claim for medical, prospective medical and temporary compensation are moot. Claim for benefits is denied.

In support of the Arbitrator's decision with respect to (M) Penalties, the Arbitrator finds as follows:

Petitioner filed a petition seeking penalties under Sections 19(k), 19(l), and 16. Where there is a genuine controversy as to whether Petitioner sustained an accident that arose out of and in the course employment, it is not unreasonable for Respondent to require Petitioner to prove her case. As more fully discussed with respect to the Arbitrator's decisions with respect to Accident and Causal Connection, Respondent has presented a good faith defense as to whether Petitioner sustained an accident arising out of her employment and whether her condition of ill being is causally connected to her alleged accident. In light of the evidence submitted by Respondent on Accident and Causal Connection and the Arbitrator's decision with respect to Accident and Causal Connection, the Petition for Penalties is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATARAZYNA WISNIEWSKI,

Petitioner,

16IWCC0095

vs. NO: 13 WC 28784

JOLLY MAID,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and prospective medical, 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. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Respondent appealed the April 13, 2015 19(b) Decision of Arbitrator Hegarty finding that Petitioner, a 23 year-old cleaning lady, sustained accidental injuries arising out of and in the course of her employment on August 22, 2013, that Petitioner provided timely notice of the accident, that Petitioner's current condition of ill-being with respect to her cervical and lumbar spine is causally related to the accident, that Petitioner was temporarily totally disabled for a period of 72-4/7 weeks, from August 22, 2013 through January 13, 2015, at the rate of $283.88 per week under Section 8(b), that Petitioner is entitled to $160,933.49 for necessary medical

expenses under Section 8(a) and pursuant to Section 8.2, and that Respondent shall authorize and pay for the reasonable and necessary prospective medical services, an anterior cervical discectomy and fusion at C5-6 and continued post op therapy for her lumbar spine as recommended by Dr. Sokolowski, pursuant to Section 8(a) and subject to Section 8.2 of Act. The Arbitrator further denied Petitioner's request for an award of penalties and fees, based upon Respondent's reasonable reliance on the Utilization Review and the Section 12 examination of Dr. Gleeson in denying medical benefits and TTD benefits.

Based upon a review of the record as a whole, the Commission affirms the Arbitrator's finding of causal connection between Petitioner's August 22, 2013 work injury and her current cervical condition of ill-being, and award of prospective medical in the form of an anterior cervical diseconomy and fusion at C5-6, recommended by Dr. Sokolowski,. However, the Commission modifies the Arbitrator's Decision, and finds that Petitioner failed to prove that her current condition of ill-being with respect to her lumbar spine is causally related to her August 22, 2013 work-related injury. Based upon the Commission's finding with respect to causal connection, the Commission further vacates the Arbitrator's award of medical expenses related to Petitioner's lumbar spine condition, and the Arbitrator's award of prospective medical services in the form of continued post-operative therapy for her lumbar spine.

The Commission places great significance on the lack of any evidence of lumbar complaints or objective findings related to the lumbar spine from the date of injury, August 22, 2013, through September 6, 2013, despite Petitioner having received medical services with three different providers during that period of time.

On the date of injury, Petitioner was attended to by the Summit Fire Department Emergency Medical Services, at which time she reported she struck her head against the head seat rest, and complained of pain at the back of her head and dizziness. The EMS technician further recorded that Petitioner denied any neck or back pain. (PX1).

Upon arrival at the MacNeal Hospital Emergency Room, Petitioner was seem in triage, and reported head pain, dizziness, left arm pain, and denied any loss of consciousness. The nursing assessment subsequently performed indicated Petitioner complained solely of head and neck pain, and Petitioner again denied any loss of consciousness. Petitioner was evaluated by the Emergency Room physician, Dr. Lauren Dawson, at which time she reported a possible loss of consciousness. Petitioner further complained of an occipital headache that radiated upwards, neck stiffness with no focal neck pain. On physical examination, Petitioner was noted to have a normal ENT exam, no cervical spine tenderness to palpation, no pain on passive or active range of motion, no midline back pain, no tenderness to palpation, no step-off. Her neurological examination indicated no focal weakness, good coordination, and a normal gait. Petitioner's musculoskeletal examination indicated normal extremities with adequate strength and full range of motion, without lower extremity swelling or edema, and normal back alignment. The attending physician further indicated in the progress notes, that Petitioner's complaints were limited to an occipital headache radiating upward, and neck stiffness, without focal neck pain,

midline neck pain, or pain with movement. Petitioner denied focal numbness, tingling, or weakness. Dr. Dawson further noted that Petitioner reported no other complaints. Following a CT scan of her head, which was negative for a fracture, Petitioner was diagnosed with head injury status post motor vehicle accident, and discharged home and advised to follow up with her primary care physician, or with Dr. Guo, an internist. The medical records of MacNeal Hospital fail to reflect that Petitioner complained of any lower back complaints, that Petitioner had any significant lower back findings on examination, or that Petitioner was provided with any diagnosis with regard to her lower back. (PX2).

On August 24, 2013, Petitioner sought treatment with Dr. Forys, at Central Medical Clinic, at which time Petitioner complained of headache, dizziness, neck pain, and upper back pain. On examination she was noted to have a 15 cm linear abrasion on her left cheek, a left arm abrasion measuring 20 cm, with a 5cm x 7cm ecchymosis. Petitioner's neck was noted to be diffusely tender over the facets, decreased range of motion in all planes, with moderate trapezius muscle spasms bilaterally. Petitioner's lumbosacral spine was noted to be non-tender. Dr. Forys diagnosed contusion/abrasions, concussion, headache, whiplash, and situational anxiety due to the motor vehicle accident. Dr. Forys recommended a cervical x-ray, pain medication, and that Petitioner remain off work. (PX3).

On cross examination Petitioner admitted that on August 26, 2013 she signed an Application for Adjustment of Claim in this matter, 13 WC 28784, contained within the Commission file. (T42-43). The Application was filed on September 3, 2013, alleging that August 26, 2013 she injured her injured "neck, upper back, left arm." The Application for Adjustment of Claim is also void of any mention of an injury to Petitioner's lower back.

Petitioner followed up with Dr. Forys on August 30, 2013, at which time her complaints were limited to headaches, pain in the neck and upper back, and paresthesia of both hands. The office visit note is void of any lower back complaints or of any lower back examination findings. Dr. Forys again diagnosed a concussion, headaches, whiplash and situational anxiety, and continued Petitioner off work. When Petitioner returned to Dr. Forys on September 6, 2013, she again complained of pain headaches, neck pain, dizziness and paresthesia in her hands, without mention of any low back symptoms. Petitioner's September 6, 2013 physical examination failed to reveal any findings with regard to her lumbar spine. She was diagnosed with a concussion and whiplash, and was advised to start physical therapy and follow up in one week. (PX3).

On September 13, 2013, Petitioner presented to Dr. Forys, at which time she provided a history that she had "developed lower back pain w/ paresthesia of R LE." On physical examination Dr. Forys noted a tender lumbosacral spine, with a positive straight-leg raise on the right. Dr. Forys diagnosed cervical radiculopathy, sciatica, and post-concussion headaches. sciatica as well. (PX3).

On cross-examination, Petitioner admitted that the first time she complained of lower back pain following her August 22, 2013 work injury was on September 19, 2013, when she saw Dr. Forys. Petitioner also admitted she had no lower back complaints during her Emergency Room visit, or during her office visits with Dr. Forys on August 24, 2013, August 30, 3013, and September 6, 2013. (T41-45). Petitioner further admitted on cross-examination that from the date of accident through September 19, 2013, she was off work and resting in bed, and all of the sudden one day her lower back started hurting. (T44-45).

The Commission is unable to reconcile Petitioner's testimony regarding a low back injury at the time of her August 22, 2013 motor vehicle accident with the significant lack of any lower back symptoms, examination findings, or diagnoses from the date of injury until September 19, 2013. The Commission concludes the overwhelming evidence supports a finding that Petitioner failed to prove her current condition of ill-being with regard to her lumbar spine is causally related to her August 22, 2013 work-related injury. Accordingly, the Commission reverses the Arbitrator's finding of a causal connection between the work injury and her lumbar spine condition, vacates the Arbitrator's award of medical expenses related to the lumbar spine, contained within PX6 through PX12,
and vacates the Arbitrator's award of prospective medical, post-operative rehabilitation, related to the lumbar spine.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 13, 2015, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $283.88 per week for a period of 72-4/7 weeks, for the period of August 22, 2013 through January 13, 2015, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award under §8(a) of the Act, medical expenses contained within PX6 through PX12 related to Petitioner's lumbar condition of ill-being, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award under §8(a), prospective medical care in the form of an anterior cervical discectomy and fusion at C5-6 recommended by Dr. Sokolowski, is hereby affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award under §8(a), prospective medical care in the form of lumbar post-operative rehabilitation recommended by Dr. Sokolowski, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for an award of penalties and fees under Sections 19(k), 19(l) and 16 is denied.

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 $75,000.00. 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.

DATED: FEB 3 - 2016
KWL/kmt
O-12/08/15
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0095

WISNIEWSKI, KATARZYNA
Employee/Petitioner

Case# 13WC028784

JOLLY MAID
Employer/Respondent

On 4/13/2015, 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 0.09% 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:

2234 CHEPOV & SCOTT LLC
MASHA A CHEPOV
5440 N CUMBERLAND AVESUITE 150
CHICAGO, IL 60656

1596 MEACHUM STARCK & BOYLE
JAMES JANNISCH
225 W WASHINGTON ST SUITE 1400
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION **16IWCC0095**

Katarzyna Wisniewski
Employee/Petitioner

Case # 13 WC 028784

v.

Consolidated cases

Jolly Maid
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 **Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **January 13, 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: Prospective Medicals

FINDINGS **16IWCC0095**

On **August 22, 2013** 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 $**22,142.12**; the average weekly wage was $**425.81**.

On the date of accident, Petitioner was **23** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **5,596.49** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $5,596.49.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

- Petitioner sustained injuries arising out of and in the course of her employment with Respondent on August 22, 2013. Petitioner's current condition of ill-being is causally related.

- Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $16,315.00 to Dr. Victor Forys, $2,619.00 to Edgebrook Radiology, $19,097.00 to Dr. Mark Sokolowski, $23,116.00 to Dr. Neema Bayran, $36,985.75 to Illinois Neck and Back Institute, $8,777.90 to Ashland Medical Specialist, $6,601.75 to Prescription Partners, $43,867.09 to Westlake Hospital, $3,480.00 to Neuromonitoring Services, and $74.00 to Illinois Laboratory Medicine Associates, as provided in Sections 8(a) and 8.2 of the Act.

- Respondent shall pay Petitioner temporary total disability benefits of $283.88/week for 72 4/7 weeks, commencing August 23, 2013 through January 13, 2015, as provided in Section 8(b) of the Act.

- Respondent shall pay reasonable and necessary prospective medical services as recommended by Dr. Sokolowski, as provided in Sections 8(a) and 8.2 of the Act.

- No penalties or fees are awarded.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

1/8/15
Date

APR 13 2015

IN THE WORKERS' COMPENSATION COMMISSION
OF THE STATE OF ILLINOIS

KATARZYNA WISNIEWSKI, Petitioner,	)	**16IWCC0095**
	)	Case No: 10 WC 028784
JOLLY MAID., Respondent.	)	Arbitrator Hegarty

ADDENDUM TO THE DECISION OF ARBITRATOR

This matter was proceeded to arbitration pursuant to §19B of the Illinois Workers' Compensation Act "the Act" on January 13, 2015, before Arbitrator Jessica A. Hegarty.

The disputed issues in the arbitration proceeding are: (F) Whether Petitioner's current condition of ill-being is causally related to the injury; (J) Whether the medical services provided to Petitioner were reasonable and necessary; (K) What amount of compensation is due for temporary total disability; (M) Should penalties or fees be imposed upon Respondent; and (O) Whether Petitioner is entitled to prospective medical care.

FINDINGS OF FACT

On the date of accident, Petitioner, was 23 years old. During her sophomore year of high school, Petitioner left school in order to help her family financially. Petitioner stated that she initially went to work with her mother who was a cleaning lady for residential homes. She worked with her mother for a few months while she learned to clean. Thereafter she went to work for a cleaning service, working at two other companies before coming to Respondent Jolly Maid approximately one year before the accident. As a cleaning lady for Respondent, Petitioner testified her job duties included driving long distances, dusting, mopping, vacuuming, moving furniture and lifting mattresses to change sheets. She further explained that all these activities required her to routinely bend, kneel, stoop, twist and lift, push and pull heavy household objects.

Petitioner testified that prior to her work accident, she was in good health. She testified that until the age of 18 she was regularly examined by her family doctor. Petitioner testified she never suffered from any pain nor received any medical treatment to her neck, upper back, lower back or for headaches. She also testified that she never experienced any symptoms of radiculopathy in the upper or lower extremities. Petitioner she was able to perform her daily activities and laborious work duties without any difficulties or pain prior to her accident.

On August 22, 2013, Petitioner was driving her co-worker home when they were involved in a motor vehicle accident in which they were hit from behind. She testified that at the time of the collision she was at a complete stop with both hands on the steering wheel and not expecting the impact. Petitioner testified that as a result of the impact her body was first jolted backwards, forcefully striking her head and neck against the headrest and seat, then being pushed forward, causing her to lose consciousness. When she regained consciousness after a few minutes, she testified she was in shock, felt pain in the back of her head and burning in the left arm. Petitioner testified that she was bleeding from a cut on her left check that was immediately swollen and also had two cuts on the upper portion of her left arm. She testified that upon getting out of the car she noticed that the entire back window shattered and that the back of the car had extensive damage. (PX 13). Petitioner further testified that she felt a throbbing pain in the back of her head and that she was experiencing dizziness; prompting her to call 911 and request an ambulance.

Petitioner was transferred from the scene via ambulance to MacNeal Hospital. (PX 1). At the emergency room Petitioner complained of headache, dizziness and neck pain. (PX 2 at 11). Examination included cleaning of her wounds and a CT scan of the head after which, Petitioner was released home. (PX 2). Petitioner testified that she was released with pain medications and instructions on how to care for concussion syndrome, head injury and her neck pain. (Also see discharge instructions as contained in PX 2 at 5-9). She also testified that she was instructed to follow with a primary physician if she had any symptoms or pain in the days following the accident. Petitioner testified that after being brought home from the emergency room by her husband, she took another dose of pain medication and went to bed.

Upon waking the next morning, Petitioner testified that she felt stiffness throughout her body and had pain with simple movements. She most notably had pain in her neck, the area between her shoulder blades in the upper back, headache and dizziness. As her pain continued to worsen that day, her mother called to schedule an appointment for her with Dr. Victor Forys at Central Medical Clinic.

On August 24, 2013, Petitioner was examined by Dr. Forys. Medical records document complaints of neck and upper back pain, headaches and dizziness. VAS scale was reported as 8/10 for headaches and 9/10 for the neck, increasing with activity. (PX 3 at 23). Physical exam was positive for tenderness over the facets of the neck and upper spine, tenderness of the sternocleidomastoid and trapezius muscles bilaterally and decreased range of motion in all planes. (Id. at 22). The doctor also noted a 15cm abrasion on the left side of the cheek, 2 abrasions with ecchymosis on the left arm measuring 20cm and 5x7 cm. (Id). Dr. Forys' working diagnosis was multiple contusions/abrasions, concussion and whiplash. He referred Petitioner for x-rays of the cervical spine, prescribed Ibuprofen and Vicodin and advised Petitioner to rest and remain off work. Petitioner testified that until the time of surgery she took her pain medication every 4 to 6 hours for pain.

Petitioner testified that she saw Dr. Forys numerous times over the next few months and that her symptoms continued to worsen. At the August 30, 2013 examination with Dr. Forys, it is noted that Petitioner began experiencing paresthesia of both hands.

Petitioner also testified that approximately two and a half weeks after the accident she began experiencing pain in the lower back, shooting into the buttocks with symptoms of numbness and tingling down the right leg into the knee and foot and weakness of the leg. She stated that she woke up one morning and noticed the pain. Petitioner further explained that since the time of the accident she had been careful with her movements and did not sustain any new trauma or suffer abrupt pains.

Notes from the September 13, 2013, office visit with Dr. Forys note these symptoms as well as no history of new trauma. (Id. at 16). The examination revealed tenderness over the lumbar spine, positive straight leg raises on the right and Spurlings sign. (Id.). The new diagnoses of cervical radiculopathy and sciatica were added. Petitioner was referred to physical therapy for both her cervical and lumbar symptoms and advised to continue pain management with prescribed medications.

Petitioner began physical therapy on September 13, 2013. After an initial evaluation, therapy consisted of e-stim, massage therapy, hot packs and exercises for stretching and strengthening. (PX 3). Petitioner testified that therapy helped decrease her pain by relieving stiffness and soreness in her spine. Unfortunately, it did not improve her radicular symptoms as significantly.

At trial, Petitioner testified that her pain during this time was constant, despite incremental relief with pain medication every four to six hours. She explained that the pain in her neck and upper back would shoot into the area between her shoulder blades and that her lower back pain producing shooting pain into the buttock and down her right leg into her toes. Petitioner further described the nature of her pain as a burning sensation, with tingling and numbness in the bilateral arms from the elbow into the hands and in the right leg and foot.

When Petitioner's symptoms failed to improve with physical therapy and pain medications, Petitioner was referred for MRIs of the cervical and lumbar spine. Petitioner testified that initially only the lumbar MRI was approved by the Workers' Compensation carrier. The imaging was performed at Edgebrook Radiology on October 9, 2013 and revealed a subligamentous posterior disk herniation at L4-L5 measuring 3-4 mm elevating posterior longitudinal ligament and indenting ventral surface of thecal sac. (PX 4 at 7-8). After reviewing the MRI, Dr. Forys referred Petitioner for an orthopedic consult with spine surgeon Dr. Mark Sokolowski.

Petitioner was first examined by Dr. Sokolowski on October 14, 2013. Subjective complaints included neck pain with radiation to the bilateral periscapular regions, bilateral upper extremity numbness and tingling, lumbar pain with radiation to right buttock and right lower extremity. (PX 5 at 110-111). VAS score were recorded as 7-8/10 in the lower back, right leg pain at 4/10, neck pain at 7-8/10 and bilateral arm pain at 4/10.

Physical examination revealed an antalgic right sided gait pattern with positive sagittal profile, restoration to neutral sagittal profile reproduced concordant back pain with radiation to right buttock and right leg, positive Spurlings sign bilaterally for reproduction of concordant periscapular and arm pain, decreased sensation in C6-C8

dermatomal distributions bilaterally, pain with resisted bilateral supraspinatus strength test, bilaterally positive Neer and Hawkins impingement signs and tenderness to palpation over the thoracic spine. (Id.).

Dr. Sokolowski's working diagnosis was lumbar pain with radiculopathy and cervical pain with radiculopathy. He referred Petitioner for MRIs of the cervical and thoracic spine, prescribed a Medrol Dosepak, continued physical therapy and fitted Petitioner for a semi-ridged lumbosacral support. (PX 5 at 112).

Four days later at her follow-up with Dr. Forys, it was noted that Petitioner was now experiencing pain and radicular symptoms going into the bilateral legs, right greater than left. (PX 3 at 7).

At this juncture additional physical therapy and the MRIs were denied pending utilization review. Petitioner continued to have documented symptoms that were severe in nature. The treatment was subsequently approved following peer review. (PX 5 at 102-104).

The November 6, 2013, MRI of the cervical spine revealed a 2-3 mm C6-C7 subligamentous posterior disk herniation measuring elevating the posterior longitudinal ligament and indent ventral surface of thecal sac. (Id. At 101). The thoracic MRI performed on December 19, 2013 was unremarkable. Petitioner also resumed physical therapy. Following review of the MRI films at the December 20, 2013, visit, Dr. Sokolowski referred Petitioner to Dr. Bayran at Pain Centers of Illinois to begin interventional pain management for her cervical and lumbar pain. (PX 5 at 85). Petitioner was also given a prescription for dedracin to supplement her Norco for pain.

On January 7, 2014, Petitioner underwent an Independent Medical Examination with Dr. Thomas Gleason, admitted as Respondent's Exhibit 1. Petitioner testified that while she told Dr. Gleason of the impact, when she started to describe what happened to her body inside the car Dr. Gleason instead began the physical examination. Petitioner further testified that the examination conducted by Dr. Gleason was brief, lasting no more than five minutes, consisting mostly of measuring her extremities as detailed in the report. She stated that she was asked to walk back and forth in the exam room, the examiner pushed on her spine, checked range of motion and reflexes. The report notes normal gait, tenderness over the lower cervical spine and lower lumbar spine, para-cervical and lower para-lumbar tenderness, negative Spurlings and straight leg raise tests, normal strength and reflexes. (RX 1 at 2). The diagnosis was resolved cervical, thoracic and lumbar strains or in the alternative, temporary aggravation of a pre-existing condition. The report goes on to opine that Petitioner could return to work full duty based on the lack of objective findings on examination.

Following the results of the IME, Petitioner attempted to return to work on January 16, 2014. She testified that after contacting Respondent, she was told they did not have an open position for her. Petitioner then began looking for new employment and secured employment with another cleaning service. The new job, similar to that with Respondent, was residential cleaning where Petitioner worked in a team with a co-

worker. She explained that prior to this day she was not engaged in any strenuous activities outside of physical therapy and that she was limiting her activities of daily life due to pain.

Petitioner testified that once at her new job she attempted to do some light housework in the form of dusting, vacuuming and mopping without too much bending and no heavy lifting, but that she had immediate and significant increase in her symptoms. She testified that the pain in her neck, upper and lower back as well as her radicular symptoms required her to take constant breaks and sit in an effort to alleviate her pain. Petitioner testified that she called her new employer at the end of the day explaining that unfortunately she could not return to work because of the pain and that her inability to do her share of the work was unfair to her co-worker.

The following morning Petitioner called Dr. Sokolowski for an emergency appointment due to her severe pain. Dr. Sokolowski recommended Petitioner proceed with her previously suggested epidural injection with Dr. Bayran. In his office note of January 17, 2014, in an effort to secure approval for the epidural injection, Dr. Sokolowski summarized the specific findings of lumbar radiculopathy on his multiple examinations as: 1) positive sagittal profile and antalgic gate; 2) reproduction of concordant pain to right buttock and right leg (and now bilateral lower extremities) with restoration to neutral; 3) bilaterally positive straight legs raise at 45 degrees; and 4) sensory deficits in the right L4 and L5 dermatomes. (PX 5 at 74). Dr. Sokolowski further stated that these findings corresponded with the MRI findings of L4-L5 disc herniation with resultant neural impingement. (Id.) He also opined that the ongoing findings of cervical radiculopathy were consistent with the disc herniation identified on MRI. (Id.).

On January 18, 2014, Petitioner was examined by Dr. Bayran. Subjective complaints were documented as neck pain with radiation into the shoulder blades and bilateral upper extremities and hands, right greater than left, numbness and tingling in both hands, lower back pain with bilaterally radiation to the sides, posterior thigh and calf and numbness and tingling from the knee into the foot. (PX 6 at 17). Physical examination noted tenderness over the paraspinal and midline muscles bilaterally, pain with extension and bending of the head to sides, positive Spurlings sign, positive straight leg raises bilaterally, tenderness over midline at L4-L5 and L5-S1, pain in the lumbar spine with extension, flexion at 40°, and lateral bend at -20°. (Id.) Dr. Bayran's assessment was neck pain secondary to cervical pathology at C5-C6 and lower back pain with bilateral leg pain secondary to disc herniation at L4-L5.

Following the examination, Petitioner underwent a bilateral transforaminal lumbar epidural injection at L4-L5 under fluoroscopic guidance. Petitioner testified at trial and it is documented in Dr. Bayran's office visit of January 29, 2014, that the injection provided 20-30% relief of systems, especially with leg symptoms. (PX 6 at 15).

On February 5, 2014, Petitioner underwent a second injection at L4-L5. At the February 19, 2014, follow up visit with Dr. Bayran it was recorded that the second injection provided further pain relief, decreasing symptoms approximately 60%. (PX 6 at 11). It

was also noted that Petitioner continued to have complaints of neck pain radiating into the area of the bilateral shoulder blades and bilateral numbness and tingling in arms and 3rd-5th digits.

Petitioner was next seen by Dr. Sokolowski on March 3, 2014. VAS score was noted at 3-4/10 in the lower back and 2-3/10 in the lower extremities. Physical examination noted continued diminished sensation in the L4 and L5 and C6 through C8 dermatomal distributions, positive Spurlings signs bilaterally with concordant periscapular and arm pain and only mildly positive straight leg raises bilaterally. (PX 5 at 62). At this juncture with significant diminution of her lumbar pain and symptoms, Dr. Sokolowski referred Petitioner for cervical epidural injections and continued physical therapy. Dr. Sokolowski also noted that Petitioner's improvement following the injections was diagnostically valuable. (Id.)

On March 5, 2014, Petitioner underwent a cervical epidural injection at C6-C7 under fluoroscopic guidance. (PX 6 at 9). At the March 19, 2014, follow up visit with Dr. Bayran, Petitioner reported 10% improvement as well as return of some of her lower back pain. (Id. at 7). A second injection was performed on April 26, 2014. (Id. at 5). At follow up on May 7, 2014, Petitioner reported 20-30% relief of symptoms in the neck and upper extremities. (Id. at 3). Petitioner thereafter underwent a final lumbar transforaminal epidural injection at L4-L5 on May 18, 2014. Petitioner testified at hearing that all the injections provided good relief of her pain, unfortunately, the relief was not long lasting.

Petitioner returned to Dr. Sokolowski on June 24, 2014. Subject complaints included on-going neck pain with radiation into the bilateral periscapular region, numbness and tingling in the bilateral upper and lower extremities and lumbar pain with radiation to the right buttocks and leg. (PX 5 at 50). Petitioner testified that her pain and symptoms were severe and functionally limiting. Physical examination was significant for positive Sagittal profile, reproduction of concordant back pain and radiation to the buttocks and lower extremities with restoration to neutral, positive straight leg raise at 60° seated bilaterally, positive Spurlings sign bilaterally positive and ongoing bilateral paresthesias in the C6-C8 and L4-L5 dermatomal distributions. (Id.).

At this time Dr. Sokolowski opined that Petitioner had exhausted conservative measures and recommended a L4-L5 lumbar decompression.

Petitioner testified that she wanted to proceed with surgical intervention in order to alleviate her constant pain. She explained how after the accident her life completely changed. How she spent every day in pain, managing her symptoms as best she could with pain medications, wearing her semi-rigid belt and home exercises. Petitioner testified her pain, radicular symptoms and weakness in her arms and legs greatly interfered with her ability to perform routine tasks of daily life and impaired her quality of life. She explained how she could not feel her hands the same, causing difficulty with simple tasks like holding small objects and washing her hair, could not bend or twist without pain, could not sit, stand or even lay down in a single position for a long time because of shooting pains and numbness and tingling in her extremities. Petitioner testified that she wanted to return to her life as a healthy young women, to return to

work, to wake up in the morning without pain, to sleep through the night without waking in pain, to stop taking pain medications multiple times a day and to start a family.

In preparation for surgery, Petitioner had an updated MRI of the lumbar spine, x-rays and underwent surgical clearance. The radiologist's reading of the September 5, 2014, was L4-L5 loss of normal height as well as loss of normal hydration of the nucleus pulposus representing desiccation changes, with subligamentous posterior disk herniation and mildly extruded nucleus pulposus with posterior annular tear measuring approximately 3-4 mm, noted to elevate the posterior longitudinal ligament and indent the ventral surface of thecal sac with mild central stenosis. (PX 4 at 1-2).

Dr. Sokolowski also reviewed the MRI films at the September 23, 2014, pre-operative office visit. Dr. Sokolowski's reading of the films was an L4-5 disc herniation with large annular tear with associated impact upon thecal sac centrally causing stenosis. (PX 5 at 15).

Petitioner underwent surgery with Dr. Sokolowski on October 7, 2014, at West Lake Hospital. (PX 10 at 130-131). Following surgery Petitioner was admitted to the hospital for a period of three days.

At her first post-operative visit with Dr. Sokolowski on October 22, 2014, Petitioner was noted to have decreased radicular symptoms in the lower extremities and VAS scores of 5-6/10 for back and neck pain and leg/buttock pain at 1-2/10. Petitioner was referred for physical therapy and her prescriptions of Hydrocodone and Gabapentin were refilled. (PX 5 at 10).

Petitioner began therapy on November 4, 2014, and at the time of trial had undergone sixteen sessions. Therapy consisted of stabilization, strengthening and flexibility exercises, functional and neuromuscular retraining, postural education, gait and balance training, cardiovascular conditioning, manual therapy and ice. Petitioner testified at trial that her lower back pain and radicular symptoms are significantly improved following surgery and therapy.

At the November 25, 2014, visit with Dr. Sokolowski Petitioner was prescribed a TENS unit which she testified further helped alleviate pain. (Id. at 6). Dr. Sokolowski also ordered physical therapy to include treatment for the cervical spine.

Petitioner was last examined by Dr. Sokolowski on December 30, 2014. At this visit she reported continued improvement with her lower back pain but complained of continued neck and periscapular pain with radiculopathy. (Id. at 1). Dr. Sokolowski advised continued physical therapy for the cervical and lumbar spine for another month and noted that he would like to transition to work hardening, however expressed concern that the patient's significant cervical symptoms would hinder such transition. Dr. Sokolowski opined that if Petitioner remains persistently symptomatic with respect to her cervical spine he would seeking approval for anterior cervical discectomy and fusion at C5-C6. (Id. at 1-2).

Petitioner testified at trial that she continues to experience pain in the neck and upper back on a daily basis. She rated her neck pain at a 7/10 and explained that her symptoms include shooting pains into the middle of her back and between the shoulders, numbness and tingling in her forearms and hands as well as burning sensations. Petitioner testified she wants to return to work and activities of daily life without pain or limitations. She explained that after discussing surgery with Dr. Sokolowski, if her symptoms persist, she wishes to proceed with cervical surgery in hopes it will relieve her pain as the lumbar surgery has.

Petitioner testified that since the accident, she has not returned to work other than the one day in January 2014, she has not engaged in any strenuous activities outside of therapy nor has she suffered any falls or new injuries.

CONCLUSIONS OF LAW

(F) Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator adopts her findings of fact contained above and incorporates them herein by this reference.

Petitioner testified that on August, 22, 2013, she suffered an injury while involved in an undisputed work accident. Petitioner's non-contributing medical history and prior good health is documented throughout the medical records submitted as Petitioner's Exhibits 1 through 10, as well as Respondent's Exhibit 1. The Arbitrator finds credible the testimony of Petitioner that prior to the accident she never suffered any injury or pain in her neck, middle or lower back, never experienced any symptoms of radiculopathy or numbness and tingling in the upper or lower extremities

Petitioner further testified that since the accident she has not engaged in any strenuous activities and did not suffer any new injuries. While Petitioner returned to work for one day in January 2014 per the recommendations of Respondent's IME physician, Petitioner testified she wore her lumbar support and was careful with her movements.

Throughout the medical records submitted by Petitioner, there is a clear history of a work related accident followed by consistent complaints of pain, radicular symptoms and disability. Medical records from the emergency room at MacNeal Hospital document headaches, dizziness, pain in the neck and back of the head. (PX 2 at 11-13). At the first examination with Dr. Forys there is documented complaints of severe neck pain and associated radicular symptoms going into the area of the shoulder blades and upper extremities. (PX 3 at 22).

Although Petitioner did not have any immediate symptoms in her lower back, she testified that she noticed the pain upon waking in the morning approximately a week and a half after the accident. The Arbitrator notes Dr. Forys' records of September 13, 2013, contain a consistent atraumatic history of the start of Petitioner's lower back pain and symptoms into the right leg. (PX 3 at 18). Arbitrator further notes Respondent's

Exhibit 1 does not contain any opinions from Dr. Gleason stating that the short delay in the appearance of lumbar pain and symptoms affected his opinions on causation of the injury.

The Arbitrator finds persuasive opinions regarding causation as contained in the medical records of Dr. Forys as well as Dr. Sokolowski. Dr. Forys' causally related diagnoses are concussion with headache, whiplash, multiple abrasions and ecchymosis, situational anxiety, cervical radiculopathy and sciatica. (PX 3 at 16 and 22). Dr. Sokolowski's casually related diagnoses are lumbar pain, lumbar radiculopathy, cervical pain, cervical radiculopathy and thoracic pain. (First noted in PX 5 at 110-111).

Dr. Sokolowski credibly relates Petitioner's current conditions of ill-being to the work-injury based on the mechanism of injury as well as the temporal onset of pain. He opined that the mechanism of injury, that being a rear end collision, and resulting whiplash type injury to the cervical and lumbar spine, combined with the onset of continuous pain is consistent with Petitioner's symptoms and pathology found on imaging. He further stated that the imaging studies correlated with Petitioner's subjective complaints and objective findings on physical examination.

The Arbitrator finds Respondent's Exhibits 1, the Independent Medical Examination report of Dr. Gleason unpersuasive. Dr. Gleason concludes in his report that Petitioner suffered a soft tissue strain and or temporary aggravation of her pre-existing condition of the cervical and lumbar spine. (RX 1 at 6). Dr. Gleason based his opinion regarding causation on his examination failed to elicit any objective findings.

The Arbitrator notes that Dr. Gleason's report contains no history of prior injuries, symptoms, condition or treatment to the cervical or lumbar spine prior to the work accident. Arbitrator finds important the findings by Dr. Gleason that Petitioner showed no evidence of any psycho-social or medial co-morbidities contributing to her complaints of pain. (Id.). This Arbitrator also notes that Dr. Gleason acknowledged the finding of pathology in both the cervical and lumbar MRIs and further stated that the findings demonstrate potential objective anatomic sources of pain which would be consistent with Petitioner's subjective complaints. (Id at 5-6).

Dr. Gleason fails to provide any medical explanation for Petitioner's ongoing pain complaints and radicular symptoms other than to say his singular examination did not illicit any objective findings on examination. (Id.). Dr. Gleason provides no justification or basis to contradict the multiple documented objective findings on examination by Dr. Forys, Dr. Sokolowski and Dr. Bayran. This Arbitrator finds the documented findings from the numerous examinations conducted by Petitioner's multiple treating physicians to be more credible.

Dr. Gleason's opinion of a temporary aggravation of a pre-existing condition is not persuasive. Dr. Gleason's report fails to state any evidence or statistics of degenerative conditions for Petitioner's age group. This Arbitrator instead finds more credible the opinion of Dr. Sokolowski that he is unaware of any peer-review journal which suggests the routine presence of degenerative pathology in the general population of Petitioner's

age. (PX 5 at 53-54). Additionally, the Arbitrator notes that Dr. Gleason considered the degenerative findings on MRI to be clinically insignificant. (RX 1 at 6).

Arbitrator also agrees with Dr. Sokolowski's assessment that Petitioner's temporary relief of pain and radicular symptoms following epidural injections was diagnostically valuable and positively prognostic; especially given Petitioner's testimony of further improvement after surgery. (PX 5 at 53 and 62). This reliable finding is objective evidence in contradiction to Dr. Gleason's opinion that Petitioner did not have any objective pain complaints.

Based on the above, and after reviewing the entire record, the Arbitrator finds that Petitioner's condition of ill-being in the lumbar and cervical spine with accompanying radicular symptoms are casually related to the work accident of August 22, 2013.

(J) Were the medical services provided to Petitioner reasonable and necessary?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

Having determined that Petitioner's condition of ill-being is casually related, the Arbitrator finds all of the treatment provided and bills submitted for these conditions as detailed in Petitioner's Exhibits 1 though 12 were reasonable and necessary for treatment of Petitioner's work related injuries.

The Arbitrator does not find persuasive the opinions contained in Respondent's Utilization Reviews submitted as Exhibits 2-4.

The utilization review authored on January 13, 2014, failed to conduct a peer to peer review as requested by Dr. Sokolowski. The Arbitrator notes a written request by Dr. Sokolowski for a peer to peer which specifically stated three dates with the doctor's availability for multiple hours per day. (PX 5 at 86). Dr. Sokolowski further documented that although a single message was left for him he returned the call but that call was never returned. (Id. at 73).

Without a proper peer to peer the reviewer denied the requested injections by concluding that the medical records he reviewed documented no evidence of radiculopathy. The Arbitrator notes and finds persuasive Dr. Sokolowski's written response detailing the numerous document objective findings of radiculopathy throughout his multiple examinations those being: positive sagittal profile and antalgic gate, and reproduction of concordant pain to right buttock and right leg (and now bilateral lower extremities) with restoration to neutral, bilaterally positive straight legs raise at 45 degrees and sensory deficits in the right L4 and L5 dermatomes. (Id. at 74).

Regarding Respondent's Exhibits 3 and 4, the Arbitrator notes that the reviewer failed to document what medical records he reviewed in making his determination. It is notable that in the Summary of Treatment section, the reviewer states that Petitioner

had only one epidural injection at L4-L5 in May 2014. However, by the date of the report, Petitioner had in fact undergone three injections at this level as well as two injections in the cervical spine as documented in the medical records of both Dr. Sokolowski and Dr. Bayran. Therefore, the Arbitrator concludes that the reviewer's determination was based on incomplete medical records.

The Arbitrator further notes that the reviewer denied the request for L4-5 decompression despite acknowledging that Petitioner remains symptomatic following conservative treatment based solely on the opinions of the IME physician. The Arbitrator finds more persuasive the opinions and studies detailed by Dr. Sokolowski of the *North American Spine Society*, which recommend surgical intervention for disc herniation in the presence of "pattern of radiculopathy explained by imaging," and "6-12 weeks of non-operative treatment," both criteria met by Petitioner. (Id. at 54).

Lastly, the Arbitrator notes that the reviewer did not view the updated MRI of the lumbar spine taken on September 5, 2014. Both the radiologist and Dr. Sokolowski noted central stenosis. (PX 4 at 1-2) and (PX 5 at 15). This was a finding that according to the reviewer and the ODG guidelines cited was an important finding indicating necessity of surgery.

Based on the above, and after reviewing the entire record, the Arbitrator finds Petitioner's Exhibits 1 through 12 contain medical records and bills incurred as a result of the August 22, 2013 work injury. The Arbitrator awards Petitioner's medical bills to be paid by Respondent pursuant to Sections 8(a) and 8.2 of the Act.

(K) What amount of compensation is due for temporary total disability?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

Petitioner claims she was temporarily totally disabled from August 23, 2013 to the hearing date of January 13, 2015, a total of 72 4/7 weeks. The necessary off-work documentation from medical providers is contained in the medical records of Dr. Forys, Petitioner's Exhibit 2 and Dr. Sokolowski, Petitioner's Exhibit 5.

The Arbitrator therefore finds that Petitioner was temporarily totally disabled for this period.

(M) Should penalties and fees should be imposed upon Respondent?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

The Arbitrator declines to award penalties and fees in this case. The Arbitrator finds that Respondent submitted the disputed medical treatment to Utilization Review, as seen in their Utilization Review reports, which were entered as Respondent's Exhibits 1, 3 and 4, and reasonably relied on the results of the Utilization Review in non-certifying the

medical procedures requested. The Arbitrator finds Respondent adhered to Section 8.7(j) of the Illinois Workman's Compensation Act. Respondent entered into evidence and relied upon Utilization Review reports as well as an IME report in denying petitioner's medical benefits and temporary total disability benefits. This Arbitrator finds Respondent reasonably relied on these Utilization Review reports and IME report, and used all 4 reports as the basis to deny the medical treatment and payment for said treatment in good faith. Petitioner's request for fees and penalties is denied pursuant to Section 8.7(j) and no penalties are assessed against Respondent accordingly.

(O) Is Petitioner is entitled to prospective medical care?

The Arbitrator adopts her findings of fact and conclusions of law contained above and incorporates them herein by this reference.

Based on Petitioner's on-going subjective complaints, objective findings on exam, MRI results, positive response to the L4-L5 decompression and cervical epidural injections, Dr. Sokolowski has recommended Petitioner continue post-operative therapy for her lumbar spine and subsequently undergo an anterior cervical discectomy and fusion at C5-C6.

Petitioner testified at arbitration that she wishes to proceed with Dr. Sokolowski's recommendations in order to alleviate her pain and symptoms and to be able to return to work and her daily routines of life.

The Arbitrator, having found the Petitioner's condition of ill-being regarding the cervical and lumbar spine to be casually related to the accidental injury of August 22, 2013, hereby orders Respondent to authorize treatment recommended by Dr. Sokolowski as well as all pre-operative and rehabilitative treatment necessitated by the recommended surgeries.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Employment	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN TURNER SHANKLE III,

Petitioner,

vs. NO: 13 WC 38755

OMEGA DEMOLITION CORP.,

16IWCC0103

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of employment, accident, causation, medical expenses, and temporary total disability, and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of employment but adopts the statement of facts from the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the modifications noted below.

The Commission finds that Petitioner failed to meet his burden of proof that he was verbally hired by Respondent or became an employee prior to his accident on October 31, 2013. We find that the preponderance of the evidence shows that Petitioner was still in the process of interviewing for the estimator's position at the time of his accident.

We note that the Arbitrator found that Petitioner was employed by Respondent based, in part, on an analysis of case law relating to whether someone should be considered an employee versus an independent contractor for the purpose of being covered under the Workers' Compensation Act. However, neither party is arguing that Petitioner was an independent contractor during his first week at Respondent's office. Therefore, such an analysis is premature and not relevant because this presumes that Petitioner was actually hired. In other words, if a contract for employment is actually entered into, the "worker" may be considered an employee or an independent contractor, regardless of the label given to the relationship by the parties because other factors need to be considered such as the right to control the manner of work, method of payment, right to discharge, the skill required to perform the work, and who provides the tools, material, and equipment. (See Roberson v. IC, 225 Ill2d 159 (2007)). However, the case law that the Arbitrator

applied does not address whether an individual is an interviewee or an employee, which is the issue in Petitioner's case.

The primary question is whether there was an express or implied contract of employment that was the product of mutual assent or a "meeting of the minds." (See Goodrick v. IC, 237 Ill.App.3d 885 (1992); Crepps v. IC, 402 Ill. 606 (1949)).

Petitioner claims that he was verbally hired by John Smith on Monday, October 28, 2013, and testified that, after going over the first sample estimate that Petitioner had done, Mr. Smith said, "Good job. Hey, it looks like you got the job." (T. 10/10/14 at 31). Petitioner testified that he took that conversation to mean that he was hired and that he accepted the position. (Id. at 32).

Mr. Smith denied this and testified that he did not offer Petitioner a job or tell him that the job was his after the first day. (T. 11/10/14 at 26). Mr. Smith testified that he has no authority to hire someone and never offered a job to anyone at Respondent. (Id. at 15). He testified that Chuck Gerage has the sole authority to hire estimators. (Id.)

We do not find Petitioner's testimony credible that he was offered the job by Mr. Smith on October 28th and that Petitioner accepted it. The situation here is not one where someone or some entity (whether formally structured as a business or not) hires another person to do a job for a short period of time such as mowing the lawn, putting up a fence, or driving a car from an automobile auction. (See, e.g., Goodrick v IC, 237 Ill.App.3d 885 (1992); Ragler Motor Sales v. IC, 93 Ill.2d 66 (1982)). In such cases, it might be reasonable to find that there was a meeting of the minds based solely on an agreed price.

However, this is not the situation with Petitioner. He was considering relocating from Washington, D.C. to the Elgin, IL area if he was hired by Respondent. This was anticipated to be long-term employment and Petitioner was an experienced estimator. Petitioner was not unfamiliar with or naïve in the ways of the business world. He testified that he owned his own business, A-1 Remediation, since 2004 and worked for other demolition companies as a consultant. His most recent job prior to applying at Respondent was working for his own company through a "consulting agreement" with B.S. Environmental in Washington, D.C. Petitioner, himself, requested that the terms of his interview visit to Respondent be put in writing and Chuck Gerage, the President of Respondent, obliged. The e-mail correspondence (Px1) between Petitioner and Mr. Gerage indicates that Petitioner was coming to "test the waters" and the purpose of his visit was for Respondent to "evaluate your estimating skills and abilities." Respondent agreed to reimburse Petitioner for his gas to drive from Washington, D.C. to Elgin, IL and provide a hotel room "during the days of your visit next week." We note that it is clear from the e-mail that Petitioner was expected to be there for multiple "days" (plural). The e-mail is also very clear that, "If Omega is acceptable to your estimating skills and abilities, Omega will make you a **written offer** at such time." (Emphasis added.) It also indicates that the parties were "currently discussing a starting salary of $85,000.00." No other terms of employment were mentioned.

Petitioner had agreed to the terms of his interview visit and knew that if he was going to be hired he would receive a written offer. Instead of asking Mr. Smith for the job offer in writing, when he was allegedly told he got the job on October 28th, Petitioner apparently did nothing to confirm his salary or resolve any of the other terms of employment such as vacation days, sick days, holiday time, health insurance, access to a company vehicle, etc. The evidence shows that these significant issues were not addressed or resolved until Monday, November 4th.

Petitioner claims that he knew what his salary was going to be because of the e-mails prior to his visit. However, those e-mails only reflect that the parties were "currently discussing" a starting salary of $85,000.00. If, after the interview, Respondent did not believe that Petitioner was

worth $85,000.00, it had the right to offer him less and Petitioner would have had the choice to accept or reject it.

Prior to his interview visit, Petitioner's only contact with Respondent was with Mr. Gerage. It was with Mr. Gerage that Petitioner agreed to come for the interview in exchange for gas and lodging. It was by Mr. Gerage that Petitioner was told that if an offer was going to be made it would be in writing. We find it highly unlikely that Petitioner would accept employment, requiring him to relocate from Washington, D.C., based solely on an alleged statement by Mr. Smith and relying on a prior email "discussing," but not confirming, a starting salary and without any discussion of vacation and sick time, health insurance, or other benefits. Respondent eventually did offer Petitioner a job with a starting salary of $85,000.00 as reflected by the written offer on November 4, 2013.

Regarding the length of the interview process, Petitioner testified that he was coming to Respondent's office for a one-day interview on Monday, October 28, 2013, and that it was not for the whole week. (T. 10/10/14 at 81.) Mr. Gerage testified that he and Petitioner had talked about how the visit would be a few days to assess his skills and that Petitioner was aware of this. (Id. at 174). Mr. Gerage testified that it is his standard practice for interviews to take a few days because "I need to have somebody provide me different type of information to make sure I'm secure with their estimating abilities." (Id. at 175). He has hired about a dozen estimators and, in the past few years, about three of the estimator interviews lasted three days. (Id. at 213-14). Only one, a person he knew for 15 years and knew what he was capable of, was hired after one day. (Id.) Mr. Gerage testified that he believed he conveyed sufficiently to Petitioner that the interview process would last a few days and pointed to the emails indicating "days." (Id. at 231). Mr. Gerage testified that Petitioner consented to that and told him that "since he wasn't working and had nothing to do, he had no problem being up...here, and that was it." (Id.)

Mr. Smith testified that it was his understanding that the interview process with Petitioner was going to last a week. (T. 11/10/14 at 27). He has had three or four other interviewees "shadow" him and that process takes a week before they are hired. (Id. at 62). When Mr. Smith was hired by Respondent, he flew to Illinois to meet Mr. Gerage for a meeting that lasted about four hours. Another date was set up for approximately two weeks later, at which time Mr. Smith walked through a building and took measurements to put together an estimate for a project that Respondent had already bid. Mr. Smith returned home "with a set of prints" and worked on the bid for about week. He then submitted his estimate to Mr. Gerage and received a job offer. (Id. at 8-11, 61-62).

Rhonda Lenzi, Respondent's office manager and Human Resources person, testified that from her experience, the interview process for estimators lasts "three days or so" and when she gets the acceptance letter she knows that they are hired. (Id. at 91, 124-25). The Commission finds that the testimony of Mr. Gerage, Mr. Smith, and Ms. Lenzi are supported by the emails between Mr. Gerage and Petitioner, which indicate that the interview visit would last multiple "days."

Also significant regarding whether Petitioner was considered an employee prior to his injury on October 31st, Mr. Smith testified that he asked Petitioner several times after he was injured if he wanted to go to the hospital or doctor but Petitioner told him "no" and said "he was very embarrassed by the fact that he did something like this, and he expressed the opinion that he hoped this didn't affect his being hired, whether he would be hired or not at Omega." (T. 11/10/14 at 45).

Petitioner disputed that Mr. Smith ever offered to take him to the hospital. (T. 10/10/14 at 117). Petitioner testified that he was "in such pain, excruciating pain" at the time but that going to the hospital "didn't even come to my mind." (Id. at 118-19). The Commission finds that the testimony of Mr. Smith is more persuasive than that of Petitioner regarding their conversations after the injury.

Mr. Smith testified that he completed an Initial Incident Report (Rx3), which is done anytime there is an incident "no matter how big or how little" and is done for employees and non-employees alike. (Id. at 48-9). We note that this form asks for the "Injured Party" and not "Injured Employee." Mr. Smith wrote the details of the incident and identified the Injured Party as "John Shankle Prospective Employee." (Id.) We find this credible regarding Mr. Smith's perception of Petitioner's classification at that time.

In addition to Petitioner's claim that he was offered the job by Mr. Smith on October 28th, he also claims that this was confirmed by Mr. Gerage during a meeting in Mr. Garage's office on Friday, November 1st. Prior to this, Petitioner's only contact with Mr. Gerage was a brief introduction on Monday, October 28th and a phone call around 7:30 or 8:00 p.m. on Thursday, October 31st, after Mr. Gerage learned that Petitioner had been injured. (T. 10/10/14 at 87, 121-122, 189).

Petitioner testified that, on November 1st, he arrived at the office at 8 a.m. and asked Mr. Smith where a drug store was located because he had to get a prescription filled. (T. 10/10/14 at 50-51). Petitioner went to Walgreens, returned around 11 a.m., and was called into Mr. Gerage's office. (Id. at 124). On direct examination, Petitioner gave the following testimony:

Q: After you filled your prescription when John Smith told you where a Walgreens was, what happened next?
A: I met with Chuck in his office, and he verified everything.
Q: What did he verify?
A: Verified the employment, you know. I was getting paid that week and everything was fine, that he would see me Monday morning.
Q: Okay. What did you take that to mean?
A: That I was an employee all week.
Q: What did you do the rest of that day?
A: Actually, they had pizza in the lunchroom, and I went back to the hotel because I was in excruciating pain. And I had just taken a pain pill.

(T. 10/10/14 at 54-55). On cross-examination, Petitioner testified:

Q: Okay. And what did you and Chuck discuss?
A: Well, he verified everything; and, you know, told me I was getting paid that week, everything was fine.

And I went back to my – that was it. I went back to my office and I told him – they were having a pizza party in the lunchroom, and he asked me to stay.

And I said: Look, I'm in pain. I'm going to go home. I'll see you Monday morning at 8:00.

...

Q: Okay. This is your first in-person meeting with him outside of the handshake the first day of the week?
A: That's correct.
Q: Okay. And he calls you in and says – he just says: I'm going to pay you this week?
A: No. There was some conversation. I just can't recall what we went through, you know.

John – everything was fine, you know. John – you know, all of that. I just can't recall – you want me to tell you exact times. I can't tell you.

Q: Okay. Did he offer you the job?
A: Did he offer me the job? I already had the job.
Q: Because of what Mr. Smith said?
A: Because I was there all week, and I went to work Tuesday morning officially at 8:00 o'clock a.m.
Q: According to you, correct?
A: According to me and John Smith.

(T. 10/10/14 at 124-26). Later, Petitioner testified:

Q: Okay. Did you talk to Chuck at all that weekend?
A: I don't recall. I don't think so.
Q: And at no point in time prior to October 31st or on the date of October 31st were you provided with a written offer, is that correct?
A: It was a verbal offer. Same thing as a written offer. Verbal. And it's in the email.
Q: What's in the email?
A: The offer, $85,000 a year.
Q: I believe that was discussed – I'm not going to get into an argument.
Okay. That was your understanding, that that was an offer in the initial email?
A: That is correct.
Q: Okay. And you accepted it at the time of the email, then?
A: I wouldn't say I accepted it, but we both know what the base salary is going to be.

(T. 10/10/14 at 128-29). We find it significant that Petitioner was unable to recall much detail regarding his conversation with Mr. Gerage on Friday, November 1st, except that Mr. Gerage allegedly "verified everything" and said that he was going to be paid for that week. The Commission does not find Petitioner's testimony credible in light of the other testimony and evidence.

Mr. Gerage testified that he met with Petitioner in his office on November 1st because Petitioner was asking him "what is he doing, is he getting hired, is he not, should he go back home, what was he doing." (T. 10/10/14 at 190, 193). Petitioner told him that he was in a lot of pain, couldn't finish one of the projects he was interviewing with him on, and wanted to go back to his hotel and rest. (Id. at 190). Mr. Gerage testified that he told Petitioner that he had not had a chance to meet with Mr. Smith yet but that he would meet with him that afternoon and follow up with Petitioner later that evening or the next day. (T.192-93). Mr. Gerage testified that there was no discussion about Petitioner already being an employee, or about workers' compensation insurance, or about receiving payment for the week of October 28th. (Id. at 191).

Mr. Gerage testified that he also had a meeting with Mr. Smith on Friday, November 1st, at which time Mr. Smith told him that he felt they could work with Petitioner. (T. 10/10/14 at 191-92). Mr. Gerage testified that he made his decision to hire Petitioner after this conversation with Mr. Smith. (Id. at 209). Mr. Gerage called Petitioner on Saturday, November 2nd, to offer him the job and Petitioner said "good." (Id.) Mr. Gerage testified that Petitioner did not discuss that it was his understanding that he had already been employed and did not mention any concerns regarding payment for the week of October 28th. (T. 11/10/14 at 194). Mr. Gerage told Petitioner that he would have Ms. Lenzi get him an offer letter and have all of his paperwork filled out and signed and that "I look forward to working with you." (Id.)

Mr. Smith confirmed that he had a meeting with Mr. Gerage on Friday, November 1st regarding Petitioner. (T. 11/10/14 at 55). Mr. Smith did not tell Mr. Gerage that he should or shouldn't hire Petitioner but just that "he had some abilities that I felt we could work with." (Id.) At the end of the meeting, Mr. Gerage had not given any indication as to whether or not Petitioner was hired. (Id.) Mr. Gerage called him over that weekend and mentioned that he was going to offer Petitioner a job. (T. 11/10/14 at 57).

Ms. Lenzi testified that she became aware that Petitioner was hired by Mr. Gerage on November 4th via e-mail. (Id. at 100-102).

We find that the testimony of Mr. Gerage, Ms. Lenzi, and Mr. Smith is supported by the e-mails from Mr. Gerage to Ms. Lenzi on Saturday, November 2nd at 10:20 a.m. indicating certain changes that should be made to the offer letter and Ms. Lenzi's reply e-mail on Monday, November 4th at 10:29 a.m. (Rx8).

Petitioner testified that he thinks he filled out some of the new hire forms on the Wednesday during the week of the 28th through the 1st. (T. 10/10/14 at 133-34). However, all of the employment records in evidence are dated October 4, 2013 or November 4, 2013. Petitioner and Ms. Lenzi both testified that the date on some of the documents is October 4th but it was really November 4th. (T. 11/10/14 at 133, 104-5). We find that those documents dated October 4th were in error and should be November 4th but the fact remains that there is no evidence to support Petitioner's testimony that he filled out forms during the first week. We find that the evidence is consistent with Ms. Lenzi's testimony that she prepared and gave the forms to Petitioner on November 4th. (T. 11/10/14 at 101-106).

Petitioner testified that when he was presented with the written offer by Ms. Lenzi on November 4th, he told her that the date was incorrect but signed it anyway because he didn't have a choice. (T. 10/10/14 at 56-58, 132-33). Petitioner testified that he then called Mr. Gerage and said that he was supposed to have been paid for the first week but Mr. Gerage responded that the first week was a trial period. (Id.) In contrast, Ms. Lenzi testified that Petitioner did not indicate any concern about filling out the paperwork on November 4th or about payment for the week of October 28th through November 1st. (T. 11/10/14 at 106). Mr. Gerage testified that Petitioner did not express to him, on November 4th when the written offer was made, any concerns or expectations about payment for the first week. (T. 10/10/14 at 197). Based on the above, we find Petitioner's testimony unpersuasive. Although we do not base our decision on this, we also find it interesting that Petitioner apparently didn't claim to have confronted Mr. Smith, the person who allegedly offered him the job, about his pay for the first week.

In addition to our determinations regarding credibility as discussed above, we find that the preponderance of the evidence does not support a finding that Petitioner was an employee prior to November 4, 2013. Although it is possible that someone could be performing activities and functions of an employee such that an implied employment relationship exists, we find that is not the case here. Rather, Petitioner remained an interviewee during the first week and, most importantly, at the time of his accident on October 31st.

We note that, during the first week, Petitioner was using his own software and estimating tools to prepare sample proposals, whereas Respondent required its estimators to use Respondent's own program and format. (T. 10/10/14 at 94-95; T. 11/10/14 at 22-23). This supports the testimony of Mr. Gerage that none of the information prepared by Petitioner during the week of October 28th through November 1st was used by Respondent for the purpose of securing business because Respondent had already bid those projects. (T. 10/10/14 at 186).

Petitioner testified that he used Respondent's computer "maybe one time" during the first week using Mr. Smith's access code and that he was "eventually" assigned his own code. (T.

10/10/14 at 154). This is consistent with the e-mail from Ms. Lenzi to "Tech" on Monday, November 4th at 10:39a.m. requesting that Petitioner's computer and e-mail account be setup with his own password. (Rx5).

Mr. Smith testified that he reviewed Petitioner's folder on Respondent's computer, which reflected that Petitioner submitted three proposals between November 4th and the middle of November but that no bids or proposals were prepared by Petitioner prior to November 4, 2013. (T. 11/10/14 at 58-59).

Mr. Smith testified that Petitioner did not go to any sites with him after November 4th and Petitioner was doing his own bids after that date. (Id. at 58). This is consistent with Petitioner's testimony that after November 4th, he was going to sites on his own. (T. 10/10/14 at 135). Petitioner also testified that he did not have access to company vehicles during the first week. (Id. at 156). These facts are consistent with a finding that Petitioner was hired on November 4, 2013.

Mr. Gerage testified that Petitioner was given a phone on November 4th when he was hired. (T. 10/10/14 at 197). Petitioner testified that he didn't recall when he was given a phone. (Id. at 146).

We do not find the fact that Respondent paid for Petitioner's gas and lodging during his stay to be indicative of employment because those were clearly the terms of Petitioner's visit for his interview. Likewise, the fact that Petitioner was given assignments, a work cubicle, and transportation by Mr. Smith to various sites does not show direction and control of Petitioner. Rather, the entire purpose of the interview process was for Petitioner to perform bids on projects, which Respondent had already bid on, to be able to assess Petitioner's abilities. We find that Petitioner performed these tasks and accompanied Mr. Smith voluntarily as part of the interview process in the hopes of obtaining a job.

We do not put much weight in Petitioner's claim that he entered through what he considered to be an "employee entrance." The evidence does not indicate that there was any sign indicating that it was for employees only. Rather, the evidence (Px14) shows that the sign stated, "AUTHORIZED PERSONNEL ONLY DO NOT ENTER". As an interviewee with permission, Petitioner was obviously authorized to enter. We also note that it was an unlocked door and Petitioner had not been given any keys, which might indicate that he was an employee. Just because someone enters through a particular door, even if it was marked "employees only," does not automatically make that person an employee. We find that even if Petitioner was directed by Mr. Smith to use that entrance, this only indicates that Petitioner was authorized to use that entrance.

Finally, the mere fact that Respondent engaged in a hazardous or extra-hazardous business does not automatically convert Petitioner from an interviewee into an employee. Again, we find that Petitioner voluntarily participated in this interview process and could have refused, at any time, to continue. Of course, this may have affected whether he was ultimately hired, but we find that Petitioner's motivation was to obtain a job. The fact that he was, most unfortunately, injured during this process is similar to Barry v. St. Francis Motherhouse, 07 WC 1252 (2008), in which the Commission found that the claimant was not an employee when she was injured during her pre-employment physical.

We next address the Arbitrator's finding that "parts of Respondent's witness testimony [were] somewhat unreasonable. In particular the testimony of Ms. Lenzi that she never comes to work before 9 a.m. due to her son's school schedule is troubling as the Petitioner testified credibly that he arrived for his interview at 8 a.m. and was met by Ms. Lenzi." (Dec. at 19). Petitioner testified that he reported to Respondent's office at 8 a.m. on October 28th. He walked in the front door and after a short time the office manager, Rhonda, escorted him back to Mr. Smith's office.

(T. 10/10/14 at 28, 85). Ms. Lenzi testified that her hours at Respondent are from 9:00 a.m. to 5:30 p.m. and that she doesn't get there before 9:00 a.m. because she has to get her son on the bus to school. (T. 11/10/14 at 92). She had no reason to believe that her hours would have been different during the week of October 28, 2013. (Id. at 93). Ms. Lenzi testified that she believed she met Petitioner during the week of October 28th when John Smith walked Petitioner around the office and introduced him. However, she did not recall specifically meeting Petitioner on October 28th nor showing Petitioner back to the office and introducing him to Mr. Smith. (Id. at 94). Mr. Smith testified that around 8:00 a.m. someone from the front office called him and told him that Petitioner was there to meet him so he went up to the front office and escorted Petitioner back to the estimator's office area. (T. 11/10/14 at 16).

Obviously, all of this testimony is conflicting. Petitioner testified that he arrived at Respondent's office at 8:00 a.m. on October 28th and that Ms. Lenzi escorted him back to Mr. Smith's office. Mr. Smith testified that he went up to the front around 8:00 a.m. and escorted Petitioner back himself. Ms. Lenzi testified that she didn't specifically recall meeting Petitioner at all that day or showing Petitioner to Mr. Smith's office. While we will not speculate as to all of the possible reasons for these discrepancies, we don't agree with the Arbitrator that Ms. Lenzi's testimony is "troubling" or that it reflects poorly on her credibility regarding other aspects of her testimony.

We also disagree with the Arbitrator who found that Mr. Smith "testified that he had no idea that the Petitioner was injured enough to require hospitalization. In the Arbitrator's assessment, Mr. John Smith was clearly impeached by the [October 31, 2013] report when he denied that he know [sic] Petitioner went to the hospital as his own report listed Sherman Hospital as the location when the Petitioner sought medical care." (Dec. at 16-17). On direct examination, Mr. Smith clearly testified:

Q: I'm just asking what your recollection is.
Do you recall if the Petitioner went to the hospital that day?
A: Yes, he did.
Q: Did he go with you?
A: No.
Q: Do you recall who he went with?
A: Jerry Zembroch told me that he was going to take him.

Mr. Rudolfi: Objection.
Arbitrator: Sustained.

Q: Do you know personally, did anybody go with the Petitioner to the hospital, did you observe anyone?
A: I observed Jerry Zembroch taking Mr. Shankle with him to the hospital.

(T. 11/10/14 at 53-54). Although the hearsay objection was sustained as to what he was told, Mr. Smith clearly stated that he observed Jerry Zembroch, another estimator, take Petitioner to the hospital that day. This is consistent with the information contained on the incident report. (Rx3). The discrepancy, relied on by the Arbitrator, took place during cross-examination:

Q: When were you made aware that he went to Sherman Hospital?

A: I didn't know he went to Sherman Hospital, I – again in speaking with Jerry Zembroch, Jerry told me –

Mr. Rudolfi: Objection, asked for hearsay.
Arbitrator: You asked him the question, you're objecting to his answer?
Mr. Rudolfi: Can I rephrase.
Arbitrator: You can rephrase the question.

Q: Rephrase.
When were you made aware that Mr. Shankle went to Sherman Hospital?
A: If you want to get technical call right now.
Q: Today was the first day?
A: Today was the first day I was made aware that he went to Sherman Hospital, specifically.
Q: Very good. I hand you again what's been marked as Respondent's Exhibit No. 3, did you mark down that he went to get medical attention, on October 31st, did you mark down that we went to get medical attention?
A: Apparently I did.
Q: Okay, where did he get medical attention?
A: It says Sherman Hospital, so I must have been made aware before it.
Q: But again your testimony was –
A: Again, it's a year ago, and that apparently I was made aware of that before that, and my recollection is that Sherman Hospital was – I don't recall it being Sherman Hospital.

(T. 11/10/14 at 79-80). We note that the hearsay objection by Petitioner's attorney was not ruled upon by the Arbitrator. From our review of the transcript, the issue is whether Mr. Smith knew, prior to the date of hearing, that Petitioner went to Sherman Hospital specifically as opposed to a different hospital. Although Mr. Smith apparently didn't recall at trial precisely what he had written in the incident report a year prior, it is clear that he had relied, in part, on what he was told by Mr. Zembroch when he prepared the report. This is not a situation where Mr. Smith denied at hearing that Petitioner went to a hospital at all on the date of an accident and was then impeached with his own report indicating that Petitioner actually did. Rather, Mr. Smith was only "impeached" with reference to the specific hospital that Petitioner went. We do not find that this reflects negatively on Mr. Smith's other testimony in this case.

Based on the above and our thorough review of the record as a whole, we find that there was no mutual assent or "meeting of the minds" to create an employment relationship prior to Petitioner's injuries on October 31, 2013. Petitioner's claim that he was hired verbally by Mr. Smith on October 28, 2013 and that this was confirmed by Mr. Gerage on November 1st is not credible. We find that the testimony and evidence shows that Petitioner was not treated like an employee until the written employment offer on November 4, 2013. We find that any belief Petitioner may have had, that he had been already hired and was going to be paid for the first week, is unreasonable under the circumstances. Therefore, Petitioner has failed to prove that he was an employee of Respondent on October 31, 2013 and that his injuries arose out of and in the course of employment. All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated February 4, 2015, is hereby reversed and all awards vacated.

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.

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.

DATED: FEB 4 - 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/16/15
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

SHANKLE III, JOHN TURNER
Employee/Petitioner

Case# **13WC038755**

OMEGA DEMOLITION CORP
Employer/Respondent

16IWCC0103

On 2/4/2015, 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 0.06% 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:

1067 ANKIN LAW OFFICE LLC
JOSHUA RUDOLFI
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

1296 CHILTON YAMBERT PORTER LLP
BRADLEY L BREJCHA
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

16IWCC0103

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John Turner Shankle III
Employee/Petitioner

v.

Omega Demolition Corp.
Employer/Respondent

Case # 13 WC 38755

Consolidated cases: -----

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **October 10, 2014 and November 10, 2014.** 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. [x] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [x] Was there an employee-employer relationship?
C. [x] 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

ICArbDec19(b) 2/10 100 W. Randolph Street #8-200 Chicago, IL 60601 312/814-6611 Toll-free 866/352-3033 Web site: www.iwcc.il.gov
Downstate offices: Collinsville 618/346-3450 Peoria 309/671-3019 Rockford 815/987-7292 Springfield 217/785-7084

FINDINGS

On the date of accident, **10/31/2013**, 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 $**85,000.00**; the average weekly wage was $**1634.62**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**21,000.00** for other benefits, for a total credit of $**21,000.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $3,583.20, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2014.20 to Sherman Hospital, and $1,569.00 to Suburban Orthopedics, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $3,583.20, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $0.00 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,089.75/week for 46 4/7 weeks, commencing November 19, 2013 through October 10, 2014, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from November 19, 2013 through October 10, 2014, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $0.00 for temporary total disability benefits that have been paid

Penalties

The petition for penalties and fees as provided in Section 16 of the Act, Section 19(k) and Section 19(l) of the Act is dendied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Kelli Steffen
Signature of Arbitrator

2/2/15
Date

ICArbDec19(b)

FEB 4 - 2015

STATEMENT OF FACTS

The petitioner, John Turner Shankle III, was fifty-six years of age on the date of the alleged accident of October 31, 2013. He is a project manager/estimator by trade. (Transcript of Arbitration, pp. 11, hereinafter referred to as "R.") As an estimator he calculates the amount of materials that come out of buildings for renovation projects and calculates the amount of material left over when a building is torn down. (R. at 11-12) The Petitioner has been involved in this field of work for approximately 18 years. (R. at 12) The job of "estimator" is one that is involved with the demolishing of buildings. (*Id.*)

In October 2013 the Petitioner was living in Washington, D.C. and sent a resume to the Respondent, Omega Corporation ("hereinafter Omega") in response to a job posting on the internet. (R. at 13) On October 21, 2013 the Petitioner received an email from Mr. Charles (Chuck) Gerage requesting additional information concerning the Petitioner's work experience and inquiring as to Petitioner's availability to start work in the Chicago land area. (Pet. Ex. #1) The Petitioner provided the requested information that same day, received a reply from Mr. Gerage inquiring about salary, and responded that he would request $85,000 per year. (*Id.*) On October 22, and 23, 2013 the Petitioner sent Mr. Gerage an email containing sample bids that he had previously performed. (*Id.*) On October 24, 2013, the Petitioner inquired as to how quickly Mr. Gerage was looking to hire someone, to which Mr. Gerage replied that he was "looking to hire someone now" and that if the phone interview is a fit that the next step would be to meet at his office. (*Id.*) Following a telephone conversation between the Petitioner and Mr. Gerage on October 25, 2013, Mr. Gerage sent the Petitioner an email indicating that the Petitioner was to come to Elgin, IL in order for the Respondent to evaluate his estimating skills. (*Id.*) Mr. Gerage indicated that the Respondent would reimburse him for gas for the drive from Washington D.C. to Elgin, IL and provide a hotel for the Petitioner. (*Id.*) He further indicated that if the Petitioner's skills were acceptable that a written offer would be made and that the Respondent was currently discussing a starting salary of $85,000. (*Id.*)

The following is the email exhange:

"Chuck good talking to you today, If you could shoot me a e-mail of what we went over today as far as me coming up *next week. I see no problem in being there on Monday 10/28/13 to test the waters so to speak.* I look forward to this new opportunity. Thanks John." (*Emphasis added*).

Per the petitioner's request, Mr. Gerage responded on October 25, 2013;

"John,

Pursuant to our conversation, Omega will reimburse you for the gas to drive from Washington DC to Elgin IL. Omega will provide you a hotel room *during the days of your visit next week. The purpose of your visit is for Omega to evaluate your estimating skills and abilities. If Omega is acceptable to your estimating skills and abilities, Omega will make you a written offer at such time.* We are currently discussing a starting salary of $85,000.00.

We look forward to your visit on Monday October 18th 2013.

Drive Safe!" (*Emphasis added*)

Both parties have agreed and stipulated that in the email, October 18th , was a typo and meant to read October 28th. On October 27th, the petitioner sent a text message to Mr. Gerage indicating that he had made it safely to Elgin, IL. The petitioner testified that he was not provided any maps or directions for locating Omega. Mr. Gerage responded to the petitioner informing him that he would be shadowing John Smith during his visit and that he would meet Mr. Smith the morning of October 28th at Omega. Mr. Smith was one of four estimators working at Omega in October 2013.

Mr. Gerage testified that it was normal for interviews to last few days as it was necessary to properly assess an interviewee's skills and abilities. Omega employs between 100-125 employees. It has four estimators who are all salaried employees and all signed written offers. One of those estimators is Mr. Smith who is the senior estimator as he has been with Omega for ten years. Two other estimators have been with the company approximately five years each. The last estimator, Jerry, had been with Omega five years as of October 2013 but was going to be taking a personal leave. This was the position that the petitioner applied for on Career Builder. Mr. Smith testified that it was normal for interview to last a few days and indicated the he went through a similar process when he was hired ten years earlier. Over the years he had around 3-4 estimators

shadow him but indicated that who the interviewee shadows depends on which department they are applying. Mr. Smith has never hired an estimator and does not schedule interviews. Mr. Gerage, Mr. Smith and Ms. Rhonda Lenzi, Omega's office manager, all testified that Mr. Gerage is the sole person in charge of hiring.

The petitioner testified that he arrived at Omega on October 28, 2013 promptly at 8:00 a.m. where he met Ms. Lenzi and was escorted back to meet Mr. Smith. Ms. Lenzi testified that she would not be in the office at 8:00 am and did not escort petitioner back to meet Mr. Smith. Ms. Lenzi's hours are 9:00 am to 5:00 pm everyday and she has never arrived earlier then 9:00 am. Mr. Smith had been informed by Mr. Gerage that the petitioner would be coming in to shadow him for a few days. Mr. Smith was instructed to have petitioner look at some projects that had previously been bid by Omega. Mr. Smith and Mr. Gerage testified that the purpose of having petitioner bid projects already worked up was to assess his abilities and accuracy with estimating demolition projects by comparing them to those figures previously determined by Mr. Smith.

The first project the petitioner reviewed was located at 37 S. Sangamon Street. The petitioner was provided with a printout from Google Earth as well description of the property. The bid for this property had previously been prepared by Mr. Smith and the petitioner acknowledged that Mr. Smith had already 'worked it up, his numbers' prior to going over the bid with the petitioner. Mr. Smith testified the petitioner had sufficient information for which to prepare a bid without actually visiting the potential job site but that the petitioner wished to view the site in-person. The petitioner was not instructed to visit the site, was not provided any directions, and used his own vehicle. The property at Sangamon was described as a single building which still had tenants occupying the premises. To gain entry to the building required getting buzzed or admitted into the property. There is no indication in the record that the petitioner actually entered the property at 37 S. Sangamon but rather likely observed it from the outside. Petitioner then prepared a bid using his personal computer and his own bidding program. Both Mr. Smith and the petitioner identified that there are a number of programs that estimators can use when preparing a bid. Both parties agree that Omega uses a specific program for preparing

bids and that no bids prepared by the petitioner the week of October 28th utilized this program. Rather all hypothetical bids prepared by the petitioner the week of October 28th were prepared using his personal computer and personal estimating program. The petitioner confirmed that his proposal did not use a program consistent with Omega. All bids prepared by the petitioner after November 4, 2013 did use Omega's estimating program. Regarding the property located on Sangamon, the petitioner's bid for the project was $81,460.00. Mr. Smith's bid prepared previously was $76,240.00, a difference of approximately 5% which Mr. Smith confirmed was sufficient enough to lose a possible job. Mr. Smith confirmed that none of petitioner's work that day was used or relied upon in attempting to secure the project at Sangamon as that bid had been previously prepared by Mr. Smith.

The petitioner testified that after reviewing the bid with Mr. Smith that Mr. Smith told petitioner 'Hey, it looks like you got the job'. Mr. Smith testified that he never made any such statement and that he never would as he had no authority to hire someone. The arbitrator notes that with possibly the exception of a brief greeting, the petitioner did not meet or otherwise speak with Mr. Gerage on October 28, 2013. Mr. Gerage confirmed that he had introduced himself to Mr. Shankle earlier that afternoon but that was the extent of their conversation. The arbitrator further notes that Mr. Gerage was not in the office the majority of this day and did not have any discussions regarding the petitioner with Mr. Smith.

On October 29, 2013 the petitioner again went to Omega. On this day he reviewed take-offs and bids from a previously bid project at the University of Michigan. The petitioner testified that he worked the entire day in a cubicle. Mr. Gerage, Mr. Smith and Ms. Lenzi's testimony confirmed that petitioner was situated in a cubicle the week of October 28th. They further confirmed that estimators worked in actual offices which were located near the cubicles.

On October 30, 2013 the petitioner shadowed Mr. Smith to two different job sites. The petitioner testified that he rode in Mr. Smith's car on this day which he identified as a blue SUV. Mr. Smith confirmed that he

drove the petitioner on this day but has never owned or operated a blue SUV. Both he and Mr. Gerage confirmed that none of the vehicles used or operated by Omega is blue in color. Mr. Smith testified that in October 2013 he would have been driving a silver Ford Escape. Mr. Smith testified that the purpose of having the petitioner shadow him to these projects was to show him the possible project sizes he could be expected to work with should he get hired. The first site the petitioner described as an industrial plant. The petitioner testified that this was Mr. Smith's client and that the petitioner did not do any talking. They then had lunch a barbecue restaurant before proceeding to what has been described as a lime plant. The petitioner testified that he watched a short video that was provided by the lime plant before exiting the building and sitting in Mr. Smith's car. Mr. Smith testified that the petitioner did not have the proper work boots and thus was not permitted into the plant. Mr. Smith testified that work boots are not provided by Omega but rather purchased by the employee. Mr. Smith then performed a walk through while petitioner sat in the car for approximately an hour.

On direct examination, the petitioner testified that Mr. Smith drove him back to Omega. On cross-examination, the petitioner admitted that he had omitted another appointment that same afternoon. On cross-examination, the petitioner admitted that around 2:00 pm the afternoon of October 30, 2013, he accompanied Mr. Smith to a meeting at a restaurant. Mr. Smith testified that this meeting was scheduled by Mr. Michael Libert, a salesperson with Omega, to discuss potential future business. Also in attendance at this meeting was a businessman from Gary, Indiana. Upon arrival at the meeting, the petitioner was asked to leave by Mr. Libert because it was pertaining to potential future business for Omega and the petitioner was not an employee. The petitioner complied and chose to take a seat in the bar where he ordered a beer. The meeting concluded around 3:30 pm after which Mr. Smith drove the petitioner back to his car. The Petitioner and Mr. Smith returned to the office and left for the day around 6:30pm. (R. at 37)

The petitioner did not see Mr. Gerage at all on this day and did not review or prepare any sample bids. On October 31, 2013, the petitioner accompanied Mr. Smith to a site located at 2070 Maple Street in Des Plaines,

IL. Testimony at trial confirmed that this same site is also identified as 1780 Birchwood, Des Plaines, IL. Mr. Smith again drove to the site with the petitioner as a passenger in his silver Ford Escape. Mr. Smith testified that he had previously bid this site on July 25, 2013. Mr. Smith testified that this earlier bid was prepared without doing any actual walk through of the property. He testified that he had been out to the site located at 2070 Maple Street but had never walked through the building. The first time he walked the building was on October 31, 2013 with the petitioner. The building was vacant but was otherwise maintained and had running water and electricity. The petitioner testified that during the walk-thru he opened an interior loading dock door and fell approximately four feet. Mr. Smith testified that he saw the petitioner approaching the door but was unaware that it was an interior loading dock door because it simply looked like a door. He testified that a gate should have been across the door but that it had been left open. Mr. Smith testified that he immediately jumped down from the dock and helped the petitioner back up. Mr. Smith specifically recalled handing the petitioner back his e-cigarette as he recalls the petitioner was trying to quit smoking. Mr. Smith asked the petitioner if he needed to go to the hospital but was told by the petitioner that he did not. The petitioner expressed to Mr. Smith that he was embarrassed for falling and hoped it would not affect his possibly being hired. Mr. Smith took a few more pictures around the building before heading back to Omega. Mr. Smith testified that while driving back he attempted to reach Mr. Gerage to discuss the petitioner's fall but was redirected to Ms. Lenzi. Ms. Lenzi testified that she has been with Omega for around 17 years and often people looking for Mr. Gerage are directed to her when Mr. Gerage is out. Mr. Smith testified that he asked the petitioner numerous times if he would like to go to a hospital but the petitioner declined. Mr. Smith did prepare an incident report which he testified would be prepared for any incident with Omega, employee or non-employee alike. The petitioner is identified as prospective employee where injured party is indicated. Initially, Mr. Smith denied that he knew Petitioner was seeking medical help at the time when he prepared the report. On cross-examination, he acknowledged that the incident report indicated that Petitioner had gone to Sherman hospital.

The petitioner testified that he went to the hospital on October 31, 2013. He followed an Omega employee to Sherman Hospital. The petitioner treated at Sherman Hospital where x-rays were taken of the petitioner's right knee left elbow and left shoulder. All x-rays were normal. Petitioner was diagnosed with a lumbar contusion, ankle sprain and left shoulder sprain. He was given a prescription for Norco. He did not receive any work restrictions. Mr. Gerage contacted the petitioner that night to see how he was doing. The petitioner told him he would be back at Omega on November 1, 2013.

The Evidence shows that the petitioner did prepare a sample bid for the site located at Maple. The bid was prepared using the petitioner's personal computer and personal estimating program. The petitioner's estimated bid for the site was $636,773.00. Mr. Smith's original bid in July 2013 was $470,000.00. His rebid was $498,815.00, a difference of $137,958.00, nearly 25%, between the petitioner's bid and Mr. Smith's rebid. Mr. Gerage and Mr. Smith testified that this sample bid prepared by the petitioner was not used or relied upon in attempting to secure the Maple project.

The petitioner testified that he did go to Omega on November 1, 2013 but left early to get pain pills and go back to his hotel. The petitioner confirmed that he performed no work on November 1, 2013 and left before pizza was delivered for presumably lunch. The petitioner testified that Mr. Gerage met with him before he left and 'verified the employment, you know. I was getting paid that week and everything was fine, that he would see me Monday morning.' Mr. Gerage confirms that he did speak with the petitioner on this date but flatly denies the petitioner mentioning any expectation of pay for the week of October 28th which he acknowledged would be contrary to the scope of the interview agreed upon by the parties. The extent of the conversation between Mr. Gerage and the petitioner consisted of the petitioner informing Mr. Gerage that he was going back to his hotel. Mr. Gerage confirmed that he would be in touch with the petitioner after he had a chance to speak with Mr. Smith that afternoon regarding the petitioner's sample bids from the week. In the afternoon of November 1, 2013 Mr. Gerage and Mr. Smith sat down to discuss the interview with the petitioner for the first

time. Mr. Gerage and Mr. Smith testified that they had possibly discussed the petitioner's activities briefly in the week but that this was the first time they had an extended discussion and the first time Mr. Gerage had a chance to review the petitioner's sample bids. Mr. Gerage testified that he was out more than usual this week attending to a personal matter, a fact that the petitioner was aware of prior to agreeing to come to Omega for the week to 'test the waters'. Mr. Smith went over the two bids with Mr. Gerage and noted that although they were quite a bit off that he would be able to work with the petitioner. Mr. Smith acknowledged that he was not made aware of whether or not Mr. Gerage was going to hire the petitioner at the conclusion of this meeting but rather found out over the weekend. On November 2, 2013 Mr. Gerage contacted the petitioner and offered him the job as estimator.

On November 4, 2013, petitioner reported to Omega where he signed the written offer prepared by Omega. The letter is dated November 4, 2013 and signed by the petitioner. Ms. Lenzi, the office manager, is in charge of providing all new hires with the information contained in the new hire packet. The petitioner was also provided at this time with the new hire packet which included the written offer letter signed by the petitioner, a W4-form signed by the petitioner, an employee eligibility signed by the petitioner, an employee handbook and disclaimer signed by the petitioner, and an emergency contact form signed by petitioner. The date indicated on each of these forms next to the petitioner's signature is 10/4/13 which the petitioner acknowledged should be 11/4/13. Ms. Lenzi has also signed these documents and appropriately addresses them 11/4/13. The arbitrator notes that the petitioner testified that he had received these forms the week of October 28th. Mr. Lenzi testified that she prepares these new hire documents the same day as being informed by Mr. Gerage of a new hire. She received an email from Mr. Gerage on November 4, 2013 regarding the hiring of the petitioner Ms. Lenzi testified that she had perhaps met the petitioner in passing the week of October 28th but had not given him any forms or documents to sign prior to November 4, 2013.

On November 4, 2013 the petitioner moved from the temporary cubicle he was sitting at the previous week to an office. A computer was set up for him as was an email address. This is confirmed in emails exchanged between Ms. Lenzi and the office technician on November 4, 2013. As of November 4, 2013 the petitioner testified that he was preparing his own bids and traveling to potential job sites on his own. He no longer traveled with Mr. Smith and all subsequent bids prepared by the petitioner were prepared using the Omega estimating program. The petitioner worked for Omega for approximately the next two weeks. On November 15, the petitioner testified the he left his phone and any other tools he received from Omega in his office. Petitioner identified this day as a Friday and noted that he did not work this weekend. Upon observing his phone left in his office the following Monday, November 18, 2013, Mr. Gerage and Ms. Lenzi contacted the petitioner to determine his whereabouts. The petitioner told them that if his medical was not going to be paid for by Omega than he was returning home. This was the last conversation between the petitioner and any one from Omega. Mr. Gerage and Ms. Lenzi confirmed that petitioner was not terminated but rather left of his own volition. Payroll records confirm the petitioner was paid for November 4, 2013 through November 17, 2013. His hotel and travel were paid for the week of October 28, 2013.

On November 19, 2013, four days after leaving Omega, the petitioner was examined by Dr. Ankur Chhadia who diagnosed the petitioner with a right knee MCL sprain and possible left shoulder rotator cuff tear. He recommended an MRI and authorized the petitioner off work.

On April 9, 2014, Dr. Chaddadi authored a second off work slip and further indicates that petitioner is unable to travel. There is no report accompanying these two notes as that which was with the November 19, 2013 visit.

On August 12, 2014 underwent an MRI of his right knee and left shoulder. A rotator cuff tear of the left shoulder was indicated as well as suggestions of a chronic injury to the MCL. Dr. Chhadia has a recommended a left reverse total shoulder arthroplasty.

Petitioner has not worked since November 15, 2013.

ANALYSIS/FINDINGS

With respect to issue (B), was there an employee-employer relationship at the time of the petitioner's accident on October 31, 2013, the Arbitrator concludes the following:

The Primary issue in this case is whether the Petitioner, John Shankle, III was an employee of the Respondent Omega Demolition Corporation on the date of the uncontested accident on October 31, 2013. The Respondent proposes that the Petitioner did not become a contractual employee of the Respondent until after the accident when he was given a formal written offer and that on the date and time of the accident he was a mere interviewee out on the field for his week-long interview. The Petitioner argues that he has proven through testimony and other credible evidence that he was hired verbally as an employee prior to this accident and that regardless of the formal written offer to the contrary, he became an employee of Respondent based on the control and direction that the Respondent exercised over him in the time preceding the accident.

The Arbitrator acknowledges that some of the evidence in this case is not clear cut and that the case rests on a fine balance between credibility of the witnesses, case law and the intent and purpose of the Worker's Compensation Act. Ultimately, the Arbitrator finds that formal contractual agreement between the parties (dated after the accident) is not the decisive/controlling factor, but rather, just a factor. The Arbitrator finds that John Turner Shankle, III was an employee of Omega Demolition Corporation on the date of the work accident on October 31, 2013. The Arbitrator finds that the Petitioner has proven that he was verbally hired prior to his accident through his credible testimony and supporting documentary evidence.

The Illinois Workers' Compensation Act defines an employee as a "person in the service of another under any contractor of hire, express or implied, oral or written...." 820 ILCS 305/1(b)(2). "Although the definition of 'employee' contained in the Act is to be broadly construed, there can be no employer/employee relationship and therefore no liability under the Act in the absence of a contract for hire, express or implied. *Normand*

Goodrick v. Industrial Commission, 237 Ill.App. 3d 885, 888 (1992). When the evidence is conflicting and the facts are subject to diverse interpretations, it is within the province of the Industrial Commission to draw inferences from the evidence, ascertain the credibility of witnesses, evaluate conflicting testimony, and resolve whether the claimant has met his burden of proof. *Goodrick v. Industrial Commission*, 237 Ill.App. 3d 885, 888 (1992).

The "employer and employee is a contractual relationship...determined by an application of the principles governing the formation of other contracts". *Crepps v. Industrial Commission*, 402 Ill. 606, 614 (1949). Implicit in such a statement is the requirement that "the relationship is a product of mutual assent, that is, of a meeting of minds expressed by some offer on the part of one to employ or to work for the other and an acceptance on the part of the other." *Id.*

"There is no rigid rule of law for determining whether an employer-employee relationship exists, rather such a determination depends upon the particular facts of the case." *West Cab Co. v. Industrial Comm.*, 376 Ill.App.3d 396, 404, 876 N.E.2d 53 (1st Dist. 2007). Various factors must be considered including "the right to control the manner in which the work is done, the method of payment, the right of discharge, the skill required in the work to be done, and who provides tools, materials, or equipment." *West Cab*, 376 Ill.App.3d at 404 (*citation omitted*). The court expounded that "the right to control the manner in which the work is done is the paramount factor in determining the relationship." *Id.*

"It has been held that the label given by the parties in a written agreement will not be dispositive of the employment status, but that the facts of the case must be considered to determine what the individual's employment status is." *Roberson v. Indust. Comm'n.*, 225 Ill. 2d 159, 183 (2007). In order to determine if a worker is an employee, the following factors should be considered: 1. Right to control the manner in which work may be done; 2. Method of payment; 3. Right to discharge; 4. Skill required to perform the work; and, 5. Who provides the tools, materials or equipment. Of these factors, the right to control the manner in which the

work is done is the most important in determining the relationship. *Yellow Cab Co. v. Indust. Comm'n.*, 238 Ill. App. 3d 650, 652 (1st Dist. 1992). Even if the Petitioner was not specifically hired by Mr. Smith on October 28, 2013, the Petitioner was an employee of the Respondent.

Respondent has produced the written offer prepared by Omega and signed by all parties dated November 4, 2013 as the starting date for the employer-employee relationship. The evidence is uncontested that these forms were signed on November 4th. The Petitioner testified that he received the forms on October 28 and Ms. Lenzi testified that she received an email form the owner, Mr. Gerage on November 4th and prepared and presented the forms the same day to the Petitioner. She acknowledged that she may have met the Petitioner on October 28th but did not give him these forms. Respondent emphasizes that it written instrument that should control the finding in this case. The Arbitrator disagrees with this singular analysis and is cognizant of the holding that " the label given by the parties in a written agreement will not be dispositive of the employment status, but that the facts of the case must be considered to determine what the individual's employment status is." *Roberson v. Indust. Comm'n.*, 225 Ill. 2d 159, 183 (2007). The Petitioner's explanation that there was a verbal offer and acceptance in place prior to the written agreement that followed is persuasive and credible in the Arbitrator's determination. Also the Petitioner's testimony that he signed the agreement under protest as he was injured, living in a hotel for from his home state and under financial duress is plausible.

On the contrary, the actions of Mr. John Smith in hastily preparing an accident report labeling Petitioner as "Prospective Employee" on the incident report of October 31, 2013 is suspect. (Resp. Ex. #3) Mr. Smith testified that he was never made aware on October 31, 2013 that the Petitioner sought medical care at Sherman Hospital. He had personally witness the electric shock and the subsequent fall of a "prospective Employee" under his care and guidance during the alleged interview process. He found the matter serious enough to try to call the company owner and to try to fill out the accident report himself although he was not the human resources manager. Yet, he testified that he had no idea that the Petitioner was injured enough to require

hospitalization. In the Arbitrator's assessment, Mr. John Smith was clearly impeached by the report when he denied that he know Petitioner went to the hospital as his own report listed Sherman Hospital as the location when the Petitioner sought medical care.

Therefore, the Arbitrator is not persuaded by the written employment offer or the label on the accident report. The Arbitrator finds that the Petitioner was an employee based on his credible testimony as well an evaluation of the factors that show that the Respondent exercised control and direction over the Petitioner. The following facts were critical to the Arbitrators assessment and finding on this issue.

1. The Petitioner believed he was in town for an interview and if hired, would be paid for the week's services.

2. Respondent paid for the Petitioner's gas and lodgings.

3. It is undisputed that the Petitioner was directed and controlled by the Respondent in terms of what demolition sites to visit. In fact, the Respondent's agent, Mr. John Smith, drove him to the locations in the company vehicle.

4. The Petitioner submitted several bids which the Respondent found acceptable giving credence to Petitioner's testimony that he was verbally hired.

5. The testimony of Mr. Gerage is credible that he solely determines who gets hired but this does not discount the possibility that Mr. John Smith, who was the Petitioner's direct supervisor and who had overseen Petitioner's work, did not receive such authority to hire the Petitioner from Mr. Gerage. Petitioner's testimony that Mr. Smith examined his work and then shook hand with him to hire him is credible.

6. Petitioner, after the interview and verbal hire, testified that he reported back to the office each morning and entered into the property through the side entrance, or what he labeled the "employee" entrance. The Petitioner produced a Google Maps printout of the side entrance that revealed signs posted that "Authorized

Personnel Only" were permitted in that area and that hard hats must be worn in that area. (Pet. Ex. #14) This area is protected by a gate that is topped with barbed wire and is a controlled entrance. The Arbitrator finds this to be a persuasive fact in the Petitioner favor.

7. Respondent controlled Petitioner's work in that they gave him the client, the nature of the assignment, the work cubicle and the transportation to the job site. Although the Petitioner used a different computer program to arrive at his calculations, the Arbitrator is not swayed by the fact that Petitioner also had some leeway in how to perform his duties. The Petitioner performed "take offs" concerning a University of Michigan project on October 29, 2013 that was assigned to him by the Respondent.

8. On the accident date itself, Petitioner was asked to and reported to Respondent's business at 8:00 am, entered through an employee entrance, was told to accompany Mr. Smith to a building in Des Plaines to perform further work. The project/bid at the Des Plaines site was not completed at the time the Petitioner sustained his accident. This project is therefore different than the Sangamon project from the day before where all of the work had been performed and the Respondent was simply "checking the Petitioner's skills." The Arbitrator finds that the control exercised by the Respondent over the Petitioner during the week of October 28, 2013 and specifically on October 31, 2013 establishes that the relationship between the Petitioner and Respondent was that of employee/employer.

9. Petitioner went to Sangamon site on his own on the first day which was to be his interview day. At all other sites he was accompanied by Mr. Smith as if Petitioner were an employee in training with the senior estimator. This lends support to the proposition that he was an interviewee but then became an employee. In the Arbitrator's estimation this is a very crucial factor that shows the difference between the fact that the first day was an interview where Petitioner went to the location on his own and and prepared a secondary bid to be used in his job application evaluation. All the other days, Petitioner accompanied Mr. Smith where they worked

on bids designed to benefit the Respondent. The Arbitrator finds that the Petitioner's work product was used by the Employer for their purposes and that Petitioner was an employee after the verbal offer and acceptance.

Based on an evaluation of the above factors and the applicable case law, the Arbitrator finds that the Petitioner has met his burden of showing that he was an employee of the Respondent at the time of the accident. In reaching this conclusion, the Arbitrator is especially mindful of the fact that, perhaps, the definition of an employee under the Worker's Compensation Act is more fluid that a written instrument. This matter is largely one of assessing witness credibility and although the Petitioner was often upset and argumentative during his testimony, the Arbitrator found him to be credible. The Arbitrator found parts of Respondent's witness testimony to be somewhat unreasonable. In particular, the testimony of Ms. Lenzi that she never comes to work before 9 a.m. due to her son's school schedule is troubling as the Petitioner testified credibly that he arrived for his interview at 8 a.m. and was met by Ms. Lenzi. The Arbitrator also finds it perfectly possible that the official paper and tax forms may be filled out several days after the offer and acceptance of employment. This is not an unreasonable case scenario. The Arbitrator finds the Petitioner's testimony that he was sent to the Sangamon work site by himself to be credible. The Respondent's witnesses are firm in their belief that employment only began after the written paperwork but the Arbitrator finds to the contrary.

Lastly, it should be noted, that Petitioner and Respondent were engaged in a extra-hazardous activity as defined under Section 3 of the Act. This section provides enumerated occupations that are automatically covered because they are deemed to be "extra hazardous". Subsection 1 reads that automatic coverage under the Act applies to: "The erection, maintaining, removing, remodeling, altering or demolishing of any structure." This is the essence of the Petitioner's work and enter, examine, evaluate dangerous structures, deemed unfit for use and fit for demolition is precisely such an "extra hazardous" activity All of the witnesses at trial testified that the demolition business is hazardous and possibly extra-hazardous.

The Respondent acknowledges that demolition work can be a particularly hazardous type of employment but insists that entering the often abandoned, dangerous site as part of the interview process or to evaluate the site for demolition is not the same as performing any manual labor expended in the actual demolition. Respondent urges that the Petitioner was safely accompanied by a senior estimator at every step and that they have never had an incident during an interview in the fifteen years that Omega has been operating. The Arbitrator is wholly unconvinced by this argument and the factual scenario bears out the what the Petitioner was doing was hazardous and that Mr. Smith was not a safety net during the process. In fact, the testified showed that one of the sites they visited has been marked for demolition pursuant to accident at the site that resulted in a death. All properties had stringent safety requirements of hard hats and special shoes. The Maple street, DesPlaines property where Petitioner was injured was obviously abandoned, had unsafe/dangerous electrical wire that the Petitioner received a shock on and had unmarked bay/loading area that was poorly secured that the Petitioner fell from. The Petitioner was hardly in the safety environment of engaged office work. Accordingly, the Arbitrator finds that the Petitioner and Respondent were operating under the Act and that the Petitioner was engaged in a hazardous activity at the time of his accident.

With respect to issue, was there an accident that arose out of and in the course of employment, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner was injured in an accident that arose out of and in the course of his employment by the Respondent. The Arbitrator has previously found that the Petitioner and Respondent were in an employee/employer relationship. On October 31, 2013 the Petitioner was walking through the Des Plaines project taking measurement and writing notes in order to compile a bid. This is the essence of the Petitioner's job duties as an estimator. The Petitioner's testimony is supported by the testimony of the Respondent's witness, Mr. John Smith, that the Petitioner was entering a darkened loading dock, attempted to turn on the lights, and fell approximately four feet to the bottom of the dock. As these facts are not in dispute,

the Arbitrator finds that the Petitioner was injured in an accident that arose out of and in the course of his employment by the Respondent.

With respect to issue, is there a causal connection, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the work accident. Since the work accident the Petitioner has complained of pain to his left shoulder, left elbow and both knees. The Petitioner's medical records further substantiate these complaints. The Petitioner testified credibly that he had never had medical issues with any of these body parts prior to his work accident. The Petitioner has shown by the preponderance of credible evidence that his current condition of ill-being is causally related to his work accident. The Respondent produced no evidence to rebut the Petitioner's evidence. Accordingly, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to his work injury.

With respect to issue, was the medical care reasonable and necessary and whether the Respondent is liable for the bills, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner's medical care has been reasonable and necessary and that the Respondent has not paid all appropriate charges. The Petitioner produced outstanding medical bills from Sherman Hospital (Pet. Ex. #9) and Suburban Orthopedics (Pet. Ex. #11). Accordingly, the Petitioner is awarded these medical bills in the amount of $3,583.20.

With respect to issue (B), what TTD benefits are owed the Petitioner, the Arbitrator concludes the following:

The Arbitrator finds that the Petitioner is entitled to TTD benefits from November 19, 2013 through October 10, 2014, a period of 46 4/7 weeks. On November 19, 2013 the Petitioner was taken off work by Dr. Chhadia until an MRI of the Petitioner's left shoulder could be performed. (Pet. Ex. #10) Following that appointment the Petitioner was unable to continue his medical care due to a lack of insurance approval. Further, the Petitioner testified that he was forced to return home to Louisiana due to his being unable to work.

Following the November 19, 2013 appointment the Petitioner testified that he was informed by Mr. Gerage that the Respondent did not "pay medical." Further, the Petitioner would be stuck paying for his hotel. Rather than pay for the hotel and not be paid to stay off work the Petitioner went back to Louisiana. Since November 19, 2013 the Petitioner has been in an off work status and has been medically unable to work. Further, the Petitioner's condition has not stabilized and he is entitled to TTD benefits. *Interstate Scaffolding v. IL Workers' Comp. Comm'n.*, 236 Ill. 2d 132, 149 (2010). Accordingly, the Arbitrator finds that the Petitioner is entitled to TTD benefits from November 19, 2013 through October 10, 2014, a period of 46 4/7 weeks.

With respect to issue, is the Respondent liable for penalties/attorneys fees, the Arbitrator concludes the following:

The Petitioner is claiming penalties under Section 19(l) of the Act for the Respondent's unreasonable delay in paying benefits to the Petitioner, penalties under Section 19(k) for the Respondent's unreasonable and vexatious conduct, and claiming attorney's fees under Section 16 of the Act.

The Section 19(l) penalty is in the nature of a late fee. Assessment of the penalty is mandatory if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. *Mechanical Devices v. Indust. Comm'n.*, 344 Ill. App. 3d 752, 763 (4th Dist. 2003) The test for determining whether the employer or its carrier had adequate justification for delaying payment is that of objective reasonableness. *D.J. Masonry Co. v. Indust. Comm'n.*, 295 Ill. App. 3d 924, 935 (1st Dist. 1998) Additionally, where the overwhelming weight of medical testimony is in favor of compensation, the employer's refusal to pay can be deemed unreasonable. (*Id.*)

In this case all of the evidence produced at trial establishes that the Petitioner was injured in an accident. Although evidence of the accident is clear, the issue of Petitioner' employment is not as clear. Although the Arbitrator has found in the Petitioner's case in this case, the Arbitrator concluded that in light of the voluntarily signed, written contractual agreement between the parties, the Respondent's reliance that the Petitioner did not become an employee until this date is reasonable under the circumstances. The Arbitrator finds that the

Respondent did not act in bad faith of against the weight of the evidence. The Respondent may have felt justified in their position because the Petitioner did start out as an interviewee and not as an employee. Based on these factors, the Arbitrator denies the penalty petition under Section 19(k), Section 19(l) and fees under Section 16 of the Act.

With respect to issue, is the Petitioner entitled to prospective medical care, the Arbitrator concludes the following:

Having found accident and causal connection, the Arbitrator finds that the Petitioner is entitled to surgery as prescribed by Dr. Chhadia along with all reasonable and necessary, associated rehabilitative care. The Petitioner's medical records (i.e. MRI examination and doctor's notes) and the evidence produced at trial establish that the Petitioner requires this surgery and that the need for this surgery is related to the work accident.

With respect to the issue (N) is the respondent due any credit?, the Arbitrator concludes the following:

By stipulation between the parties, Respondent has paid $21,000 in advance to the Petitioner. This amount may be credited to the Respondent towards his obligations pursuant to this ruling.

Ketki Steffen
Signature of Arbitrator

2/2/15
Date

16IWCC0103

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JANET CARAWAY,

Petitioner,

vs. NO: 13 WC 39289

16IWCC0108

SOUTHERN ILLINOIS UNIVERSITY, CARBONDALE,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, prospective medical, and notice, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator for the reasons stated below.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. The Commission finds that Janet Caraway failed to prove an accident arising out of and in the course of her employment on July 23, 2013. Petitioner's claim for compensation is, therefore, denied. A separate decision has been issued for case 14 WC 43373.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

16IWCC0108

1. Janet Caraway worked for Rainbow's End Child Development Center for 13 years. T.17. Petitioner testified that her right knee pain became noticeable after 6 months of working for the respondent. T.26.

2. Beginning in 2001 and continuing for 7 years, Petitioner worked full-time in the infant room. There was 1 teacher to every 4 infants. She would sit and play with the children on the floor, rock them, pick-up toys, and change diapers. T.18. She would also get on her hands and knees once a week to clean the carpet. T.19. She was up and down off the floor numerous times per day. All the infants slept in cribs. T.41

3. Thereafter, Caraway worked in the toddler classroom for three years. She would bend down to pick up toys, kneel down to put the children to sleep on the cots every day, and sit on the floor and read to them. There were 12 children in the classroom. There were both cribs and cots. The teacher to child ratio was 1 to 4. T.39-T.40.

4. Petitioner then went to the older toddler room where there were no cribs. T.23. She would put the cots on the floor and her duties were similar to the toddler classroom. There were 15 students. T.24.

5. Petitioner testified, on cross-examination, that there were student workers who would come in and out throughout the day, and throughout the year. T.40.

6. Janet Caraway then returned to the infant room and her duties were exactly the same as before. T.23. She was there one year.

7. Respondent offered the job description for a Child Development Associate into evidence. The description does not mention anything about bending, kneeling or squatting. RX.4. Petitioner typed a description of her job duties indicating that she performed a lot of bending, stooping and kneeling throughout the day.

8. Petitioner had an unrelated accident in December 2013 when she ruptured her left Achilles tendon. She testified that she did not fall on her right knee. T.34. She was released back to work in May 2014 and retired. T.35.

9. Ms. Drust is the Director at Rainbow's End. She stated that there are teachers and student workers. T.57. No one teacher would take care of everything. *Id.* She stated that toys are picked-up throughout the day. T.56.

10. Ms. Drust testified that the teachers are not on their knees for extended periods of time. T.59. When the children nap, the teachers will sit next to them versus kneeling. T.59.

11. On January 25, 2013, Caraway was seen by Bianca Bottiaux PAC of the Center for Medical Arts for right knee pain that had been present for 1 year. Her pain was

aggravated by climbing stairs and movement. X-ray of the right knee revealed moderate narrowing of the medial meniscal compartment with small osteophytes and subchondral sclerosis of the tibial plateau. The impression was degenerative joint disease and small joint effusion. The diagnosis was degenerative arthritis of the right knee. She was to follow-up with Dr. Migone in two weeks. PX.2.

12. Petitioner was seen by Gretchen Mason PAC and Dr. Ronald Barr of Orthopaedic Institute of Southern Illinois on May 21, 2013 for right knee pain that had been present for several years but was progressively getting worse. She reported it was in the medial aspect of her knee. Petitioner was 5 feet tall and weighed 160 pounds. She had pain and swelling. She had x-rays and an MRI of her knee. Petitioner denied any injury; just that her condition had progressively gotten worse. She had mild swelling of the right knee and a slight varus alignment. She was very tender to palpation along the medial joint line. She had mild crepitation with range of motion. X-rays revealed advanced medial compartment osteoarthritis with bone-on-bone articulation medially and spurring in the patellofemoral and lateral compartments. The diagnosis was advanced osteoarthritis of the right knee, and right Achilles tendinitis. He recommended a trial of cortisone. Dr. Barr explained that Petitioner's condition was a degenerative type problem that was mostly genetic to normal wear and tear, and the demands of getting up and down maybe exacerbate her symptoms, but were not the cause of the arthritis. PX.1.

13. Petitioner presented for follow-up with Bianca Bottiaux PAC on August 2, 2013 seeking a referral to Dr. Nathan Mall for a second opinion as her right knee pain was severe. PX.3. Petitioner testified that she wanted a second opinion from Dr. Mall as her granddaughter had seen him and had good results.

14. Petitioner completed a Notice of Injury on August 5, 2013. She reported that she had right knee damage due to repetitive trauma while working. Per the report, petitioner reported her condition to her supervisor on July 23, 2013. PX.3. Petitioner testified that Ms. Durst stated that they were looking into new flooring that had more padding. T.32.

15. Caraway was seen by Dr. Nathan Mall of Regeneration Orthopedics on August 19, 2013. Petitioner completed a job history form and listed her job as "manual labor which including kneeling, squatting, climbing and carrying, etc. (construction labor)," and "moderate-including walking, climbing stairs, on her feet and some time on your feet." Petitioner reported that she worked in an early childhood program performing a lot of sitting and standing, and had been doing this more over the last few months. She was now in the room in which kids take naps and had to kneel down on her knees and pat several children to sleep. This seemed to exacerbate or aggravate her symptoms making them worse over the last few months. Dr. Mall noted that the x-rays revealed near complete loss of the joint space in the medial compartment of the right knee. The left knee had mild osteoarthritis. Dr. Mall noted that petitioner did not do a lot of other activities outside of work that could potentially cause an exacerbation. While petitioner was

predisposed to having osteoarthritis, her job as an early childhood teacher, in which she did a lot of sitting and standing, and back and forth from a kneeling position to a standing position in a repetitive nature, likely expedited this process and made it occur faster than it normally otherwise would have given the normal genetic course of this disease. Her work activities aggravated her symptoms. She needed a total knee replacement. PX.3.

16. Per the Supervisor's Report of Injury or Illness completed by petitioner's supervisor on September 2013, Ms. Drust reported that petitioner visited her office in either July or August 2013 and reported that her knee sometimes bothered her. She denied any specific trauma. Petitioner stated that she wanted to start a paper trail in case she ever needed a knee replacement. She thought the pain might be caused from being on her feet a lot and also from her age. She mentioned arthritis runs in her family. RX.2.

17. Petitioner followed-up with Dr. Mall on March 10, 2014. Petitioner was off work for an unrelated injury resulting in a left Achilles tendon repair. She reported that her right knee got better during this period despite walking somewhat unevenly and having a lot of stress on it. Her right knee pain was returning however, as she started to walk normal. Dr. Mall reiterated his causation opinion and need for surgery. PX.3.

18. Petitioner underwent a Section 12 examination with Dr. Richard Hulsey of Orthopedic Associates on May 2, 2014. The petitioner provided Dr. Hulsey with a work history document relative to her repetitive trauma of the right knee. She reported a lot of sitting, standing, and kneeling. Petitioner emphasized that she frequently had to get up and down off the floor in order to care for the infants and toddlers as well as clean the room and floors at the end of the day. She had to frequently kneel and squat throughout the day. She also felt that the toddlers would press on the inside of her knee with their feet. Petitioner reported that her pain gradually became more severe over the past year. The impression was end stage osteoarthritis. She needed a total knee replacement. He opined that her right knee pain was strictly a degenerative process that was very common in her age group. Her work activities did not cause or accelerate the arthritic process. If it did she would have had similar findings in her left knee. With the severity of changes, any activity of daily living could exacerbate the pain. The degenerative changes were present long before July 2013. The need for a total knee replacement was not related to her job. PX.6.

19. Dr. Hulsey was deposed September 8, 2014 and is board certified in orthopedic surgery. RX.7. pg.6. He stated that end stage osteoarthritis generally develops within 5 to 10 years after osteoarthritis. He stated that Petitioner described her job duties and that she had to frequently be on her knees, squat up and down, and clean the floor. She testified that she knelt and squatted for much of the day. RX.7. pg.13. She did not have any left knee issues, which he noted was not uncommon and was consistent with a degenerative condition. RX.7. pg.14. He diagnosed petitioner with degenerative advanced osteoarthritis of the right knee. RX.7. pg.15. Her job duties did not cause or accelerate her

condition; it was a long term process probably involving genetics, her weight (as she was moderately overweight) and other factors. Her job duties would not significantly accelerate the process or the severity of changes that she had in her knee. *Id.* He stated that daily activities of prolonged sitting, walking, or stair climbing would make her more symptomatic. *Id.* Her medical treatment was related to her underlying arthritis. She did not require any work restrictions. RX.7. pg.16. Any further medical treatment would not be related to any work injury. *Id.* He did not feel her job activities accelerated her pain. She was in need of a total knee replacement. RX.7. pg.24.

20. On cross-examination, Dr. Hulsey stated that high impact activities can accelerate the process a lot more than just kneeling, squatting or walking. RX.7. pg.18. He did not feel she did enough kneeling or squatting to hasten the disease process. RX.7. pg.19. He stated that any activity would cause pain given the severity of her condition. *Id.* While a lot of activities caused her discomfort, it did not necessarily accelerate the process or the need for a knee replacement. *Id.*

21. Dr. Hulsey was asked whether petitioner's job duties "no matter how minute, anything at all to do with what you say she needs, which is a total knee." Dr. Hulsey answered, "If you put it that way, then yes, I would say it played a role in the sense that it's part of her everyday activity." RX.7. pg.21. Dr. Hulsey later testified, however, that he was not aware of any study that suggested that kneeling on a floor or squatting accelerated or caused a problem. RX.7. pg.22. While she may not have been at end stage when she started working, she has a progressive disorder which will get worse no matter what the activity.

22. Petitioner testified that she has difficulty getting in and out of bed. Her knee pain awakens her on occasion. She can only walk short distances or about 10 minutes. She would like to undergo the total right knee replacement.

The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).

To obtain compensation under the Act, a petitioner bears the burden of showing, by a preponderance of the evidence, that she has suffered a disabling injury which arose out of and in the course of her employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002). "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 81, 212 Ill. Dec.

250, 656 N.E.2d 1084 (1995). It is not enough, however, to simply show that an injury occurred during work hours or at the place of employment. The injury must also "arise out of" the employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 212 Ill. Dec. 537, 657 N.E.2d 882 (1995). The "arising out of" component of establishing entitlement to benefits is primarily concerned with causal connection such that it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (2007); *Homerding v. Industrial Comm'n*, 327 Ill. App. 3d 1050, 1056 (2002). With respect to the third category, "[i]njuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC. The increased risk may be either qualitative (*i.e.*, when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than members of the general public by virtue of his employment). *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011).

The Commission finds that Caraway failed to prove that her work duties were repetitive in nature or that she was exposed to a risk greater than the general public. The petitioner testified that she performed tasks that included kneeling, squatting, and bending while working in all of the rooms. In support of her testimony, petitioner offered into evidence a self-produced job description that listed all of her daily activities. The Commission reviewed petitioner's job description along with Respondent's exhibit four, the job description for a Child Development Associate. The job description for a Child Development Associate makes no reference to the frequency at which petitioner had to kneel, squat, or bend. The Commission notes, however, that the teacher-to-child ratio was 1 to 4 in the classrooms. The Commission further notes that student helpers were present in the classrooms throughout the day. This information was not contained in Petitioner's self-produced job description. Additionally, Ms. Drust testified that no one teacher would take care of everything. The Commission finds this information pertinent as it reduces the frequency in which petitioner had to kneel, squat, or bend.

Based upon the evidence and testimony of record, the Commission finds that the petitioner was not exposed to a risk more frequently than the general public or that her employment contributed to her condition.

The Commission further finds that Petitioner failed to prove causal connection. The evidence establishes that petitioner was diagnosed with end state osteoarthritis. When she sought medical treatment in January 2013 and May 2013, petitioner was advised by Dr. Barr that her

condition was the result of a degenerative process and was related to normal wear and tear. Petitioner, however, then sought a second opinion from Dr. Mall who ultimately found causal connection. The Commission is not persuaded by Dr. Mall's opinion.

Dr. Mall diagnosed petitioner with degenerative osteoarthritis. The x-rays revealed a near complete loss of the joint space in the medial compartment of the right knee and mild osteoarthritis of the left knee. Dr. Mall's August 19, 2013 report indicated that while petitioner was predisposed to osteoarthritis, her job duties likely caused her knee to degenerate faster than it normally otherwise would have given the normal genetic course of this disease process. The Commission finds Dr. Mall's opinion generic and not persuasive. Dr. Mall essentially opined that because petitioner did a lot of bending, kneeling, and squatting at work, her degenerative condition was hastened by her work duties. Dr. Mall's opinion does not address the frequency at which petitioner was required to squat, bend, or kneel. His report further does not allude to whether he was familiar with the teacher to student ratio or that student workers were present in the room, which reduces the frequency in which Caraway was required to perform her duties. As such, the Commission is not persuaded by Dr. Mall's opinion.

Petitioner's argument that Dr. Hulsey found causation is not persuasive. When asked by petitioner's counsel if petitioner's work "had anything, no matter how minute, anything at all to do with what you say she needs, which is a total knee," Dr. Hulsey stated that "if you put it that way, then yes, I would say it plays a role in the sense that it's part of her everyday activities." The Commission, however, notes that petitioner failed to point out that Dr. Hulsey stated there was no study that he knew of that would suggest that kneeling on a floor or squatting would accelerate or cause a problem.

Dr. Hulsey reiterated his opinion that Caraway's condition was degenerative in nature. Dr. Hulsey further noted that if Caraway's condition was related to her employment she would have experienced symptoms in both knees. The fact that she had pain in one knee only demonstrated a classic degenerative condition. Dr. Hulsey further noted that petitioner's condition was a long term process involving her genetics, weight, and any life activity would cause her pain given the severity of her condition. While many activities caused her discomfort, Dr. Hulsey noted that it did not accelerate the process or the need for a knee replacement. The Commission finds Dr. Hulsey's opinion persuasive as it demonstrates a better understanding of a degenerative process, and a better understanding of petitioner's job duties and the impact of activities of daily living.

The Commission therefore finds that petitioner failed to prove an accident arising out of and in the course of her employment, and failed to prove that her condition is causally related to her work duties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 5, 2015 is hereby reversed. Petitioner's claim for compensation is therefore denied.

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

DATED: FEB 8 - 2016

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 12-14-15
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CARAWAY, JANET
Employee/Petitioner

Case# **13WC039289**

14WC043373

16IWCC0108

SIU-C
Employer/Respondent

On 5/5/2015, 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 0.07% 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:

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SPRINGFIELD, IL 62794-9208

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

MAY 5 = 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **Williamson**)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Janet Caraway
Employee/Petitioner

v.

SIU-C
Employer/Respondent

Case # **13** WC **39289**

Consolidated cases: **14 WC 43373**

16IWCC0108

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 11, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0108

FINDINGS

On the date of accident, **7/23/13**, 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 **$21,285.00**; the average weekly wage was **$409.33**.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a general credit for any medical bills paid through its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Respondent shall authorize and pay for the knee replacement surgery recommended by Dr. Nathan Mall.

Respondent shall pay reasonable and necessary medical expenses as set forth in Petitioner's Exhibit 9 pursuant to the applicable Fee Schedule as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be a given a credit for any medical bills paid by it or its group medical plan and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Nancy Rudsey
Signature of Arbitrator

May 3, 2015
Date

ICArbDec19(b)

MAY 5 - 2015

16IWCC0108

Findings of Fact and Conclusions of Law

At the commencement of the hearing Petitioner presented a Motion to Consolidate her two claims and without objection from Respondent, the claims were consolidated. The parties requested one decision for both cases[1]. The only difference between the two claims is the alleged date of accident, with the case of 13 WC 39289 having a date of accident of July 23, 2013 and the case of 14 WC 43373 having a date of accident of August 19, 2013. Both cases allege repetitive trauma injury to Petitioner's right knee.

In this case Petitioner alleges she sustained a repetitive trauma injury to her right knee which manifested on July 23, 2013 due to her job duties as a day care worker for Respondent. The issues in dispute are accident, notice, causation, prior medical treatment and prospective medical treatment. Two witnesses testified at the hearing: Petitioner and Linda Drust. Respondent had a representative, Jenny Batson, present throughout the hearing.

The Arbitrator Finds:

On January 25, 2013, Petitioner presented to Bianca Bottiaux, PAC at the Center for Medical Arts. (PX2). Petitioner complained of right knee and left foot pain. (PX2). Petitioner indicated that the right knee pain radiated into the right lower leg and the onset of pain was one year prior. (PX2). Petitioner had recently returned from Colorado. Petitioner indicated that the pain was aching and throbbing and aggravated by climbing stairs and movement. Petitioner denied any injury. Her pain was relieved by bracing. (PX2). Petitioner further indicated that associated symptoms were swelling, crepitus, and joint tenderness. (PX2). Ms. Bottiaux noted Petitioner was 61 years old, 60 inches tall, and weighed 169 pounds. (PX2). Petitioner's left ankle revealed crepitus. Petitioner was referred for an orthopedic consult for right knee degenerative arthritis and left Achilles tendonitis. An appointment/follow-up with Dr. Mignone was scheduled for February 11, 2013. (PX2).

On January 25, 2013, Petitioner underwent an x-ray of her right knee. (PX2). The findings indicated that there was no change from January 13, 2012. (PX2). The impression was: 1) degenerative joint disease and 2) small joint effusion. (PX2).

On May 21, 2013, Petitioner presented to Dr. Roland Barr at the Orthopaedic Institute of Southern Illinois. (PX1). Petitioner complained of pain (primarily medially) that had been going on for several years, but was progressively worsening. Petitioner also

[1] Despite the request of the parties, the Arbitrator is issuing separate decisions as recently requested by the Chairwoman of the IWCC with regard to all consolidated cases.

complained of "quite a bit of heel pain" as well and thought the two might be associated with one another. (PX1). On physical examination, Petitioner had mild swelling of the right knee and a slight varus alignment. (PX1). Petitioner had mild crepitation with range of motion, but range of motion was full. Petitioner also had quite a bit of heel pain which she associated with her knee pain. Petitioner reported having previously undergone x-rays and an MRI. (PX1). Dr. Barr noted that review of Petitioner's right knee x-rays showed advanced medial compartment osteoarthritis with bone-on-bone articulation medially and also spurring of the patellofemoral and lateral compartments. Petitioner was very tender to palpation over her left Achilles tendon. (PX1). Dr. Barr assessed Petitioner with advanced osteoarthritis of the right knee and right Achilles tendonitis. (PX1). Dr. Barr recommended a cortisone injection, which was given at that time. (PX1). Dr. Barr noted that Petitioner asked a lot of questions about whether her right knee problems were associated with her job with Respondent. (PX1). Dr. Barr further noted:

> I explained to her in depth that this is a degenerative type problem that is mostly genetic to normal wear and tear and the demands of getting up and down maybe exacerbate her symptoms, but were not the cause of her arthritis.

Dr. Barr recommended stretching for Petitioner's Achilles tendonitis. (PX1). Petitioner was to follow up in six weeks for her right knee. (PX1).

On July 23, 2013, Petitioner reported to her supervisor Linda Drust that she suffered repetitive trauma to her right knee due to her job duties. (RX1; PX 3).

On July 28, 2013 Petitioner signed her Application for Adjustment of Claim in case # 13 WC 039289. (AX 3)

On August 2, 2013, Petitioner followed up with Bianca Bottiaux, PAC, regarding complaints of right shoulder pain and right knee pain. (PX2). Petitioner indicated that she wanted a second opinion regarding her right knee. (PX2). Petitioner indicated that her right knee symptoms began years earlier and that they had gradually been worsening. (PX2). Ms. Bottiaux noted Petitioner had advanced osteoarthritis in her right knee and that Petitioner had requested a referral to Dr. Nathan Mall in Chesterfield, Missouri. (PX2). Petitioner indicated she would make her own appointment. (PX2).

On August 5, 2013, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form indicating she had injured her right knee through repetitive trauma. (RX1). On this form, Petitioner indicated she notified her supervisor, Linda Drust, of said injury on July 23, 2013. (RX1; PX 3)

Respondent also tendered a "Supervisor's Report of Injury or Illness" at hearing. (RX. 2) This report was filled out by Petitioner's supervisor, Linda Drust. This form also indicates that, "In either July or August 2013, Janet visited my office to report that her knees sometimes bothered her...." (RX. 2)

On August 19, 2013, Petitioner presented to Dr. Nathan Mall at Regeneration Orthopedics. (PX4). Prior to seeing Dr. Mall, Petitioner completed a new patient intake

form. (PX4). On this form, Petitioner indicated that her reason for the visit was for workers' compensation for her right knee. (PX4). Petitioner indicated that she had been injured at work and had previously seen a doctor for her complaint. (PX4). Petitioner indicated that she heard of Dr. Mall's office through her attorney, Jason Caraway. (PX4). Petitioner marked that her problem began due to work injury/work overuse and that she had had this problem before. (PX4).

Dr. Mall noted that Petitioner had been diagnosed with osteoarthritis of the right knee. (PX4). Petitioner indicated that she had worked for many years in an early childhood program doing a lot of sitting, standing, and kneeling. (PX4). Petitioner indicated that her symptoms had been getting worse over the last few months. (PX4). Petitioner also indicated that she had gotten approximately two and a half months of relief from the cortisone injection from Dr. Barr, but that her pain was returning. (PX4). Petitioner denied any prior right knee surgeries or past significant pain in the knee. Petitioner also didn't think she'd ever been to an orthopedic surgeon before going to Dr. Barr. Petitioner denied any prior right knee surgeries or past significant pain in her right knee. Petitioner was noted to be 62 years old, five feet tall, and weighed 175 pounds. (PX4). On physical examination, Petitioner's right knee had full range of motion, tenderness on the medial and lateral side, mild effusion, some patellofemoral crepitus, but no patellar instability. (PX4). Dr. Mall noted that x-rays of the right knee demonstrated near complete loss of the joint space in the medial compartment and that the left knee had some mild osteoarthritis. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall recommended physical therapy and strengthening exercises, anti-inflammatory medication, and occasional cortisone injections. (PX4). A cortisone injection was given to Petitioner that day. (PX4). Dr. Mall also indicated that a total knee arthroplasty will likely be needed eventually. (PX4). Petitioner was to return on a p.r.n. basis when her cortisone shot wore off. (PX4). Petitioner was given no work restrictions. (PX4).

Dr. Mall added a note addressing causation at the end of the August 19, 2013 medical record. (PX4). Dr. Mall indicated that while Petitioner was predisposed to having osteoarthritis in her right knee, he believed that her job duties as an early childhood teacher likely expedited the process and made it occur faster than it normally would have. (PX4). Dr. Mall further stated that even if it was determined that this was a pre-existing condition; he believes that her work activities exacerbated her condition. (PX4).

A copy of Petitioner's Application for Adjustment of Claim in case # 13 WC 39289 was mailed to Respondent on November 20, 2013. (AX 3)

Petitioner's Application for Adjustment of Claim in case # 13 WC 039289 was filed with the Commission on November 26, 2013. (AX 3)

On March 10, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she had been doing well with the cortisone injection, but that it was starting to wear off. (PX4). Petitioner also indicated that she had been off work for her left Achilles tendon which had been repaired. Petitioner reported that her knee actually got

better while off work despite walking on it somewhat unevenly and having it bear a lot of stress. Now that she was walking more normally, Petitioner was noting more right knee pain as well. On physical examination, Petitioner's right knee pain had full range of motion, varus deformity more so on the right than the left, medial joint tenderness, mild effusion, and no patellar instability. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall noted that he wanted to give her additional time to see how she does after she no longer had to wear the boot for her left ankle. (PX4). Dr. Mall indicated that he would continue to follow Petitioner and treat with cortisone injections as long as she was getting three months relief from them, after that she will likely need a total knee arthroplasty. (PX4). Again, Dr. Mall noted he believed Petitioner's work duties aggravated her condition. (PX4). Petitioner was given no work restrictions. (PX4).

On May 2, 2014, Petitioner underwent a Section 12 examination with Dr. Richard E. Hulsey regarding Petitioner's right knee. (RX6). In anticipation of the exam Petitioner had prepared a detailed description of her work duties and their impact on her right knee. (PX 8) Dr. Hulsey performed a physical examination, reviewed Petitioner's medical records, and took a verbal history from Petitioner. (RX6). Petitioner also gave Dr. Hulsey a typewritten description of her job duties for Respondent. (RX6, PX8). Petitioner indicated that she would frequently get up and down off the floor in order to care for the children and clean the room. (RX6). Petitioner also told Dr. Hulsey that she would have to kneel and squat frequently throughout the day. (RX6). Petitioner further indicated that she did not have a specific injury, but rather that pain developed over the last several years and gradually became worse. (RX6). On physical examination, Petitioner walked without support, was able to get in and out of her chair without difficulty, had pronounced genu varum deformity of the right knee, lacked full extension, flexed to approximately 125 degrees, tenderness over joint lines, and light crepitation with flexion and extension. (RX6). Dr. Hulsey took x-rays of Petitioner's right knee which showed severe osteoarthritis with total obliteration of the medial compartment and varus deformity, and moderate osteophyte formation off the patella and lateral compartment. (RX6). X-ray of the left knee showed mild changes. (RX6). Dr. Hulsey opined Petitioner had end-stage osteoarthritis in her right knee and would need a total knee replacement. (RX6). Dr. Hulsey further opined that Petitioner's right knee condition is strictly a degenerative process that is common in her age group and that the work activities that she described did not cause or accelerate the arthritic process. (RX6). Dr. Hulsey opined that with the severity of the changes seen on the x-rays any activities of daily living could exacerbate her pain and that Petitioner's need for a total knee replacement was not related to her job duties for Respondent. (RX6).

On May 5, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she continued to have right knee pain. (PX4). Petitioner also indicated that she had been off work for an Achilles tendon injury and had been somewhat better in terms of her right knee. (PX4). Petitioner was noted to be five feet tall and weigh 185 pounds. (PX4). Petitioner had varus deformity more so on the right than the left, medial joint tenderness, and limited range of motion of the right knee from about five degrees short of full extension to 110 degrees of flexion. (PX4) Dr. Mall's assessment was right knee osteoarthritis aggravation. (PX4). Dr. Mall recommended another cortisone injection that

performed that day and additional physical therapy for quadriceps strengthening. (PX4). Dr. Mall noted that Petitioner's complaints seemed somewhat better while being off work and "this is an indication that her job duties are aggravating her osteoarthritis in her right knee." (PX 4) He believed she would need a total knee replacement eventually. (PX4). Petitioner was to return in three months or when her pain returned. (PX4). Petitioner was given no work restrictions. (PX4). No further medical records were admitted into evidence.

Dr. Hulsey was deposed on September 8, 2014. (RX7). Dr. Hulsey is an orthopedic surgeon board certified in orthopedic surgery. (RX7, p. 6) Dr. Hulsey testified that Petitioner described her job duties as taking care of infants and toddlers, frequently being on her knees, squatting up and down, and cleaning the room at the end of the day. (RX7, p. 13). Dr. Hulsey also testified that Petitioner provided him with a written job description of her duties that he reviewed. (RX7, p. 13). Dr. Hulsey testified that Petitioner did not have any significant complaints or symptoms with her left knee, which he stated was consistent with a degenerative condition, as one side is frequently more affected than the other. (RX7, p. 14). Dr. Hulsey testified that Petitioner had advanced osteoarthritis of the right knee. (RX7, p. 15). He further testified that Petitioner's job duties did not cause or accelerate her condition. (RX7, p. 15). Dr. Hulsey testified that the basis of his opinion was that the degree of kneeling or squatting would not have accelerated the process as this is a long-term degenerative process involving genetics, Petitioner's weight, and other factors. (RX7, p. 15). Dr. Hulsey testified that any activities of daily living could exacerbate her degenerative condition. (RX7, pg. 15). Dr. Hulsey testified that Petitioner's age and weight would be risk factors that could affect her right knee condition. (RX7, p. 16). Dr. Hulsey testified that if Petitioner underwent a total knee replacement it would not be due to her alleged work-related injury or repetitive trauma. (RX7, p. 16). On cross-examination, Dr. Hulsey testified that there are activities that can accelerate the osteoarthritis process, like high impact activities such as running and jumping where the knees see more stress than kneeling and squatting. (RX7, p. 18). Dr. Hulsey further testified that he did not know of any study that suggests kneeling on a floor or squatting accelerated or caused osteoarthritis. (RX7, p. 22). Dr. Hulsey testified that he did not believe that Petitioner's job duties accelerated her osteoarthritis and that she would have needed a knee replacement regardless of her job. (RX7, p. 24).

On cross-examination, Dr. Hulsey was asked if Petitioner's work could have caused her to have symptomatic pain related to her osteoarthritis. Dr. Hulsey responded, "Again, any activity I think she does, whether it's at her job or at home would cause increasing pain and discomfort." (RX 7, p. 20) Dr. Hulsey was asked if Petitioner's work "had anything, no matter how minute, anything at all to do with what you say she needs, which is a total knee?" (RX 7, pp. 20-21) Dr. Hulsey responded, "If you put it that way, then yes, I would say it plays a role in the sense that it's part of her everyday activities." (RX 7, p. 21) He went on to state that activities can aggravate her knee. (RX. 7, p.22)

On December 18, 2014 Petitioner signed her Application for Adjustment of Claim in case # 14 WC 043373. A copy of the Application was sent to Respondent that same

day. The Application for Adjustment of Claim was filed with the Commission on December 24, 2014. (AX 4)

At the hearing Petitioner testified that she has worked at Rainbow's End Child Development Center on the campus of SIU Carbondale for thirteen years. During her time at the day care facility she worked in a number of different classrooms.

Petitioner first worked in the "infant room" for seven years. During this time Petitioner would sit on the floor with the children, rock them to sleep and change their diapers. Petitioner testified she frequently bent to pick up various toys. As Petitioner was the closing teacher, she was charged with cleaning the classroom at the end of each day. This involved picking up toys off the floor, disinfecting them and returning them to the shelves. Each Friday, Petitioner would get down on her hands and knees to clean the thin mat the children played on. Petitioner testified this job in the infant room required her to get up off and down onto the floor a number of times each day.

After her seven years in the infant room, Petitioner was transferred to the "younger toddler" classroom. She worked in this classroom for three years. Again, Petitioner was tasked with picking up toys throughout the day. In this classroom some of the children slept close to the floor on cots. Petitioner testified she was up and down off the floor to assist with picking up and cleaning toys and putting the children to sleep on the cots and reading to them. Petitioner explained she would also kneel to care for the children. There were twelve children in this classroom.

After three years in the "younger toddler" classroom, Petitioner was transferred back to the "infant" room. She returned to the infant room for one year. While back in the infant room for this assignment, her duties did not change from her previous time in the classroom.

Petitioner next worked in the "older toddler" classroom. Again, Petitioner would bend down and get up and off the floor to assist the children while going to sleep on cots. Petitioner also got up and down off the floor to read to the children. Again, Petitioner was charged with cleaning the classroom and would bend down to pick up toys so that they could be disinfected. Once again, Petitioner would get up and down from the floor to read to the children. There were fifteen children in this classroom.

Petitioner further testified that in each of her assigned classrooms there were other teachers as well. Petitioner also testified that she was not solely responsible for putting all of the children in her classrooms to sleep.

Prior to beginning work for Respondent Petitioner suffered no major trauma or accident to her right knee. Petitioner testified that her knee pain became noticeable after approximately six months of employment with Respondent. She testified this knee pain worsened over her thirteen year career at the day care facility and occurred while performing her job duties for Respondent.

Petitioner testified she sought active medical care for her right knee in 2013. She first treated with her primary care physician, Dr. Migone, on January 25, 2013. She

acknowledged that she said nothing specific about her knee pain being associated with her work activities at that time.

Petitioner then saw an orthopedist, Dr. Barr, on May 21, 2013. Petitioner testified that while she was at her appointment with Dr. Barr and that she asked him if her knee pain was related to her work and that he did not inform her that her current condition was work-related.

Sometime after this appointment, Petitioner received a letter from Dr. Barr's office with a copy of the medical record dictated from her appointment on May 21, 2013. Petitioner testified that within thirty days or so of receiving this report she had a formal conversation with her supervisor, Linda Drust. Petitioner testified she spoke to Ms. Drust on July 23, 2013, regarding her right knee problem. Petitioner testified that in this conversation, Ms. Drust indicated that she had been checking into some new flooring for the classrooms.

After seeing Dr. Barr, Petitioner returned to see her primary care physician, Dr. Migone, on August 2, 2013. (PX 2) Petitioner testified that Dr. Migone referred her to Dr. Mall. Petitioner testified that her granddaughter had seen Dr. Mall. Petitioner's granddaughter is the child of Petitioner's attorney, Jason R. Caraway.

Over the course of her treatment with Dr. Mall, Petitioner has received three injections to her right knee which she testified only provided temporary relief of her symptoms. In addition, Petitioner underwent a month of physical therapy as ordered by Dr. Mall as well.

Petitioner testified that while being treated by Dr. Mall, she had a non-work-related accident in December of 2013 when she fell and tore her Achilles tendon in December 2013. Petitioner testified she did not fall on her right knee in this accident and did not injure her right knee in any way. Petitioner ultimately underwent surgery for her Achilles injury and was off work for an extended period of time. Petitioner was released to return to work for her Achilles injury in May of 2014. Petitioner did not return to work, however, and, instead, decided to retire due to her achilles tendon.

On cross-examination, Petitioner admitted that she was not the only teacher in any of the rooms that she worked in. Petitioner also admitted that the teacher to child ratio was one teacher to four children in both the infant and the toddler rooms. Petitioner admitted that there were always other teachers in the room with her and that student workers would come in and out throughout the day. Petitioner also admitted that she was not responsible for putting all of the children to sleep. Further, Petitioner admitted that in the infant room there were only cribs, in the smaller toddler room there were both cribs and cots, and in the older toddler room there were only cots. Petitioner testified that she worked eight years in the infant room, which did not have cots. Petitioner testified that there were adult size chairs to sit in in all the rooms.

Petitioner presently has trouble getting in and out of bed and can only walk short distances. She occasionally feels a sharp pain in her knee. She would like to undergo the surgery recommended by Dr. Mall.

Petitioner acknowledged being examined by Dr. Hulsey and she identified Petitioner's Exhibit 8 as the job description she typed up and gave to Dr. Hulsey to review.

Linda Drust was called by Respondent to testify. Ms. Drust is the current director of the day care Petitioner was employed by. Ms. Drust began her employment at the day care in March 2012. Ms. Drust testified that Petitioner did report a work place injury on July 23, 2013 and that her "son wanted her to start a paper trail". Ms. Drust testified that in addition to other teachers being present in Petitioner's classrooms, student workers also were present. Ms. Drust testified that while getting up and down was a significant part of Petitioner's job, it did not require her to be directly on her knees for extended periods of time. When asked about Petitioner's cleaning duties, Ms. Drust testified at the time Petitioner performed these duties, she was not employed by Respondent. Ms. Drust further testified she had no direct personal knowledge of Petitioner's job prior to 2012.

The Arbitrator Concludes:

Issue (C) Accident and Issue (F) Causal Connection:

Petitioner sustained an accident on July 23, 2013 that arose out of and in the course of her employment with Respondent. It was on July 23, 2013 that Petitioner reported her right knee problems to her employer and stated her belief that they were caused by her job duties. While Petitioner may have begun treating for her right knee problems before that date, the records from those doctors fail to contain any reference to a discussion with Petitioner regarding the etiology of her right knee complaints or (as in the case of Dr. Barr) indicate that Petitioner inquired about work-relatedness but was advised her condition was most likely degenerative. A doctor's opinion as to causation is not absolutely necessary in order for a manifestation date to occur. In this instance it was Petitioner herself who believed she had sustained an "accident" to her right knee as a result of her job and reported same to her employer. With regard to the "arising out of" element, the Arbitrator finds Petitioner's job duties over thirteen years for Respondent exposed her to a greater risk of knee problems than that of the general public. It is clear from the testimony of Petitioner, and the exhibits regarding her job duties, that her job duties required a significant amount of bending, stooping and kneeling. The Arbitrator finds the causation opinion of Petitioner's treating physician, Dr. Mall to be more persuasive on the issue of accident and causal connection than that of Respondent's Section 12 examiner, Dr. Hulsey.

Petitioner's current right knee condition is causally connected to her work for Respondent over thirteen years. Petitioner's undisputed testimony is that she did not have right knee pain when she began her employment with Respondent and her pain gradually increased over time with her work activity. Further, the Arbitrator finds the opinions of Dr. Mall more persuasive than those of Dr. Hulsey regarding whether Petitioner's work was a factor in her current condition of ill-being. While Dr. Mall was not deposed his records reflect his understanding that Petitioner worked for many years in an early childhood program performing a lot of sitting, standing and kneeling. Thus, he was familiar with Petitioner's general duties. Respondent could have deposed Dr. Mall

regarding his knowledge but did not do so. Additionally, Dr. Hulsey conceded on cross-examination that Petitioner's activities could aggravate her osteoarthritis. A careful reading of his deposition testimony reveals that he was very careful to opine that Petitioner's job did not cause or accelerate her osteoarthritis in her knee. On cross-examination, however, he was asked about the relationship between aggravation and activities and ultimately conceded that activities, including Petitioner's job duties, could aggravate her knee.

Issue (E) Was timely Notice provided:

Petitioner provided timely notice of her accident. With regard to the July 23, 2013 accident, Petitioner provided notice that same date. (See RX 1, PX 3)

Issue (K) Prospective Medical Care:

Respondent shall authorize and pay for the treatment recommended by Dr. Mall. The Arbitrator finds Petitioners' pending right knee replacement with Dr. Mall to be reasonable and necessary. There is no dispute in any of the evidence presented at hearing about whether or not Petitioner is in medical need of a right knee replacement.

Issue (J) Medical Expenses:

Petitioner is awarded the medical bills found in Petitioner's Exhibit 9 subject to the Medical Fee Schedule. Said bills are found to be reasonable and necessary. There is no dispute in any of the evidence presented at hearing about whether or not Petitioner's conservative medical care prior to hearing was reasonable and necessary.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tom Schaefer,

Petitioner,

vs. NO. 13WC041150

Excel Plumbing,

Respondent.

16IWCC0075

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical care, notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 27, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

16IWCC0075

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 $75,000.00. 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.

DATED: JAN 2 9 2016
SJM/sj
o-12/10/15
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

SCHAEFER, TOM
Employee/Petitioner

Case# **13WC041150**

16IWCC0075

EXCEL PLUMBING
Employer/Respondent

On 5/27/2015, 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 0.08% 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:

2396 KNAPP OHL & GREEN
L DAVID GREEN
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

0299 KEEFE & DePAULI PC
GREGORY S KELTNER
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

16IWCC0075

STATE OF ILLINOIS)
)SS.
COUNTY OF **Madison**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Thomas Schaefer
Employee/Petitioner

v.

Excel Plumbing
Employer/Respondent

Case # **13** WC **41150**

Consolidated cases: **N/A**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **January 14, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0075

FINDINGS

On the date of accident, **January 2, 2013**, 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 $**79,905.80**; the average weekly wage was $**1,536.65**.

On the date of accident, Petitioner was **51** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**11,265.92** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**11,265.92**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,024.43/week for 17 weeks, commencing 3/4/13 through 3/17/13 and from 10/2/14 through 1/14/15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 1/2/13 through 1/14/15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $11,265.92 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $78,387.74, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for any medical treatment recommended by Dr. Galatz, including but not limited to surgery, as provided in §8(a) and 8.2 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

5/20/15
Date

ICArbDec19(b)

MAY 27 2015

16IWCC0075

BACKGROUND

Petitioner, Thomas Schaefer, a 53 year old plumber, alleges repetitive trauma injuries to both of his shoulders, with a manifestation date of January 2, 2013. Petitioner has not worked for Respondent since October 2, 2014, the date he underwent surgery for a left total shoulder replacement. He is seeking payment of previous medical expenses, prospective medical treatment and TTD benefits. The parties stipulated and agreed Respondent is entitled to a credit of $11,262.92 for TTD benefits already paid.

FINDINGS OF FACT

Petitioner has worked for Respondent for over 20 years as a journeyman plumber. His supervisor while working for Respondent was Dan Ponce, who was a co-owner of Respondent until he died in January of 2014. Mr. Ponce ran his own separate division of Respondent's business. Mike Allen was the other co-owner of Respondent and also ran a separate division. Petitioner testified, and Mike Allen confirmed, that there was very little overlap between the two divisions.

Petitioner testified as to his general job activities as a plumber for Respondent. Petitioner testified that prior to beginning his job within a house he would need to carry the materials and tools needed from the truck inside the house. Some of tools he would have to carry into the house included a 17 pound small hammer drill, a 39 pound large hammer drill, 40 pounds of hand tools in a toolbox, a 19 pound sawzall saw, a 32 pound half-inch copper fitting tray, a 37 pound three-quarter-inch copper fitting tray, a 39 pound chop saw, a 35 pound hole hawg drill and bits, a 30 pound torch, a 26 pound small step ladder, a large step ladder, an extension ladder, a 32 pound pipe threader and a 30 pound pipe vice. (P.Ex.7) Petitioner would also carry 30 feetlengths of 3-inch PCP pipe, weighing 24 pounds, 21 foot lengths of 1-inch black iron pipe, weighing 33 pounds, a 45 pound bundle of half-inch copper pipe, and a box of PVC fittings, weighing 25 to 40 pounds. (P.Ex.7, Tr.19-20). Petitioner stated that when carrying in the piping from the truck, he would have to carry it on his shoulders, using both arms. Petitioner testified that he did not always carry every one of these items to each and every job site, but he would generally need to carry several of these items each day depending on the job. (Tr.52-62). The materials that he would carry into a particular job site sometimes weighed more or less than the weights in Petitioner's Exhibit #7 depending on the amount of materials needed for the job. (Tr.58-61). Petitioner stated that he actually weighed the materials and tools since Dr. Paletta had a job description completed by Mike Allen claiming Petitioner's job only required him to lift and carry up to 25 pounds. (Tr.26-27, R.Ex.4). Mike Allen later testified that the job description he created was inaccurate and Mr. Schaefer would have carried or lifted more than 25 pounds as a plumber. (Tr.90, R.Ex.4).

Petitioner also stated that he occasionally had to carry in fiberglass tubs, 300 pound cast iron tubs, 100 pound water heaters, 60 pound toilet bowls, 35 pound toilet tanks, whirlpool tubs, sinks, urinals and drinking fountains. (P.Ex.7, Tr.24-25). In addition, if the job was a remodel, Petitioner would need to remove similar items from the job site. (Tr.16). He stated that often times a used water heater would weigh more than a new one due to sediment that had collected. (Tr.16-17). He may also be required to remove cast iron tubs from the job site, which would require him to use a sledge hammer to break the tub into smaller pieces that he could carry out of the home. (Tr.16).

Petitioner stated that his job duties included installation of sinks, which would require him to lay on his back and reach up to fasten the faucets. (Tr.25). His tasks also included installing new piping at residential job sites. If the piping was required to go under the floor, Petitioner testified that he would first need to dig a ditch in the ground using either a shovel, or if the ground was too hard, a pic. (Tr.15) He would use both of his arms to do this task. (Tr.15-16). If the job was a remodel, Petitioner would need to use a jackhammer to break up the pre-existing floor before being able to dig the ditches. (Tr.16)

Often times Petitioner would be required to install pipe overhead as he would have to run the pipe through the floor joists to reach an upper level. (Tr.20-22). In order to do this, Petitioner would first need to use a 35 pound hole hawg drill overhead to drill holes in the floor joists to run the pipe. (Tr.22, P.Ex.7). This would require Petitioner to use one hand overhead to guide the drill, and use the other hand overhead to operate the drill. (Tr.22-23) He would have to apply pressure with the arm operating the drill and if the drill bit hit a nail or a knot in the wood, the drill would violently jerk on his shoulder.(Tr.23). After drilling the holes, Petitioner would then need to lift a segment of pipe over his head and support it with one arm. (Tr.21). While doing so he would hammer hangers in place with his other arm. (Tr.21-22) He would next have to glue two segments of the pipe together overhead. (Tr.23). After applying the glue, Petitioner would have to use force with both of his arms overhead and hold the two segments together for about 20 seconds, in order to insure that there was a good seal. (Tr.23-24).

Mike Allen was called as a witness by Respondent. Mr. Allen testified that he was a co-owner of Respondent, and ran his own division. (Tr.74) He admitted that Petitioner was not a plumber in his division and he did not have much contact with Petitioner. Id. Mr. Allen only slightly disagreed with the weights of the materials and tools shown in Petitioner's Exhibit #7. (Tr.77-80) For the weights that he did disagree with, Mr. Allen admitted that he did not personally weigh any of the materials or tools himself. (Tr.77). He testified that some of the materials that Petitioner likely had to work with would have weighed in excess of 100 pounds. Furthermore, despite the fact that Mr. Allen completed the job description form which stated that Petitioner would not lift or carry more than 25 pounds, which Dr. Paletta relied on, Mr. Allen admitted that a plumber would have to lift and carry more than 25 pounds. (Tr.90).

Petitioner testified that he spent 40% to 50% of his time per day working overhead. (Tr.27-28). This estimate was confirmed by Mike Allen's testimony. This was another inconsistency between the facts as they were established at trial and the job duty form completed by Mr. Allen upon which Dr. Paletta relied in formulating his opinions. The job duty form he prepared stated that overhead work would be required on only an occasional frequency, or up to three hours a day which is consistent with Petitioner's testimony. (R.Ex.4, Tr.92). When asked whether the job duty form that he filled out for Dr. Paletta's IME was accurate regarding Petitioner's activities, Mr. Allen testified that the amount of work over the shoulders which he estimated might be low.

Petitioner first saw Dr. Leesa Galatz on the referral of his primary care physician on January 2, 2013. The Petitioner testified that he had previously seen Dr. Craig Beyer for evaluation of his shoulders. He indicated that his son had previously treated with Dr. Beyer, and he had accompanied his son to an appointment with Dr. Beyer in 2011. While he was there, he mentioned to Dr. Beyer that his shoulders bothered him. (Tr.29). Dr. Beyer instructed Petitioner to schedule an appointment, which he did. However, by the time of Petitioner's

appointment on July 12, 2011, Petitioner stated that he was no longer having any problems with his shoulders. He therefore did not follow up with Dr. Beyer after this appointment as he was not having any shoulder complaints. He continued to perform his duties as a plumber, and his shoulder pain returned and got progressively worse. By the end of 2012 he was experiencing increased pain in his shoulders, particularly doing overhead work. (Tr.31-32). He testified that it had gotten to the point that he had to have help at work. (Tr.32). The bilateral shoulder pain became severe enough that he decided to seek treatment.

At his first visit with Dr. Galatz Petitioner indicated that the pain was affecting his ability to work, including carrying tools and materials and working overhead, as well as his ability to sleep and in the performance of his daily activities. (Tr.33-34) These complaints were consistent with Dr. Galatz's records. (P.Ex.1, p.11). During her examination of Petitioner on January 2, 2013, Dr. Galatz noted bilateral shoulder pain, which mostly affected his work as a plumber. (P.Ex.1, p.11). X-rays showed bilateral glenohumeral joint arthritis, with a little bit of joint space maintained on the right compared to the left and loose bodies in both subcoracoid recesses. Id. Dr. Galatz diagnosed Petitioner with bilateral shoulder arthritis and recommended that he undergo arthroscopic debridement and removal of loose bodies. (P.Ex.1, p.11-12). Dr. Galatz noted that Petitioner would need this surgery on both shoulders, and that Petitioner would have to decide which side he wanted done first. (P.Ex.1, p.11-12). Petitioner chose to have his left shoulder operated on first, as it was bothering him more than his right at that time. (Tr.35-36).

Petitioner stated that within a week of this meeting with Dr. Galatz, he informed his direct supervisor, Dan Ponce, that he was going to receive surgery on his left shoulder. (Tr.36-37) He also stated that he informed Mr. Ponce that he was having difficulty at work because of the pain in his shoulders. (Tr.36). Ms. Debbie Runge was also called as a witness by Respondent. Ms. Runge testified that she was the office manager for Respondent and was a contact person for workers' compensation claims. (Tr.94-95) She indicated that either the injured worker or the lead supervisor (Dan Ponce in this case) would apprise her of injuries. She indicated that if injuries were not of a serious nature, such as a laceration, they would instruct the employee "[g]o to the hospital, we'll pay for the bill. If it's a questionable thing, we'll say, Go to the doctor, let me know what is going on with that. If it is more serious, then we have to turn it in to work comp."(Tr.96) She also indicated she had a couple of conversations with Petitioner regarding his shoulders in the March, 2013 time frame. (Tr.97-98) She indicated they were "general conversations a couple of different times on just the injuries on [the shoulders]. I guess, obviously, they were getting worse, and he was seeing a doctor."(Tr.97) She indicated Petitioner came into the office "and was wanting to get some physical therapy done, and he wasn't understanding why we weren't paying for him to go to physical therapy. And I think at that point I said to him, well, until we file a work comp claim, we can't. You have to see a work comp doctor." (Tr.99) When asked if she had reported the injury to the Workers' Compensation carrier after these conversations she indicated "It was always very casual conversation, and he has to report it to me that, okay, he is ready to go to work comp."(Tr.101, emphasis added) Neither Mike Allen nor Ms. Runge disputed that in January of 2013, Petitioner told Dan Ponce of his bilateral shoulder complaints, his ability to work as a result of his shoulders and his plan to have surgery performed by Dr. Galatz. Certainly neither of them indicated that there was any surprise on Respondent's part that Petitioner was claiming his shoulders were work related when the March conversations occurred. In fact, it is clear that at least Ms. Runge was well aware that Petitioner had been seeking treatment for his shoulders. The conversations, as she described them in her testimony indicate that this was a situation where it was uncertain

whether this was a case serious enough to involve the insurance company, and that until the Petitioner made that decision, it was not going to be reported.

On March 4, 2013, Dr. Galatz performed a left arthroscopic debridement, capsular release and removal of loose bodies on Petitioner at Barnes Jewish Hospital. (P.Ex.2, p.13-14). On March 22, 2013, Ms. Amanda Hessel of Apex reported that Petitioner had attended three physical therapy visits since his operation. Petitioner wished to continue his physical therapy on his own through a home exercise program. He had returned to work light duty on March 18, 2013. (P.Ex.1, p.24-25). On May 1, 2013, Dr. Galatz reexamined Petitioner. At that time, Dr. Galatz released Petitioner from care and instructed him to engage in activities as tolerated. Dr. Galatz stated that Petitioner would likely need to obtain a total joint replacement in the future, but would wait to see what pain relief he received from the previous surgery. She also stated that he may want to have the same procedure done to his right shoulder in the Fall. (P.Ex.1, p.30).

Petitioner returned to working full duty following his release from care. Petitioner eventually began experiencing worsening pain in both of his shoulders at work. On January 29, 2014, Petitioner returned to Dr. Galatz with complaints of severe pain in both shoulders, with worse popping and crepitus in his left shoulder. This pain interfered with Petitioner's work, sleep and daily activities. X-rays revealed bilateral shoulder arthritis, left worse than right, and loose bodies in the subcoracoid recess on the right. Dr. Galatz recommended that Petitioner undergo a total shoulder replacement of his left shoulder, and indicated he would likely need this procedure done on his right shoulder, as well. (P.Ex.1, p.32). On July 30, 2014, Dr. Galatz reexamined Petitioner's left shoulder. Petitioner had increasingly worse pain, which interfered with his work. At that time, Petitioner decided to go forward with a left total shoulder replacement. Dr. Galatz noted that as a plumber, Petitioner is required to lift heavy objects, and that following this surgery, he would need to ask for help with these activities. (P.Ex.1, p.39).

Dr. Galatz testified by deposition on August 20, 2014. (P.Ex.6). Dr. Galatz is a board certified orthopedic surgeon who specializes solely in upper extremities and who has performed approximately 1,000 shoulder arthroplasties. (P.Ex.6, p.5-6). She is a professor with the Department of Orthopedic Surgery at Barnes Jewish Hospital in St. Louis.

Dr. Galatz testified that she has knowledge of the work that plumbers perform. (P.Ex.6, p. 15). Dr. Galatz testified that Petitioner's work as a plumber aggravated Petitioner's arthritis and caused his pain to increase in both shoulders, ultimately requiring the March of 2013 surgery and future surgeries. (P.Ex.6, p.15, 28, 89-90). She testified that heavy lifting and repetitive activities in the overhead position as a plumber are hard on the joints and can aggravate symptoms of shoulder arthritis. (P.Ex.6, p.15-16, 89-90). Dr. Galatz was of the opinion that although Petitioner's work as a plumber did not cause the underlying arthritis in his shoulders, it did aggravate "his arthritis to where it's more symptomatic and needs medical treatment."(P.Ex.6, p.27)

Dr. Paletta testified by deposition on December 18, 2014. (R.Ex.1). He performed an §12 examination on Petitioner on May 19, 2014 at Respondent's request. He is a board certified orthopedic surgeon. (R.Ex.1, p.5). Dr. Paletta noted that Petitioner gave a history of bilateral shoulder pain from overhead activities. (R.Ex.1, p.13). He also noted that Petitioner had been having pain from throwing a baseball with his son. (R.Ex.1, p.13-14). Dr. Paletta stated that Petitioner was right hand dominant, but that he had worse pain in his left shoulder

than his right. (R.Ex.1, p.19). Dr. Paletta diagnosed Petitioner with advanced glenohumeral joint arthritis of both shoulders. (R.Ex.1, p.20). Dr. Paletta did not believe that Petitioner's shoulder condition was the result of his work activities because Petitioner did not specifically attribute the onset or increase of pain to his work activities. (R.Ex.1, p.21-27). Dr. Paletta did state that the medical treatment that Petitioner received for his left shoulder up to that point was appropriate. (R.Ex.1, p.20). He also stated that Petitioner would likely need to obtain shoulder replacement surgery in the future, as well. Id.

Dr. Paletta admitted he did not specifically ask Petitioner about his work activities or the specific tools that Petitioner used as a plumber. (R.Ex.1, p.27-28). He also did not recall whether he asked Petitioner about his overhead activities as a plumber. (R.Ex.1, p.39). Instead, Dr. Paletta relied upon the job duties form that was completed by Mike Allen. (R.Ex.1, p.36-40). However, Mike Allen admitted it was not an accurate job description. (Tr.90). Dr. Paletta also admitted that Petitioner's overhead work activities may have made him more symptomatic and that if Petitioner had complaints from work activities, then that may change his opinion on causation. (R.Ex.1, p.42). Finally, Dr. Paletta admitted that repetitive overhead activities can cause an increase of symptoms from arthritis. Dr. Paletta was asked what types of activities that a plumber performs can aggravate or accelerate glenohumeral arthritis. (R.Ex.1, p. 54). Dr. Paletta testified that repetitive overhead lifting could increase symptoms related to osteoarthrtis or heavy lifting up to 100 pounds could also be a contributing factor. (R.Ex.1, p.54-55).

On cross examination, Dr. Paletta admitted that he would have expected that Petitioner's right shoulder symptoms would have been worse if he was throwing a lot with his right arm. (R.Ex.1, p.46).

On October 2, 2014, Dr. Galatz performed a left total shoulder replacement surgery on Petitioner at Barnes Jewish Hospital. (P.Ex.2, p.30-32). Petitioner was restricted from work following the surgery. (P.Ex.4, p.1). On November 12, 2014, Dr. Galatz reexamined Petitioner. (P.Ex.1, p.54). Dr. Galatz restricted Petitioner from work until further notice. (P.Ex.4, p.3). Petitioner began physical therapy at Apex on November 17, 2014. (P.Ex.3, p.2). Petitioner was still undergoing physical therapy at the time of the hearing and had a follow up appointment with Dr. Galatz pending.

CONSLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (E): Was timely notice of the accident given to Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner testified credibly about his work duties, which included carrying tools and materials weighing well over 25 pounds and performing work overhead for three to four hours each day. Petitioner's testimony was corroborated by the testimony of Mike Allen. Mr. Allen's testimony also established the job duty form that he completed for the use of Dr. Paletta's in performing the §12 exam of Petitioner was inaccurate.

Petitioner testified that his bilateral shoulder pain limited his ability to work overhead for Respondent at the end of 2012, and this is why he sought medical treatment from Dr. Leesa Galatz. He stated in his initial visit with Dr. Galatz on January 2, 2013, that he suspected his bilateral shoulder pain was due to his long work history as a plumber. Dr. Galatz confirmed his suspicion and testified that Petitioner's job duties as a plumber

placed stress on his shoulder joints and thus aggravated pre-existing arthritis in both of his shoulders requiring medical treatment.

The Arbitrator finds the causation opinion of Dr. Galatz more persuasive than that of Dr. Paletta. Dr. Paletta admitted that he did not specifically ask Petitioner about his work duties or the tools that he used as a plumber. This would include the amount of overhead work that Petitioner performed as a plumber. Instead, Dr. Paletta relied on the inaccurate job duty form prepared by Mr. Allen. Finally, Dr. Paletta did admit that Petitioner's overhead work activities may have made the arthritis in his shoulder more symptomatic, which led to Petitioner's need to seek treatment for his bilateral shoulder condition.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner proved he sustained repetitive trauma injuries to his shoulders that arose out of and in the course of employment, and Petitioner's bilateral shoulder condition is causally related to his work activities as a plumber, with a manifestation date of January 2, 2013. January 2, 2013 is the manifestation date since Petitioner's bilateral shoulder condition reached a point at work where Petitioner had to undergo more extensive medical treatment for his injuries. Petitioner testified that he told Mr. Ponce, his direct supervisor and co-owner of Excel Plumbing at the time, about his work injuries within a week after his initial examination with Dr. Galatz on January 2, 2013. Respondent presented no evidence to refute Petitioner's testimony about giving notice of his shoulder injuries to Mr. Ponce. In fact, the testimony of Ms. Runge tends to indicate that Respondent was at least aware that Petitioner was claiming a work related condition in his shoulders at some point prior to March, 2013. Thus the notice provided to Mr. Ponce within a week of the date of accident satisfied Petitioner's obligation to place Respondent on notice of his injury within 45 days as provided in the Act.

Issue (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?
Issue (K): Is Petitioner entitled to any prospective medical care?

Petitioner proved that Respondent is liable for payment of past medical services regarding his shoulders, and will be liable for payment of the prospective medical care recommended by Dr. Galatz. Respondent shall pay reasonable and necessary medical services of $78,387.94 as set forth in Petitioner's Exhibits 3 & 5, pursuant to Sections 8(a) and 8.2 of the Act.

Issue (L): What temporary benefits are in dispute?

The Arbitrator finds that Petitioner has proved that Respondent must pay him TTD benefits from March 4, 2013 to March 17, 2013 and from October 2, 2014 to January 14, 2015, at a rate of $1,024.43 per week.

Issue (N): Is Respondent due any credit?

The Arbitrator finds that Respondent is due a credit of $11,265.92 for TTD benefits paid from October 2, 2014 to December 18, 20

STATE OF ILLINOIS)
) SS.
COUNTY OF MCCLEAN)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Shaw,

Petitioner,

vs. NO: 14 WC 00550

Illinois Department of Corrections,

16IWCC0104

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 2, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

16IWCC0104

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.

No bond or summons for State of Illinois cases.

DATED: FEB 5 - 2016

MB/mam
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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

SHAW, CHARLES
Employee/Petitioner

Case# **14WC000550**

16IWCC0104

ILLINOIS DEPT OF CORRECTIONS
Employer/Respondent

On 6/2/2015, 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 0.07% 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:

2159 HOEKSTRA LAW OFFICES PC
JOHN A HOEKSTRA
121 N MAIN ST
BLOOMINGTON, IL 61701

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

2159 HOEKSTRA LAW OFFICES PC
JOHN A HOEKSTRA
305 W WASHINGTON ST
PONTIAC, IL 61764

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 2 - 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0104

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Charles Shaw
Employee/Petitioner

Case # **14** WC **550**

v.

Illinois Department of Corrections
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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **April 22, 2013**. 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

16IWCC0104

FINDINGS

On the date of accident, **October 23, 2013**, 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 $**67,200.12**; the average weekly wage was $**1,278.13**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**49,666.99** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**49,666.99**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**852.00**/week for **77** weeks, commencing **October 24, 2013** through **October 30, 2013** and **November 6, 2013** through **April 22, 2015**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**49,666.99** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of **$2,399 to McLean County Orthopedics, $10,300 to Gray Medical, $6,747.50 to Dr. Edward Pegg and $300 to Oak Lawn Radiology**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay the reasonable and necessary expenses associated with the consultation with Dr. Oakey as prescribed by Dr. Naour, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Arbitrator Anthony C. Erbacci

May 29, 2015
Date

14 WC 550
ICArbDec19(b)

JUN 2 - 2015

16IWCC0104

FACTS:

The Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent on October 23, 2013. The Petitioner testified that he was employed by the Respondent as a correctional officer and that, on October 23, 2013, he was opening the door of a food service elevator when he experienced pain in his right shoulder and down his right arm. The Petitioner described the pain as being like a "bolt of lightning" going down his arm. The Petitioner testified that prior to this incident he had no problems with his right arm or shoulder and had never sought any medical treatment for his right arm or shoulder. The Petitioner testified that he immediately reported his injury and was directed to the Advocate Medical Group for treatment.

The Petitioner was seen at the Advocate Medical Group that same day and was noted to have complaints of right shoulder pain after having hurt his right shoulder while at work trying to open an elevator. The Petitioner was noted to have denied any numbness or tingling in his shoulder or pain in the back of the arm and to have reported that he had not hurt his shoulder or arm previously. The Petitioner was diagnosed with a shoulder sprain and an MRI was recommended. The Petitioner was kept off work the rest of the day and authorized to return to work the following day with restrictions limiting the use of his right arm.

On October 29, 2013 the Petitioner was seen by Dr. Joseph Novotny at McClean County Orthopedics. Dr. Novotny indicated that the Petitioner had significant findings of supraspinatus and possible biceps tendinitis and he administered a subacromial injection. Dr. Novotny also advised work restrictions for the Petitioner for the next two weeks. A right shoulder x-ray was noted to show advanced AC degenerative joint disease.

The Petitioner followed up with Dr. Novotny on November 14, 2013 and was noted to complain of right shoulder region pain and "burning" down to the palm of his hand and auxilla ache. The Petitioner also reported that the injection was of no help. Dr. Novotny continued the Petitioner's right upper extremity restrictions and prescribed a right shoulder MRI. On December 17, 2013 the right shoulder MRI was performed and it was reported to demonstrate moderate degenerative arthropathy at the AC join and partial thickness interstitial tears of the supraspinatus tendon.

At the request of the Respondent, the Petitioner was examined by Dr. Lawrence Li on December 30, 2013. In his report dated January 9, 2014 Dr. Li noted the Petitioner's history of injury, the medical treatment the Petitioner received, and the images and report of the December 17, 2013 MRI. Dr. Li noted the Petitioner had significantly limited range of motion and a positive Neer impingement test. Dr. Li diagnosed the Petitioner as having a right shoulder strain and a secondary adhesive capsulitis and he opined that both conditions were causally related to the Petitioner's October 23, 2013 work injury. Dr. Li recommended another cortisone injection, medications, and physical therapy three times a week for three weeks. Dr. Li further indicated that the Petitioner continued to require restrictions with regard to the use of his right arm and that the Petitioner had not yet reached maximum medical improvement.

The Petitioner followed up with Dr. Novotny on January 9, 2014 and Dr. Novotny noted that the Petitioner's symptoms were "somewhat difficult to isolate to one body part". Dr. Novotny also noted that the Petitioner "certainly seems to have pain in the shoulder on physical exam" and that he had some subjective symptoms and complaints that are consistent with neurologic compression possibly at the cervical level. Dr. Novotny prescribed a cervical spine MRI and an EMG study.

The cervical MRI was done on February 19, 2013 and was reported to demonstrate degenerative changes. The EMG was performed on February 26, 2014 and was reported to demonstrate a right upper trunk or lateral cord brachial plexus injury.

On February 28, 2014, the Petitioner returned to Dr. Novotny who noted that the Petitioner's EMG was consistent with a brachial plexus lateral cord injury and that the Petitioner reported that he continued to have weakness in his hands as well as paresthesias in his thumb, index, and middle fingers consistent with a lateral cord injury. Dr. Novotny referred the Petitioner to Dr. Pegg, a neurologist, and prescribed physical therapy.

The Petitioner testified that at the direction of the Respondent, he saw Dr. Jacob Tony on April 24, 2014. Dr. Tony noted the Petitioner's history of injury, his complaints of right upper extremity pain, and his complaints of numbness in the right hand. Dr. Tony was able to confirm neurologic impairment at C5, C6, and C7 and, because the Petitioner's symptoms were deteriorating, he ordered a repeat MRI of the cervical spine. Dr. Tony also referred the Petitioner to Dr. Julian Lin, a specialist in brachial plexus injury. The Petitioner testified that the testing recommended by Dr. Tony and the referral to Dr. Lin were not authorized by the Respondent.

At the request of the Respondent, the Petitioner again saw Dr. Li on June 23, 2014. Dr. Li reviewed the Petitioner's medical records and conducted a physical examination of the Petitioner. Dr. Li noted that the Petitioner had complaints of pain with all provocative testing including Neer impingement, biceps load test, and Hawkins impingement, which he attributed to symptom magnification, as well as decreased sensation in the C5-C6 distribution and decreased strength in the C8 distribution. Dr. Li diagnosed the Petitioner as having a right shoulder strain and indicated that the previously noted adhesive capsulitis had "apparently" resolved. Dr. Li also noted that the Petitioner "does have a brachial plexus injury." Dr. Li opined that the right shoulder strain was related to the October 23, 2013 work injury but indicated that the right brachial plexus lesion was "more confusing because he had a normal neurologic exam when I first examined him and he has an abnormal one now." Dr. Li opined that the Petitioner's right shoulder strain had resolved and the Petitioner was not in need of any further medical treatment or work restrictions which would be causally related to the October 23, 2013 work injury.

The Petitioner testified that after he was seen by Dr. Tony on April 24, 2014, he received no medical treatment for his right upper extremity until he returned to Dr. Novotny in September of 2014. The Petitioner did start a course of physical therapy at Champion Fitness on September 2, 2014 which continued through November of 2014.

On September 25, 2014 the Petitioner returned to Dr. Novotny who noted a marked frozen shoulder with limited range of motion and pain with any attempted active or passive motion. Dr. Novotny recommended an exam under anesthesia with manipulation of the right shoulder and possible intra-articular corticosteroid injection. Dr. Novotny also recommended follow-up care with a neurologist and/or neurosurgeon for the lateral cord brachial plexus injury.

The Petitioner underwent the prescribed right shoulder manipulation under anesthesia on October 20, 2014. He returned to Dr. Novotny on October 27, 2014 and Dr. Novotny noted that the Petitioner's shoulder motion was markedly improved but he continued to a significant amount of pain. Dr. Novotny recommended the Petitioner remain off working with the right arm until he is seen by a neurologist and/or neurosurgeon as previously recommended. Dr. Novotny also referred the Petitioner to Dr. Naour for pain management.

On November 4, 2014 Dr. Paul Naour saw the Petitioner for concerns of cervical radiculopathy and "severe ulnar nerve entrapment at the level of the elbow with dysfunction of his right hand." Dr. Naour noted that "This is related to a work accident of 10-23-13 and has been ongoing for greater than a year. This may represent also a component of double crush phenomenon." Dr. Naour also noted that the Petitioner had an EMG which showed brachial plexopathy but no radicular concerns and an MRI which showed a disc herniation with a paracentral extrusion at C5-C6. The Petitioner testified that Dr. Naour prescribed Lyrica which helped with the pain.

The Petitioner was also referred to Dr. Edward Pegg for a repeat EMG test, which was done November 13, 2014. Dr. Pegg compared the repeat EMG to the prior EMG of February 2014 and noted that the EMG showed severe left ulnar nerve entrapment and borderline right ulnar nerve slowing which was "somewhat worse than on the prior study." Dr. Pegg reported that he did not see any evidence that clearly would support a brachial plexitis or a cervical radiculopathy by EMG criteria.

On November 25, 2014 Dr. Naour noted that the repeat EMG showed severe nerve entrapment but no evidence of plexitis or cervical radiculopathy. Dr. Naour recommended the Petitioner consult with a hand specialist, Dr. Oakey at Mclean County Orthopedics, due to the continued dysfunction in the Petitioner's right hand.

The Petitioner testified that Dr. Naour's recommendation for a referral to Dr. Oakey has not been approved by the Respondent and that he has had no further medical treatment for his symptoms as of the date of hearing.

The Petitioner testified that his symptoms of pain from his right shoulder to his right hand have persisted from the date of the accident to the date of hearing. He testified that the lack of range of motion in his right arm gradually worsened from the date of the accident until the frozen shoulder procedure was performed by Dr. Novotny, after which he experienced significant improvement in his range of motion. The Petitioner testified that the frozen

shoulder procedure did not alleviate the pain he had, and continues to experience, in his right arm and into his hand. The Petitioner testified that he currently experiences pain on a daily basis and that his pain is increased with any pulling or lifting with his right arm. He testified that he also currently continues to have some loss of range of motion in his right shoulder and that he continues to have some tingling and numbness in his right hand and arm.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner sustained an undisputed injury to his right upper extremity on October 23, 2013. The Petitioner testified that, prior to that date, he had no injuries to, or problems with, his right shoulder, arm, or hand, nor had he sought any medical treatment for his right shoulder, arm or hand. The Petitioner's testimony in that regard was not contradicted or rebutted by any evidence offered into the record.

Following his work injury, the Petitioner commenced a course of medical treatment with Dr. Novotny which included a subacromial injection, which afforded no improvement, MRI of the shoulder and cervical spine, and EMG testing which noted abnormal findings consistent with a brachial plexus lateral cord injury. The Petitioner continued to report worsening symptoms and the development of numbness in his right arm extending to his hand and right thumb.

At the Respondent's direction, the Petitioner was seen by Dr. Tony on April 24, 2014. Dr. Tony noted numbness from the Petitioner's right shoulder to his right hand and questioned whether the Petitioner's symptoms were related to a cervical condition. Dr. Tony ordered a repeat cervical MRI and he also referred the Petitioner to Dr. Julian Lin, a specialist in brachial plexus injury. Thereafter, the Petitioner received no medical treatment for his right upper extremity until he returned to Dr. Novotny on September 25, 2014. Although the Petitioner had started a course of physical therapy at Champion Fitness, Dr. Novotny noted a marked frozen shoulder and ultimately performed a manipulation of the shoulder under anesthesia on October 20, 2014. Following the manipulation, Dr. Novotny noted improvement in the Petitioner's range of motion but continued complaints of pain. Dr. Novotny then referred the Petitioner to Dr. Naour for pain management and Dr. Pegg for a repeat EMG test.

On November 4, 2014 Dr. Naour saw the Petitioner and noted ulnar nerve entrapment at the level of the elbow with dysfunction of his right hand which he indicated "is related to a work accident of 10-23-13" and might represent a component of "double crush phenomenon". Dr. Naour also noted that the Petitioner's prior EMG showed brachial plexopathy but no radicular concerns and that the prior MRI showed a disc herniation with a paracentral extrusion at C5-C6. The Petitioner testified that Dr. Naour prescribed Lyrica which helped with the pain.

16IWCC0104

The repeat EMG performed by Dr. Pegg on November 13, 2014 was reported to show severe left ulnar nerve entrapment and borderline right ulnar nerve slowing which was "somewhat worse than on the prior study." Dr. Pegg reported that he did not see any evidence that clearly would support a brachial plexitis or a cervical radiculopathy by EMG criteria. Dr. Naour noted that the repeat EMG showed severe nerve entrapment but no evidence of plexitis or cervical radiculopathy. Dr. Naour recommended the Petitioner consult with a hand specialist, Dr. Oakey, due to the continued dysfunction in the Petitioner's right hand. Dr. Naour's recommendation for a referral to Dr. Oakey has not been approved by the Respondent and the Petitioner has had no further medical treatment for his symptoms as of the date of hearing.

The Petitioner testified that his symptoms of pain from his right shoulder to his right hand have persisted from the date of the accident to the date of hearing. He testified that the lack of range of motion in his right arm gradually worsened from the date of the accident until the frozen shoulder procedure was performed by Dr. Novotny, after which he experienced significant improvement in his range of motion. The Petitioner testified that the frozen shoulder procedure did not alleviate the pain he had, and continues to experience, in his right arm and into his hand. The Petitioner testified that he currently experiences pain on a daily basis and that his pain is increased with any pulling or lifting with his right arm. He testified that he also currently continues to have some loss of range of motion in his right shoulder and that he continues to have some tingling and numbness in his right hand and arm. The Respondent presented no evidence to rebut or otherwise challenge the Petitioner's testimony.

The Respondent introduced two reports from Dr. Li from independent medical evaluations of the Petitioner performed on December 30, 2013 and June 23, 2014. During the first evaluation of the Petitioner's right shoulder on December 30, 2013, Dr. Li noted significant reduced range of motion in the right arm and shoulder and a positive Neer impingement test. Dr. Li's diagnosis on that date was a right shoulder strain with secondary adhesive capsulitis which he opined were causally related to the Petitioner's work injury. Dr. Li recommended another cortisone injection as well as anti-inflammatory medications and physical therapy. Dr. Li also recommended work restrictions consistent with those recommended by Dr. Novotny.

At the second evaluation of the Petitioner's right shoulder on June 23, 2014, Dr. Li noted continuing limited range of motion and another positive Neer impingement test. Dr. Li noted a "normal neurologic exam" at the first evaluation, despite having noted a positive Neer impingement test at that time. Dr. Li diagnosed the Petitioner as having a right shoulder strain and indicated that the previously noted adhesive capsulitis had "apparently" resolved, despite his own findings on that date of limited range of motion. The Arbitrator notes that Dr. Novotny continued to note limitation of range of motion in the Petitioner's right shoulder and ultimately was required to perform a manipulation of the shoulder under anesthesia in September, 2014. Dr. Li also noted that the Petitioner "does have a brachial plexus injury" that needed treatment prior to the Petitioner returning to work. Dr. Li opined that the right shoulder strain was related to the October 23, 2013 work injury but indicated that the right brachial plexus lesion was

"more confusing because he had a normal neurologic exam when I first examined him and he has an abnormal one now." The Arbitrator notes that Dr. Li noted significant reduced range of motion in the right arm and shoulder and a positive Neer impingement test when he first examined the Petitioner. Dr. Li opined that the Petitioner's right shoulder strain had resolved and that the Petitioner was not in need of any further medical treatment or work restrictions which would be causally related to the October 23, 2013 work injury.

Although the Arbitrator notes that there is no specific medical opinion in the record which causally relates the Petitioner's current condition of ill-being to the work injury of October 23, 2013, the evidence demonstrates that the Petitioner had no problems, complaints or difficulties with his right arm, shoulder, or hand, nor had he sought or received any medical treatment for his right arm, shoulder, or hand, prior to his undisputed work injury on October 23, 2013. Immediately following that injury, the Petitioner began a course of medical treatment directed to his right upper extremity which has continued from that time through the present and he has been under medical restrictions regarding the use of his right arm which have continued from the date of his injury through the present time. As of the date of hearing, none of the Petitioner's treating physicians has released the Petitioner from care and additional medical consultation has been recommended. While the Arbitrator notes the opinions of Dr. Li, those opinions seem to be somewhat self-contradictory and unsupported by the findings and recommendations of the Petitioner's treating physicians. The Arbitrator does not place significant weight on the opinions of Dr. Li when compared with the findings of the Petitioner's treating physicians as set forth in the medical records and the Petitioner's contradicted testimony.

The Arbitrator finds that, in the instant matter, the undisputed temporal sequence of events, which includes a state of relative good health followed by an undisputed injury and a continuing course of medical treatment, together with the records of the Petitioner's medical treatment and the Petitioner's unrebutted testimony, are sufficient to support a conclusion that the Petitioner's current right upper extremity condition of ill-being is causally related to the work injury of October 23, 2013.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the accident of October 23, 2013.

In Support of the Arbitrator's Decision relating to (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, the Arbitrator finds and concludes as follows:

The Petitioner introduced evidence of medical expenses owing to McLean County Orthopedics in the amount of $2,399 (Pet. Ex. 11), Gray Medical in the amount of $10,300 (Pet. Ex. 12), Dr. Edward Pegg in the amount of $6,747.50 (Pet. Ex. 13), and Oak Lawn Radiology in the amount of $300 (Pet. Ex. 14). The amount owed to McLean County

Orthopedics includes charges for services rendered by Dr. Novotny and Dr. Naour from September 25, 2014 through November 25, 2014 and the procedure for the shoulder manipulation. The shoulder manipulation procedure was authorized by the Respondent. The Arbitrator finds that the medical treatment provided to the Petitioner by Dr. Novotny and Dr. Naour was reasonable, necessary, and causally related to the Petitioner's medical condition and that the Respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

The evaluation by Dr. Pegg was also authorized by the Respondent and the Arbitrator finds that the medical treatment provided to the Petitioner by Dr. Pegg was reasonable, necessary, and causally related to the Petitioner's medical condition. The Arbitrator finds that the Respondent is liable for payment of the charges of Dr. Pegg subject to the limitations of the Medical Fee Schedule provided for in the Act.

The amount owed to Oak Lawn Radiology relates to the MRI testing performed on December 17, 2013 and the Arbitrator finds that that testing was reasonable, necessary, and causally related to the Petitioner's medical condition The Respondent is liable for payment of those expenses subject to the limitations of the Medical Fee Schedule provided for in the Act.

The manipulation chair described by the Petitioner in his testimony to assist with therapy to his right arm and shoulder following the manipulation procedure is also found to be reasonable, necessary, and causally related to the Petitioner's medical condition. The Respondent is found liable to pay the charges of Gray Medical, Inc. subject to the limitations of the Medical Fee Schedule provided for in the Act.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of causation are adopted and incorporated herein.

Dr. Naour has recommended that the Petitioner be seen by a hand specialist given the Petitioner's persistent and on-going complaints of numbness and weakness in his right arm and hand. The treatment Petitioner has received thus far has not improved this condition. Based upon the testimony of Petitioner and the findings and reports from his treating physicians, the Arbitrator finds that the Petitioner has not yet reached a state of maximum medical improvement and the Arbitrator further finds that the recommendation of Dr. Naour for consultation with the hand specialist, Dr. Oakey, is reasonable under these circumstances.

Accordingly, Respondent shall authorize and pay the reasonable and necessary expenses associated with a consultation with Dr. Oakey, subject to the limitations of the Medical Fee Schedule provided for in the Act.

16IWCC0104

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of causation are adopted and incorporated herein.

From the date of the accident on October 23, 2013, the Petitioner has been under work restrictions which limit the use of his right arm. Dr. Novotny and Dr. Naour continued the same work restrictions throughout their treatment of the Petitioner through the present time. Dr. Li, the Respondent's examining physician, recommended and confirmed those work restrictions. Dr. Tony also confirmed the restrictions. The Petitioner testified he is not able to return to his former work with the Respondent as the Respondent is unable to accommodate the restrictions. The Respondent did not rebut or challenge this testimony. Other than the approximate one week when Petitioner attempted to work, he has been off work from the date of accident to the date of hearing. Accordingly, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from October 24, 2013 through October 30, 2013 and from November 6, 2013 through April 22, 2015, the date of hearing, a total period of 77 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Craig Eldridge,

Petitioner,

vs.

NO: 14WC 02899

16IWCC0081

KEHE Distributors LLC Traverlers Property Casualty Company Of America,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical, temporary total disability, causal connection, fees and penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator file April 13, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

16IWCC0081

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 $39,000,00. 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.

DATED: FEB 1 - 2016
o012116
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

ELDRIDGE, CRAIGN
Employee/Petitioner

Case# **14WC002899**

16IWCC0081

KEHE DISTRIBUTORS LLC TRAVLERS PROPERTY CASUALTY COMPANY OF AMERICA
Employer/Respondent

On 4/13/2015, 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 0.09% 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:

1876 PAUL W GRAUER & ASSOC
EDWARD ADAM CZAPLA
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

1139 NOBLE & ASSOCIATES PC
DENNIS NOBLE
387 SHUMAN BLVD SUITE 210-E
NAPERVILLE, IL 60563

16IWCC0081

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CRAIG ELDRIDGE
Employee/Petitioner

v.

KEHE DISTRIBUTORS, LLC; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA
Employer/Respondent

Case # **14** WC **02899**

Consolidated cases: _____

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 **Jessica HEGARTY**, Arbitrator of the Commission, in the city of **Chicago**, on **December 4, 2014**. 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. [x] 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. [x] 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. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, **11/18/2013**, Respondents ***were*** operating under and subject to the provisions of the Act.

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

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 Respondents.

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

In the year preceding the injury, Petitioner earned $ **89,460.38**; the average weekly wage was $**1,720.39**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **-0-** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $ **-0-**.

Respondent is entitled to a credit of $ **-0-** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,146.93** /week for a period of **26-4/7** weeks commencing **May 2, 2014** through **October 12, 214 and October 14, 2014 through November 4, 2014,** as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner the reasonable and necessary medical expenses admitted into evidence (Px. 5 – Px. 9), pursuant to the Medical Fee Schedule, as provided in Sections 8 and 8.2 of the Act.

Respondent shall pay to Petitioner penalties of **$2,449.32** as provided in Section 19(k) of the Act; and **$5,550** as provided in Section 19(l) of the Act; and attorneys fees of **$489.86**, as provided in Section 16 of the Act. Furthermore, see the Arbitrator's decision for the additional 19(k), 19(l) penalties and Section 16 attorney's fees awarded.

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

4/8/15
Date

APR 1 3 2015

IN THE WORKERS' COMPENSATION COMMISSION OF THE STATE OF ILLINOIS

CRAIG ELDRIDGE, Petitioner,	)	
	)	Case No: 14 WC 02899
KEHE DISTRIBUTORS, Respondent.	)	

ADDENDUM TO THE DECISION OF ARBITRATOR

Background

This matter originally proceeded to hearing pursuant to §19(b) and §8(a) of the Workers' Compensation Act (the "Act") on May 1, 2014. The Arbitrator found Petitioner's current condition of ill-being with respect to his right knee causally related to the November 18, 2013, injury at work and awarded Petitioner the reasonable and necessary post-operative care and treatment for his right knee injury recommended by Dr. Raab. (6/2/14 Arbitrator Decision p.3-4). The Arbitrator awarded Petitioner medical expenses (Px.6 – Px.11) and temporary total disability benefits from November 19, 2013, through January 21, 2014 and January 23, 2014 through May 1, 2014. (6/2/14 Arbitrator Decision p.4). Petitioner's claim for penalties and attorneys fees was denied.

On December 4, 2014, this matter proceeded to a second arbitration hearing pursuant to §19(b) of the Act in the City of Chicago, County of Cook.

The issues in dispute included alleged maintenance owed to the Petitioner and medical bills that were previously awarded but not paid per the fee schedule. The Petitioner filed a penalties petition.

The Arbitrator adopts and incorporates the prior decision filed with the Commission on June 2, 2014.

FINDINGS OF FACT

Petitioner twisted his right knee at work on November 18, 2013, retrieving work papers in the parking lot of a grocery store customer. (6/2/14 Arbitration Decision p.3). Diagnostic studies revealed a torn medial and lateral meniscus for which Petitioner underwent arthroscopic surgery. (6/2/14 Arbitration Decision p.3).

On March 25, 2014, Dr. Raab performed a right knee arthroscopy with partial medial and lateral meniscectomy and chondroplasty of medial femoral condyle and patellofemoral joint. (6/2/14 Arbitration Decision p.2 and Px. 3). Operative findings noted "fraying of the posterior horn of the medial meniscus" and a "complex tear of the

posterior and middle third of the lateral meniscus". (6/2/14 Arbitration Decision p.2 and Px.3).

Despite prophylactic medications including Warfarin, Lovenox, and Coumadin a postoperative hemarthrosis developed in Petitioner's right knee. (Px. 3). He was scoped by Dr. Breslow for debridement of a hematoma (on April 2, 2014)." (Px. 3).

Thereafter, Petitioner treated with Dr. Angel Guzman, a hematologist, at Lutheran General Hospital for his DVT prophylaxis. (Px. 3). Petitioner has a history of DVTs and PEs. (Px. 3).

Petitioner returned to Dr. Raab on July 14, 2014, complaining of ongoing soreness, swelling and pain in the right knee. Examination revealed positive patellofemoral crepitus and patellofemoral grind. (Px. 3). Petitioner received a double cortisone injection with 2ml of Celestone and a combination of Marcaine and Lidocaine. Continued physical therapy was ordered and Petitioner remained restricted to a seated job. (Px. 3).

On August 11, 2014, Petitioner reported no significant improvement and was given a prescription for Jobst compression stockings. (Px. 3). Examination continued to reveal positive patellofemoral crepitus and patellofemoral grind. Petitioner was issued restricted duty, alternating sitting and standing, and was released to drive. (Px. 3).

On August 21, 2014, Petitioner completed a 4 month course of physical therapy at Illinois Bone and Joint. (Px. 3).

On September 15, 2014, Petitioner returned to see Dr. Raab who noted positive patellofemoral crepitus and mildly positive patellofemoral grind on exam. (Px. 3). Dr. Raab released Petitioner to return to work full duty without restrictions and was advised to return in 1 month.

On October 17, 2014, Petitioner advised Dr. Raab that he returned back to work for 1 day and was told by his supervisor "that he is unable to perform his job and not to come back until he can perform full duty". (Px. 3). Examination of the right knee revealed some equivocal joint line tenderness, patellofemoral crepitus and equivocal patellofemoral grind. Dr. Raab ordered a functional capacity evaluation ("FCE") which Petitioner completed on November 7, 2014.

On November 5, 2014, The therapist conducting the FCE noted Petitioner performed at a "Medium to Heavy" physical demand level in this evaluation, which does meet the requirements of his pre-injury profession as Sales for Kehe Distributors. The therapist further noted:

> *[H]owever, due to poor body mechanics with lifting from floor to knuckle level, inability to safely kneel bilaterally, and limited activity tolerance with standing and walking there is noted concern with Mr. Eldridge's ability to safely complete his job.* (Px. 4).

The therapist:

> *[R]ecommends that Mr. Eldridge is not able to safely perform his pre-injury job due to his objective and subjective data collected in this functional capacity evaluation. Mr. Eldridge is not limited with strength components of FCE, however is limited with mobility and both static and dynamic standing. Evaluator can conclude that due to Mr. Eldridge's knee ROM flexion deficits, lack of walking and standing endurance/tolerance, there is noted concern with Mr. Eldridge working his pre-injury job.* (Px. 4).

On November 24, 2014, Dr. Raab released Petitioner to full duty work with no restrictions. (Px. 3).

CONCLUSION OF LAW

The Arbitrator adopts the above Findings of Fact along with the prior Findings of Fact from the May 1, 2014 hearing in support of the following conclusions of law.

Causal Connection

The Arbitrator notes no evidence contained in the record that Petitioner sustained no subsequent trauma or injury to his right knee following the initial 19(b) hearing. Therefore, based on the medical evidence presented at trial along with Petitioner's unrebutted testimony the Arbitrator finds that Petitioner's current condition of ill-being in the right knee is causally related to the November 18, 2013 injury at work.

Medical Expenses

Based on the Arbitrator's findings of a causal connection between the November 18, 2013, injury at work and Petitioner's current condition of ill-being in the right knee, the Arbitrator finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses (Px. 5 – Px. 9) incurred in the care and treatment of Petitioner's right knee pursuant to the Medical Fee Schedule and Sections 8 and 8.2 of the Act. Respondent shall receive a credit for amounts paid by Petitioner's group insurance.

Temporary Benefits

The parties stipulated that Petitioner is entitled to temporary total disability benefits from May 2, 2014 through September 14, 2014. (Arbitrator Ex. 1, p.2).

Throughout May and June 2014 Petitioner was restricted to a seated job only which Respondent didn't accommodate. (Tr. 13). In July 2014, Petitioner was issued seated work only restrictions which Respondent did not accommodate. (Tr. 16). In August 2014, Petitioner's work restrictions were modified to alternate sitting and standing. (Tr. 17). Respondent did not accommodate Petitioner's work restrictions. (Tr. 17-18).

Consequently, on September 15, 2014, Dr. Raab released Petitioner to return back to work full duty so that respondent would take him back. (Px. 3 and Tr. 36). Petitioner was not discharged from treatment. Petitioner contacted Jenny Singleton, Respondent's

HR Representative, at that time regarding his return to work. (Tr. 18-20). Petitioner continued to phone and email Jenny Singleton regarding his return to work throughout September and October 2014. (Tr. 20-21).

Petitioner was ultimately offered a $35,000 a year sales representative position to return to work for Respondent on October 13, 2014. (Px. 20 and Tr. 22). Petitioner returned to work for Respondent on October 13, 2014. (Tr. 23). At the end of his first day back to work Petitioner's supervisor, Roy Bailey, told Petitioner not to return to work the next day. (Tr. 24). Although Petitioner has problems limping, squatting, and kneeling he told Roy Bailey he could do the job and pleaded with Roy Bailey to allow him to return to work since Petitioner had not received any disability benefits since September 14, 2014. (Tr. 25-26). Petitioner received temporary total disability benefits of $253 per week from September 15, 2014 until his return to work on October 13, 2014. (Tr. 30-31).

Petitioner continued to contact Jenny Singleton regarding his return to work after talking with Roy Bailey. (Tr. 31-32). Jenny Singleton advised Petitioner to follow-up with Dr. Raab. (Tr. 32). On October 17, 2014, Dr. Raab ordered a functional capacity evaluation and issued Petitioner full-duty work restrictions. (Tr. 32). Respondent failed to respond to Petitioner's repeated requests to return to work.

However, on November 4, 2014 Respondent offered Petitioner a job assisting salesman. (Tr. 42-43). Petitioner was offered a position on the merchandising crew stocking deliveries. (Tr. 43). Petitioner returned to work for Respondent the next day November 5, 2014. (Tr. 42).

The evidence presented at trial is sufficient to support a finding that, at the time of the September 15, 2014, release to return to full duty work, Petitioner's condition had not stabilized, he was still receiving medical treatment, and he had not reached maximum medical improvement. Therefore, based upon the Arbitrator's finding of causal connection between the November 18, 2013 injury at work and Petitioner's right knee injury the Arbitrator further finds that Respondent shall pay Petitioner $1,146.93 per week for temporary total disability benefits for the periods May 2, 2014 through October 12, 2014 and October 14, 2014 through November 4, 2014. Respondent shall receive a credit for the net long term disability benefits and temporary total disability benefits issued to Petitioner.

Penalties/Fees

On June 1, 2014, the Arbitrator awarded Petitioner the following medical expenses:

Px. 6 Illinois Bone and Joint Institute
Px. 7 Advocate Lutheran General Hospital
Px. 8 Park Ridge Anesthesiology
Px. 9 Jewel Osco - $373.89
Px. 10 Jewel Osco - $44.56
Px. 11 Illinois Bone & Joint Institute, LLC
DME Services - $51 (6/2/14 Arbitration Decision p.4)

Petitioner testified that Respondent failed to pay the benefits awarded following the May 1, 2014 hearing. (Tr. 9-11). Respondent failed to pay the medical expenses awarded despite repeated request for payment. (Px. 11, 16, 17). Consequently, on October 10, 2014 Petitioner filed a third petition for penalties and attorneys fees for Respondent's failure to pay Petitioner the medical expenses awarded. (Px. 24). Respondent offered no proof of payment of the medical expenses awarded. Moreover, Respondent offered no good cause argument for their failure to pay Petitioner the medical expenses awarded pursuant to the medical fee schedule. Respondent's failure to pay the medical expenses awarded is not supported by any medical opinion.

Section 19(l) of the Act provides in part:

> "In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days more shall create a rebuttable presumption of unreasonable delay." 820 ILCS 305/19(l).

The Arbitrator finds that Respondent failed to meet their burden of showing that it had a reasonable belief in denying payment of the medical expenses awarded Petitioner. *Lester v. Industrial Commission*, 256 Ill.App.3d 520, 524, 628 N.E.2d 191 (1933). Respondent did not review the Arbitrator's award of medical expenses. Therefore, the Arbitrator awards Petitioner 19(l) penalties of $30 per day from the date of the award to present in the amount of $5,550 (185 days x $30/day = $5,550).

Petitioner also seeks 19(k) penalties for Respondent's failure to pay Petitioner the medical expenses awarded. Imposition of 19(k) penalties is discretionary. *McMahan v. Industrial Commission*, 183 Ill.2d at 515 (1998). They are assessed when a benefit payment delay is deliberate or results from bad faith or "improper purpose". *McMahan* at 515.

Section 19(k) provides:

> "In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay." 820 ILCS 305/19(k).

Over **185** days have passed since the 19(b) arbitration decision was entered which Respondent failed to pay in full.

No good cause has been given by Respondent why the Arbitration award has not yet been paid. Consequently, the Arbitrator finds Respondent's failure to timely pay the Arbitration award unreasonable and vexatious. 820 ILCS 305/19(k).

The Section 8.2 Medical Fee Schedule prepared by Petitioner reflects the following outstanding account balances from the medical expenses awarded Petitioner:

Px. 6 Illinois Bone and Joint Institute - **$4,094.78**;
Px. 7 Advocate Lutheran General Hospital - **$334.40** (Px. 25)

Furthermore, Petitioner was awarded the following medical expenses:

Px. 9	Jewel Osco	**$373.89**
Px. 10	Jewel Osco	**44.56**
Px. 11	Illinois Bone & Joint Institute, LLC DME Services	**51.00**
	Total	**$4,898.63**

Therefore, the Arbitrator awards Petitioner Section 19(k) penalties of **$2,449.32** representing 50% of the outstanding medical expenses along with Section 16 attorney's fees of **$489.86** representing 20% of the 19(k) penalties.

Finally, Petitioner seeks penalties and attorneys fees for Respondent's underpayment of benefits subsequent to the May 1, 2014, 19(b) hearing. Despite repeated requests for payment of his medical expenses Respondent continued to have the bills paid pursuant to Petitioner's group health insurance carrier (Blue Cross Blue Shield) and failed to pay the outstanding account balances (Px.5 – Px.6) pursuant to the Medical Fee Schedule. (Px. 13 and Px. 16).

Furthermore, although Petitioner was awarded TTD benefits Respondent failed to timely and adequately issue Petitioner's TTD benefits despite repeated requests. (Px. 10, 11, 15, 16, 17, 19 and Tr. 28-29). Instead, Petitioner was issued long term disability benefits that he received monthly from May 16 through September 2014 along with TTD benefits of $253/week. (Tr. 29-30).

Therefore, the Arbitrator finds that Petitioner is entitled to 19(l) penalties of **$5,550** for Respondent's delay in payment of Petitioners medical expenses and TTD benefits. (6/3/14 – 12/4/14 = 185/days x $30/day = $5,550). Furthermore, the Arbitrator finds Respondent's continued denial and delay in payment of Petitioner's medical expenses and TTD benefits unreasonable and vexatious. *McMahan v. Industrial Commission*, 183 Ill.2d 499, 515 (1998). Consequently, the Arbitrator awards Petitioner 19(k) penalties of 50% of the unpaid medical expenses pursuant to the Medical Fee Schedule and Sections 8 and 8.2 of the Act along with 19(k) penalties of 50% of the underpaid TTD benefits.

Finally, the Arbitrator awards Petitioner Section 16 attorneys fees of 20% of the 19(k) penalties for the medical expenses and TTD benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michele Edwards,
Petitioner,

vs.

NO: 14 WC 5745

Chicago Transit Authority,
Respondent.

16IWCC0105

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, and causation 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. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that there was a sufficient dispute to justify Respondent's nonpayment of temporary total disability benefits from February 22, 2014 through March 21, 2014 and the Commission vacates the Arbitrator's award of additional compensation and attorneys' fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $834.93 per week for a period of 30-5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this 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.

16IWCC0105

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,651.80 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of additional compensation and attorneys' fees is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $10,684.23 for payment of temporary total disability benefits paid to or on behalf of Petitioner on account of said accidental injury.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,700.00. 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.

DATED: FEB 5 - 2016

MB/jm

O: 1/21/16

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

EDWARDS, MICHELE
Employee/Petitioner

Case# **14WC005745**

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

16IWCC0105

On 6/29/2015, 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 0.08% 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:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALLE ST SUITE 2820
CHICAGO, IL 60601

0515 CHICAGO TRANSIT AUTHORITY
ANDREA ZECHMANN
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

16IWCC0105

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Michelle Edwards
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 14 WC 05745

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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **September 10, 2014**. 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?
B. [x] 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0105

FINDINGS

On the date of accident, **2/7/2014**, 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 **$65,124.80**; the average weekly wage was **$1,252.40**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$10,684.23** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,684.23**.

Respondent is entitled to a credit of **$0** under § 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$834.93** per week for **30-5/7** weeks, commencing **2/8/2014** through **9/10/2014**, as provided in § 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$2,651.80**, as provided in §§ 8(a) and 8.2 of the Act and as set forth below.

Respondent shall authorize and pay for the right shoulder arthroscopy offered by Dr. Nuber, along with all related services, in accordance with §8(a) and §8.2 of the Act.

Penalties

Respondent shall pay to Petitioner penalties of **$1,669.86**, as provided in §19(k) of the Act; **$6,030.00**, as provided in §19(l) of the Act and Attorneys' Fees in the amount of **$1,539.97**, as provided in § 16 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

June 22, 2015
Date

JUN 29 2015

FINDINGS OF FACT

Petitioner has been employed by Respondent as a bus operator since 1996.

On February 7, 2014 at about 10:00 pm, Petitioner injured her right shoulder driving a deadhead bus. She had started her shift at 3:00 pm. She made a left turn from westbound Foster onto southbound Broadway. The road was slick with snow and ice. She pulled on the steering wheel to steer the bus and her right shoulder popped and re-set. She pulled the bus over and called control. Petitioner's supervisor and CFD paramedics came.

Petitioner denied prior right shoulder problems. Petitioner had fallen in December and had another fall on February 6, 2014. Both falls were slip and falls on ice in Respondent's parking lot. Petitioner did not report these accidents to Respondent because she did not want to be assessed points for excessive accidents. Petitioner had a prior Workers' Compensation claim for an injured knee.

The history given to the paramedics was of a sudden onset of right shoulder pain while driving the bus. Her shoulder popped when she turned the wheel. (PetEx. 1)

Petitioner was transported to Swedish Covenant Hospital, where she was treated in the Emergency Room. The history was of a sudden onset of right shoulder pain making a left turn driving a bus. She heard her shoulder pop when making a turn. She denied a fall or injury. The pain was in the top of the shoulder and the back of the arm. She denied prior shoulder injuries. The physical exam revealed limited range of motion, severe pain with shoulder extension and UE abduction. There was moderate pain with forearm extension. X-rays were said to be within normal limits. The discharge diagnosis was right shoulder pain. Petitioner was instructed to limit use of the shoulder and ice it. She was given a sling, RTC instructions and Norco and Motrin. She was to follow up with a physician. (PetEx. 1)

The bus was checked out and there was no defective condition noted. (ResEx. 2 & 3) Petitioner completed an Injury on Duty Report on February 8, 2014. The IOD report is consistent with petitioner's testimony and the medical records. (ResEx. 4) Respondent did not submit on-board films of the event.

Petitioner was next seen in the Emergency Room at Evanston Hospital on February 9, 2014. The history given was that she slipped and fell 2 nights prior and fell with an outstretched arm, causing pain in her right shoulder. She then felt a popping sensation in her right shoulder driving a bus last night. She had pain over the deltoid and the posterior aspect of the right shoulder. The diagnosis was acute muscle strain of the right shoulder. It could be a rotator cuff tear, but the doctor did not think so. She was instructed to continue to use the sling, apply heat, do some home exercises and take 600 mg of Motrin 3 times a day. She should follow up with orthopedics. (PetEx. 6)

Petitioner next had treatment with her PCP, Dr. Rebecca Weiss Coleman, on February 9, 2014. She presented with complaints of 8/10 right shoulder pain and a history of a slip and fall on ice in the parking lot at work on 2/6/2014, falling on her right shoulder and of increased right shoulder pain when she felt a pop while turning a bus on 2/7/2014. She did not seek medical attention after the 2/6 fall, but did go to the Swedish ER on 2/7. The physical exam showed right shoulder limitations. The diagnosis was right shoulder sprain. Petitioner was instructed to use the sling and see an orthopedic specialist. She was taken off work. (PetEx. 3)

Petitioner then had treatment at Work Care Medical Center with Dr. Luis Munoz, starting on February 11, 2014. She had seen this physician before for a right knee injury. The history given was of an injury on February 7, 2014, driving a bus for the CTA. She moved her arm rapidly in trying to avoid an accident and she felt a pop and pain in her shoulder. She had immediate pain in her shoulder. The physical exam revealed pain, decreased range of motion and significant tenderness. The diagnosis was: 1.) Right shoulder RTC injury, sprain; 2.) Right arm sprain-biceps tendon sprain/strain; and 3.) Deconditioning. Petitioner was taken off work, given medications, instructions for home exercise and was told to continue the sling and begin PT. She continued treatment with Dr. Munoz through June 10, 2014. Dr. Munoz excused Petitioner from work from February 11, 2014 through July 14, 2014 (the last scheduled visit in the records). Dr. Munoz charted that the Petitioner's right shoulder condition was causally related to the injury of February 7, 2014. (PetEx. 4)

Petitioner also had treatment with Dr. Gordon Nuber at North Shore Orthopedics, beginning February 11, 2014. Unfortunately, the transcription of or the Doctor's review of his dictation (or perhaps his input into EMR) is sloppy ("Allegedly she has had like 2 falls"). The history is of two falls and the next day after the second fall, she it felt like her shoulder slipped out of joint while rotating her arm and slipped back in. The concern was subluxation, possible rotator cuff pathology. X-rays showed mild narrowing of the A/C joint without further degenerative or acute pathology. Dr. Nuber recommended an MRI arthrogram. (PetEx. 5)

Petitioner had a §12 examination by Dr. Gregory Primus, at the request of Respondent, on April 1, 2014. Petitioner gave the history of feeling her right shoulder pop when she made a left turn. She denied knowing whether the shoulder actually dislocated, but did not remember any attempt at relocation. She denied prior shoulder dislocations. She is awaiting approval for a MRI. She had complaints of pain and instability in the arm. The physical exam revealed mild hyperlaxity, decreased strength and the exam could not be completed secondary to excessive pain complaints. Dr. Primus did not review any medical records. Her had concerns about the injury and the patient's presentation. Gentle therapy and modalities were recommended before any diagnostic studies should be considered. He thought that Petitioner's complaints were not related to the injury suffered when turning the bus wheel. The complaints could be due to psychosocial issues. To simply dislocate the shoulder turning a steering wheel would require that the joint was unstable, with extreme laxity. This was not consistent with the history given by the patient. There could be symptom magnification. Dr. Primus did not have a clear diagnosis that explained Petitioner's extreme pain and dysfunction. He did not think that the complaints and limitations were due to an incident that occurred while turning a steering wheel. Even if a rotator cuff tear occurred, it would be expected that the patient would have near normal range of motion and decreased pain two months after the injury. Petitioner was not able to work at full duty, based upon her presentation. Dr. Primus could not identify a specific work related injury that occurred on 2/7/2014. He could not say that the patient was at MMI, because he did not believe that her symptoms were related to a work injury. (ResEx. 1) Petitioner had the MRI Arthrogram done on May 22, 2014. It showed a SLAP II lesion, moderate supraspinatus tendinosis and mild A/C joint osteoarthritis. Dr. Nuber thought that surgery was appropriate at the follow-up visit of June 10, 2014. Follow-up exams were on July 15 and August 28, 2014. Petitioner remains off work, pending OK for surgery. (PetEx. 5) Dr. Dunlap, who saw Petitioner on August 28, 2014, thought that therapy was indicated, secondary to no authorization for surgery. (PetEx. 1)

Petitioner testified that she has no feeling on the front of her shoulder. She has pain. She has weakness and decreased strength. She can't do overhead tasks. She wants the surgery that has been offered by Dr. Nuber.

TTD was claimed from February 8, 2014 to the date of trial, September 10, 2014 (30-5/7 weeks). TTD was paid from February 8, 2014 through February 21, 2014 and March 22, 2014 through June 4, 2014 (12-5/7 weeks).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. The Arbitrator finds that Petitioner's testimony was credible. There are some minor inconsistencies in the histories, but the Arbitrator believes that this is due to nervousness, rather than trying to deceive.

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

The Arbitrator finds that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on February 7, 2014. She injured her right shoulder turning the wheel on a bus, driving in difficult conditions. The accident happened some seven hours after Petitioner started her shift. She may have hurt her shoulder in the prior falls, but the event that caused Petitioner pain and led to medical treatment occurred as she was turning the bus through the slippery intersection of Foster and Broadway. Dr. Primus' opinions and the lack of a defect in the bus do not persuade the Arbitrator that the injury did not occur as Petitioner described.

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

The Arbitrator finds that Petitioner's current condition of ill-being regarding her right shoulder is causally related to the accidental injuries of February 7, 2014 based upon Petitioner's testimony and the medical records, including the opinion of Dr. Munoz that the shoulder condition is causally related to the injury sustained when driving.

There was no evidence of any prior medical treatment regarding Petitioner's right shoulder. While Petitioner may have injured her shoulder in the two falls, she was able to work her job until the injury of February 7, 2014. Dr. Primus' opinion on causal connection is not persuasive in this case. Significantly, he did not provide a further opinion after the MRI Arthrogram was done.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the findings above regarding accident and causation, the claimed bills from City of Chicago EMS ($1,051.00) for transportation to Swedish Covenant and EQMD ($1,600.80) for medications are

awarded. Respondent had no objection to these bills and this award is pursuant to §§8(a) and 8.2 of the Act. Respondent is entitled to a credit if the bills have been paid.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the offered right shoulder arthroscopy is reasonable and necessary to cure or relieve the effects of the injury and Respondent should pay for and authorize same based upon the findings above regarding accident and causation. Dr. Nuber is of the opinion that Petitioner is not going to improve with conservative care and arthroscopy will allow him to address Petitioner's shoulder problems. The Arbitrator is persuaded by this opinion.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon the testimony of Petitioner, the medical records and the Arbitrator's findings regarding accident, causation and the need for surgery above, Petitioner shall have and receive from Respondent TTD benefits from February 8, 2014 through September 10, 2014 in the amount of $834.93, a period of 30-5/7 weeks. Respondent is entitled to a credit for the $10,684.23 in TTD that it has paid.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Respondent disputed accident at trial. Respondent paid TTD from February 8, 2014 through February 21, 2014 and from March 22, 2014 through June 4, 2014 (12-5/7 weeks). Respondent offered no evidence as to why it did not pay TTD benefits from February 22, 2014 through March 21, 2014. Respondent did not comply with Rule 70110.70 (b) for this time period.

The report of Dr. Primus and the medical records are sufficient to justify the non-payment of TTD after June 4, 2014.

Accordingly, the Arbitrator awards Petitioner §19(k) Penalties in the amount of $1,669.86 (4 weeks of TTD from February 22, 2014 through March 21, 2014 = $3,339.72 = $1,669.86).

The Arbitrator awards Petitioner §19(l) Penalties in the amount of $6,030.00 (February 22, 2014 through September 10, 2014 = 201 days x $30.00/day = $6,030.00).

Finally, the Arbitrator awards §16 Attorneys' Fees in the amount of $1,539.97 (20% of the $7,699.86 in Penalties awarded above).

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Hicks,

Petitioner,

vs.

NO: 14WC 06996

16IWCC0044

Heath's Incorporated,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical, causal connection, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 27, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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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 $100.00. 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

DATED:
O010716 JAN 20 2016
DLG/mw
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

HICKS, BRIAN
Employee/Petitioner

Case# **14WC006996**

16IWCC0044

HEATH'S INCORPORATED
Employer/Respondent

On 4/27/2015, 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 0.09% 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:

0668 LAW OFFICES OF PAUL E SELIN
100 E CHESTNUT ST
SUITE 200
CHAMPAIGN, IL 61820

0238 WOLFE & JACOBSON LTD
PETER W JACOBSON
25 E WASHINGTON ST SUITE 700
CHICAGO, IL 60602

FINDINGS

On the date of accident, February 8, 2013, 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.

Petitioner's current condition of ill-being is not causally related to the accident.

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $n/a.

On the date of accident, Petitioner was 30 years of age, married with 3 dependent child(ren).

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's Petition for prospective medical treatment is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

William R. Gallagher, Arbitrator
ICArbDec19(b)

April 21, 2015
Date

APR 27 2015

At the direction of Respondent, Petitioner was examined by Dr. Kern Singh, an orthopedic surgeon, on November 25, 2013. In connection with his examination of Petitioner, Dr. Singh reviewed medical records provided to him by Respondent as well as the MRI scan of November 5, 2013. Dr. Singh recommended Petitioner have additional physical therapy, then transition to work conditioning; however, he opined that Petitioner was a "nonoperative patient." (Petitioner's Exhibit 3).

Subsequent to his examination by Dr. Singh, Petitioner received physical therapy at Decatur Memorial Hospital in January, 2014. In the physical therapist's record of January 28, 2014, it was noted that Petitioner exhibited what appeared to be self limiting activity because of his subjective complaints of pain (Respondent's Exhibit 3).

Petitioner was subsequently seen by Dr. Steven Sparenberg (whose medical records were not tendered into evidence) who referred him to Dr. Hyunchui Jung, who saw Petitioner on April 21, 2014. At that time, Petitioner continued to complain of low back and bilateral leg pain. Dr. Jung opined that Petitioner's pain was coming from the L5-S1 disc and he recommended Petitioner undergo epidural steroid injections at that level. Dr. Jung gave Petitioner epidural steroid injections at L5-S1 on July 3, and July 17, 2014, but they did not give Petitioner any relief from his symptoms (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Alexander Ghanayem, an orthopedic surgeon, on May 8, 2014. In connection with his examination of Petitioner, Dr. Ghanayem reviewed medical records provided to him by Respondent as well as the MRI scans of March and November, 2013. Dr. Ghanayem's findings on clinical examination were benign and he noted that the post-operative MRI of November, 2013, did not reveal any evidence of ongoing/recurrent disc herniations or neurologic compression. He further noted that Petitioner had non-organic physical findings consistent with symptom magnification. He opined that Petitioner was at MMI, could return to work without restrictions and that no further medical treatment was indicated (Respondent's Exhibit 2).

On June 10, 2014, Petitioner had another MRI performed (ordered by Dr. Jesse Butler) which revealed degenerative disc disease in the lower lumbar spine at L3-L4 through the L5-S1 level. The radiologist also noted an improved appearance and/or resolution of the disc bulge/protrusion at L3-L4 and L4-L5 when compared to the MRI of March 12, 2013. The June 10, 2014, scan also revealed an annular tear of L4-L5 and a disc bulge at L5-S1 without central spinal or neural foraminal stenosis (Petitioner's Exhibit 1).

Dr. Jung subsequently referred Petitioner to Dr. Huan Wang, a neurosurgeon, who examined Petitioner on August 19, 2014. At that time, Petitioner complained of low back pain with radiation into both legs that extended to the bottom of the feet. Dr. Wang suggested various modes of treatment including a decompression and fusion from L4 to S1. Dr. Wang's record of that date did not indicate that he had reviewed any of the MRI scans (Petitioner's Exhibit 1).

Dr. Wang again saw Petitioner on October 2, 2014, and the decision was made to proceed with the L4 to S1 lumbar decompression and fusion. This surgery was tentatively scheduled for sometime in November but was not performed because of Respondent's refusal to authorize.

The Arbitrator concludes Petitioner is not entitled to prospective medical treatment, in particular, a decompression and fusion surgery.

In support of this conclusion the Arbitrator notes the following:

Both of Respondent's Section 12 examiner's, Dr. Singh and Dr. Ghanayem, opined that Petitioner did not require surgery.

Dr. Ghanayem's findings on clinical examination of Petitioner, which included nonorganic findings indicative of symptom magnification, and his review of the MRI scans support his opinion that Petitioner does not require further medical treatment.

The Arbitrator is not persuaded by the opinion of Dr. Wang. Dr. Wang's records did not contain any reference to the MRI scans. Even though Dr. Wang testified that he reviewed them, he did not have any independent recollection of having done so. Further, Dr. Wang's opinion that the MRI technology is limited because of the patient lying in a horizontal position when the MRI is performed is questionable.

The Arbitrator finds the opinion of Dr. Ghanayem to be more persuasive than that of Dr. Wang.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tina Cederborg,

Petitioner,

vs. NO: 14 WC 16159

Caputo's New Farm Produce, Inc.,

Respondent,

16IWCC0058

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under §19(b) by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 8, 2015 is hereby affirmed and adopted.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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.

DATED: JAN 2 5 2016

MB/mam
o:1/21/16
43

Mario Basurto

David L. Gore

Stephen Mathis

LAC0028

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

CEDERBERG, TINA
Employee/Petitioner

Case# **14WC016159**

16IWCC0058

CAPUTO'S NEW FARM PRODUCE INC
Employer/Respondent

On 6/8/2015, 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 0.07% 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:

0891 STORTO FINN & ROSINSKI
LAWRENCE FINN
100 W GREEN ST
BENSENVILLE, IL 60106

4412 ACCIDENT FUND HOLDINGS INC
NICOLE B HANLON ESQ
200 W MADISON ST SUITE 3850
CHICAGO, IL 60606

16IWCC0058

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tina Cederborg
Employee/Petitioner

v.

Caputo's New Farm Produce, Inc.
Employer/Respondent

Case # **14** WC **16159**

Consolidated cases: ___

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Wheaton** on **3/27/2015**. 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. X 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. X 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. X Is Petitioner entitled to any prospective medical care?

L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance x TTD

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. Other: ___

FINDINGS

On the date of accident, **2/14/2014**, 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 not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned an average weekly wage of $**398.62**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

As he finds that Petitioner failed to prove accident and causation, the Arbitrator hereby denies compensation.

All other issues are moot.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

June 8, 2015
Date

ICArbDec19(b)

JUN 8 - 2015

TINA CEDERBORG v. CAPUTO'S NEW FARM PRODUCE, INC.
CASE NUMBER: 14 WC 16159

FINDINGS OF FACT:

The above case was tried before Arbitrator Cronin in Wheaton on March 27, 2015. It was stipulated that the petitioner was employed by the respondent on February 14, 2014. Issues in dispute include whether the petitioner's accident arose out of and in the course of her employment, whether her condition of ill-being was causally related to her injury, payment of the outstanding medical bills, and the petitioner's prospective medical treatment.

The petitioner was the first and only witness to testify. The petitioner testified that she is 51 years of age and is right-hand dominant. The petitioner testified that she is employed by the respondent, Caputo's New Farm Produce, Inc. The petitioner testified that she began working for the respondent in August 2013. The petitioner testified that prior to her current employment, she was unemployed for approximately two years. Prior to being unemployed, she worked for a non-profit company, APPNA. For over 15 years there, she worked as a secretary and entered data, typed, filed, scheduled meetings and answered phones.

The petitioner testified that in August of 2013 she began working for the respondent in their Addison store location. The petitioner was assigned to the deli department. Her duties included cleaning, stocking, assisting customers, taking orders and slicing meats. The petitioner testified that she worked in that department for approximately two to three months and then she moved into the produce department in October or November of 2013. The petitioner testified that while in the produce department, she assisted with making guacamole, cutting fruit, vegetables and making vegetable trays. The petitioner testified that the difference between the produce department and the deli department was that she had to use her hands to cut fruits and vegetables. The petitioner testified that she would spend approximately 75-80% of her day holding a knife as she would have to cut fruits and vegetables.

The petitioner testified that when she was transferred from the Addison store to the Bloomingdale store in January 2014, she was put in charge of the produce department. She had the same duties that she had at the Addison store. The petitioner testified that she was the only person in that department and would

sometimes work 12-14 hours a day, 6 to 7 days a week. The petitioner testified that she would spend approximately 75-80% of her shift holding a knife. The petitioner testified that when she worked in the produce department, in addition to cutting fruit and vegetables, she would make guacamole. The petitioner testified that she would cut up the fruit and put the sliced pieces into 16 oz. containers. The petitioner testified that when she was working in the produce department, she noticed problems with her hands, including achiness, numbness and tingling.

Prior to working in the produce department, the petitioner testified, she never experienced any problems with her hands. The petitioner testified that while working in her prior employment as a secretary, she had no problems with her hands.

The petitioner testified that in February 2014, she saw Kimbrough Clark, D.C., because she was having issues with her hands. Prior to that date she had no symptomatology in her hands. The petitioner testified that she treated with Dr. Clark and that he later referred her to Jeffrey L. Visotsky, M.D. In addition, the petitioner underwent an EMG, which revealed that she had carpal tunnel syndrome. The petitioner testified that since the diagnosis of carpal tunnel syndrome, her job had been modified and she began working fewer hours. The petitioner first worked as a greeter and was subsequently moved to the meat department. The petitioner testified that as a greeter she welcomed customers and was in charge of loss prevention. The duties of her job in the meat department include wrapping and dating the meat, stocking shelves and cleaning.

On June 11, 2014, the petitioner saw Charles Carroll IV, M.D. for a Section 12 medical examination. Dr. Carroll confirmed that the petitioner had bilateral carpal tunnel syndrome.

The petitioner testified that her right hand bothered her more than her left hand. The petitioner testified that she does not have rheumatoid arthritis, gout, hypertension or diabetes.

The petitioner testified that she reviewed the job description/video. The petitioner testified that it was not accurate as it showed two people performing a job that she typically performed by herself. In addition, the job video did not show the petitioner making guacamole or pico de gallo, and did not show the volume of produce that she would cut up in a typical day. The petitioner testified that in regard to making

pico de gallo, she would have to dice onions. In regard to making guacamole, she would have to scoop out portions of avocados with a spoon and then use a potato masher.

The petitioner testified that her symptoms have not dissipated. When questioned as to whether her symptoms had changed since she left the produce department, she said no, they had actually gotten worse. The petitioner testified that she wore braces on her wrists when she worked at the guacamole stand; however, the braces did not help her symptoms. In addition, the petitioner underwent injections, which only helped for a day or two. The petitioner testified that she wants to proceed with the bilateral carpal tunnel surgery.

On cross-examination, the petitioner testified that the respondent hired her on or about August 17, 2013. The petitioner testified that she first began working at the Addison store. The petitioner testified that she thought she was originally hired for full-time, and not part-time, work. The petitioner testified that at the Bloomingdale store, when she would make fruit trays, she would make approximately four large trays and four small trays in a day. The petitioner testified that she made approximately 40 containers of guacamole. Such containers were either 8 oz. or 16 oz. containers.

The petitioner testified that when she worked in the produce department, she was the only person working in that department. However, if she needed assistance, she could find someone to help her. The petitioner testified that her typical hours at the Addison store were from 8 to 5 or 9 to 5. The petitioner testified that she was supposed to get two breaks plus a lunch break. The petitioner testified that when she worked in the produce department, she was cutting, filling and stirring.

The petitioner testified that she currently has pain in her hands. The petitioner further testified that when she worked as a greeter, she experienced pain in her hands.

Dr. Visotsky has recommended surgery for the petitioner. On August 1, 2014, Dr. Visotsky tentatively scheduled surgery that month that consisted of right carpal tunnel release and right small trigger finger release. (Px.2)

Dr. Carroll, the respondent's examining physician, reviewed medical records, viewed the job video and examined the petitioner. Dr. Carroll opined that the petitioner's job activities are not the cause of her

condition based upon the medical issues and his review. He further opined that any aggravation would be temporary in nature. (Rx.2)

The job video was not offered into evidence.

The respondent conducted an Ergonomic Work Station Assessment of the petitioner's job in the produce department of Caputo's. The Assessor, Bill Luebke, opined: "As a result, there appears to be Low exposure to an occurrence of bilateral carpal tunnel, based on the work risk factors evaluated." (Rx.4)

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION WITH REGARD TO ISSUES (C) "DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?" AND (F) "IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?", THE ARBITRATOR FINDS THE FOLLOWING:

An employee who alleges an injury based upon repetitive trauma must meet the same standard of proof as other claimants alleging an accidental injury. Peoria County Bellwood Nursing Home v. Industrial Commission, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). In addition, the claimant in a repetitive trauma case must show that the injury is work related and not the result of the normal degenerative aging process. Id.

There is no dispute as to the petitioner's condition of ill-being. The treating physician, Dr. Visotsky, and the respondent's examining physician, Dr. Carroll, agree that the petitioner has bilateral carpal tunnel syndrome and trigger fingers. The dispute lies in whether or not the petitioner's current condition of ill-being of bilateral carpal tunnel syndrome and trigger fingers is causally related to the work activities that the petitioner performed for the respondent.

In a report dated February 10, 2015, Dr. Visotsky wrote:

At this point in time, questions put forth in the narrative report:

1. **Whether her bilateral carpal tunnel syndrome and multiple trigger fingers are causally related to her job at Caputo's?**

At this point in time, based on her clinical examination, history obtained from the patient, physical examination and serial examination of the patient along with review of the EMG and NCV studies and job video, appears (sic) that her job is the cause or contributed to the production of carpal tunnel and trigger finger. She does not have any significant co-morbidities, prior history of disease. The temporal sequence point to (sic) work causing or contributing to the production of carpal tunnel syndrome and stenosing tenosynovitis.

2. **Whether her age, weight, general medical condition are likely causes of her diagnosis?**

At this point in time, the patient has no significant comorbidities. She is 5' 4", 170 pounds, right-hand dominant female. She has a family history of diabetes but is not diabetic herself. She currently takes Seroquel, Paxil, clonazepam and B6 vitamins. There are no known drug reactions for these interactions for these drugs. Her past surgical history includes a hysterectomy, cholecystectomy, C-section, and foot surgery. These surgeries have no relationship to hands and do not indicate any underlying orthopedic problems such as arthritis, rheumatoid arthritis, or inflammatory arthropathy. There are no comorbidities that contribute to the production of carpal tunnel syndrome or trigger finger. There are diseases such as endocrine abnormalities, collagen vascular diseases that make patients more prone to this, though she has never had symptoms of these diseases or through the physical examinations from her primary treating physician and treated positive for thyroid disorder, lupus, rheumatoid arthritis. If you have further questions, feel free to contact me.

At the request of the respondent, and pursuant to Section 12, the petitioner presented to Dr. Carroll for examination. Dr. Carroll issued three reports; the last two reports followed a review of the medical records, medical reports and job video.

On June 11, 2014, Dr. Carroll took a history from the petitioner and examined her. Dr. Carroll wrote: "She presents today with evidence of bilateral carpal tunnel syndrome and multiple trigger fingers." Dr. Carroll opined: "Her age, weight, and general medical condition although (sic) likely cause of her diagnosis." At that time, Dr. Carroll had not yet reviewed the medical records, the medical reports or the job video. (Rx.1)

On June 30, 2014, Dr. Carroll issued a second report. He reviewed medical records and reports and the job video. In this report he noted: "Alterations in my understanding or new facts could change my opinions in the future." Dr. Carroll also wrote:

> The job video was dated 4/17/14. It reviews work in the department cutting fruit for her employer. Various activities are noted. Postures are not awkward. Force is not significant. Making a vegetable container was noted. Knife was in right hand. Produce was placed in a container. Various produce was cut and handled. Smaller plastic containers were filled and weighed. Labels were applied. It was hand delivered in store. It was placed on a shelf. Cutting fruit was noted. Pineapples and other fruit were cut and packaged. Wrapping of partially cut produce was noted. Placement in plastic containers and placing in store was noted. I do not find these activities are the cause of her condition based upon the medical issues and this review. Any aggravation would be temporary in nature. The video was about 20 minutes long. (Rx.2)

The petitioner testified that the video was not accurate since it did not show the volume of fruit that she was required to cut up and it did not show the tasks she was required to do in making guacamole and pico de gallo.

On October 16, 2014, Dr. Carroll issued a third report. He reviewed his report of June 11, 2014 and the EMB/NCV studies of July 29, 2014. He advised the petitioner to undergo outpatient staged bilateral carpal tunnel releases followed by three months of physical therapy and a return to full use of each hand two to three months post-surgery. Dr. Carroll wrote: "I do not have any new opinions on causal relationship based upon these studies." (Rx.3)

The petitioner claims a manifestation date of February 14, 2014, which is the first time she treated with Dr. Clark. At that time, she presented to Dr. Clark with bilateral hand pain, numbness and weakness of approximately two months duration. (Px.1)

When Dr. Visotsky first saw the petitioner on April 29, 2014, he wrote: "She presents with extreme pain in her right hand, left hand, neck and shoulders. The pain started on 02/24/2004 when she began having gradual pain in her hands and arms." (Px.2)

When Dr. Carroll first examined the petitioner on June 11, 2014, he wrote: "She developed bilateral wrist and hand complaints that she dates to March 27, 2014." (Rx.1)

The Arbitrator finds, by a mere preponderance of the evidence, that the petitioner failed to prove accident and causation. The Arbitrator finds the opinions of Dr. Carroll to be more persuasive than those of Dr. Visotsky. Dr. Visotsky's causation opinion was based on the temporal sequence of events and the lack of comorbidities. However, Dr. Visotsky did not address the mechanism of injury, that is, the petitioner's hand/wrist positions and motions while working in the produce department that allegedly led to repetitive trauma. For example, Dr. Visotsky did not address the amount of force the petitioner applied with her hands when (1) cutting/dicing the produce, (2) holding the produce or (3) stirring the dips, he did not address the various activities she performed, and he did not address whether or not the petitioner's wrists were in a flexed, extended or neutral position when she performed these activities.

Moreover, the results of the Ergonomic Work Station Assessment of the petitioner's job in the produce department of Caputo's indicate that she had a low exposure to the occurrence of bilateral carpal syndrome based on the work risk factors evaluated.

Therefore, compensation is hereby denied. All other issues are moot.

STATE OF ILLINOIS	)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Howard Williams,

Petitioner,

vs. NO. 14WC017812

Servisair,

16IWCC0088

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical, penalties and fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 26, 2015 is hereby affirmed and adopted.

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.

16IWCC0088

No bond is required for removal of this cause to the Circuit Court. 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.

DATED: FEB 1 - 2016
SJM/sj
o-12/17/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

WILLIAMS, HAROLD
Employee/Petitioner

Case# **14WC017812**

16IWCC0088

SERVISAIR
Employer/Respondent

On 5/26/2015, 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 0.08% 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:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE
CHICAGO, IL 60654

4866 KNELL O'CONNOR & DANIELWICZ
JOE NEEDHAM
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60667

16IWCC0088

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
19(B) ARBITRATION DECISION

Howard Williams
Employee/Petitioner

v.

Servisair
Employer/Respondent

Case # 14 WC 17812

Consolidated cases:

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **April 15, 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. [x] 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. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [ ] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of **March 5, 2014**,Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did not*** sustain accidental injuries that arose out of and in the course of employment.

Timely notice of the accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to either accident.

In the year preceding the injuries, Petitioner earned $**1,009.35**; the average weekly wage was $**252.35**.

On the dates of accident, Petitioner was **57** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove, by a preponderance of the evidence that an accident occurred, which arose out of and in the course of his employment by Respondent therefore, no benefits are awarded, pursuant to 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.

16IWCC0088

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) attorney's fees; 6) penalties; 7) and whether the petitioner is entitled to prospective medical treatment. *See*, AX1.

Petitioner's testimony

Mr. Howard Williams ("Petitioner") testified that his employment with Servisair ("Respondent") beginning approximately one month before the March 5, 2014 alleged date of injury. He was in good health on March 5, 2014 and was being trained to fuel commercial jetliners for United and Continental Airlines, on behalf of Respondent. Mr. James Washington, the person training him, was present in court and identified for the record. Tr. pp. 12-13.

Petitioner started training to fuel planes on March 4, 2014. He described the task and testified that on March 5, 2014, he slipped on an oily substance and fell to the ground onto both knees. He had difficulty getting up because of the oily surface, and claimed to have spent one to two minutes on the ground before he was able to regain his balance and stand. He did not call out for help, because "there was no one else out there" to assist him. The day was extremely cold and wet and upon rising, he felt pain in his knee. As he continued to work his regular shift, he walked stairs without stated difficulty but felt pain in the right knee on the trip home. He completed his shift the following day, March 6, 2014. He made no claim of a twisting component to his March 5, 2014 injury. Tr. pp.14-22.

Petitioner testified he informed Mr. Washington on March 5, 2014, that he "slipped and fell in front of the aircraft" when he returned to the fuel truck, but did not report it as a work injury because he thought it was a relatively minor accident, without injury. After completing work March 6, 2014, Petitioner called off March 7, 2014; and was not scheduled to work until March 11, 2014.

On March 11, 2014, Petitioner "called in" to inform that he would not be at work, due to right knee pain following a fall in front of a plane. He sought no treatment until April 3, 2014. On April 3, 2014, he sought treatment at the University of Chicago Hospital emergency department, with pain and swelling in the right knee. Thereafter, he had difficulty securing an appointment with Cook County Hospital and treated with Dr. Ronald Silver, who would provide him treatment without insurance, providing right knee therapy and an MRI. Following the MRI, Dr. Silver recommended right knee surgery, but would not perform it without insurance authorization.

Therapy brought about some improvement but according to the records, the right knee was not at full strength and pain medications do not alleviate the pain. The petitioner was to remain off work awaiting treatment and recovery. Petitioner testified to training logs identifying by flight number, denoting the planes fueled on March 4, 2014, and a similar record of May 5, 2015, missing the flight numbers. Tr. pp. 23-31, 33-59.

Testimony of Respondent's witness

Mr. James Washington testified that he has worked for Respondent for seven (7) years and was its lead fueler. He testified to training Petitioner on fueling duties March 4 & 5, 2014, which allowed Petitioner to be out of his sight, at times. He identified Petitioner's Exhibits 5 and 6 as the March 4 & 5, 2014 training logs, and testified that he did not know why the logs were not complete however, if March 5, 2014 was a day of high precipitation, the flight numbers would not be transcribed onto the logs, until Petitioner could do so at a dry location. Tr. pp. 60-65.

Mr. Washington stated that if Petitioner had reported an injury to him on March 5, 2014, he would have taken Petitioner to his supervisor, and the supervisor, not Mr. Washington, would have completed an injury report and taken Petitioner for medical treatment and drug screening. Mr. Washington stated it was not until the following Tuesday that he learned of Petitioner's alleged injury, and initially thought he was being informed that the petitioner injured himself at home because Petitioner did not seek medical attention for a work injury. Tr. p. 76.

Petitioner's medical records show that initial treatment began on April 3, 2014, at the University of Chicago Hospital emergency department. His initial diagnosis was knee pain, with a history of a blunt trauma to the right knee at work, two weeks prior, when he sustained a mechanical fall onto his knees. X-rays were performed and read to reveal moderate swelling and mild to moderate osteoarthritis but no acute injury; and the diagnostic impression was mild osteoarthritis, without acute fracture or misalignment. Petitioner was discharged with a knee immobilizer and crutches. PX2.

On May 21, 2014, Dr. Silver wrote a letter to Respondent's adjuster advising that he was treating Petitioner for a work injury sustained on March 4 or 5, 2014, when he fell on an oily surface. Dr. Silver described a twisting event not described in Petitioner's ER records and not alleged by Petitioner at trial. He recommended therapy and restricted Petitioner from all work. Petitioner started therapy May 23, 2014, and attended twenty-six (26) sessions prescribed by Dr. Silver between May 23, 2014 and July 22, 2014. PX3& 4.

A May 27, 2014 MRI of the right knee revealed impressions of joint effusion, a subtle tear of the posterior horn of the medial meniscus without tear of the lateral meniscus or collateral and cruciate ligaments, and a loose body in the suprapatellar bursa. The knee joint exhibited normal alignment without fracture, dislocation or bone marrow signal disruption. PX2.

Dr. Silver wrote treatment letters to Respondent's insurance company on eight separate occasions between May 30, 2014 and December 17, 2014, each time outlining his treatment plan, restricting Petitioner from working and requesting authorization to provide treatment. Petitioner's July 22, 2014 therapy record reports Petitioner "made significant progress since onset of PT" and recommended an additional 4-6 weeks of therapy. A July 30, 2014 therapy prescription from Elmwood Park Same Day Surgery Center, requested an additional five (5) weeks of therapy, with three (3) sessions per week.

That same day Dr. Silver's letter to Respondent's insurance company again sought surgical authorization, noting Petitioner would be left with permanent disability without it.

On November 24, 2014, Dr. John Cherf performed a Section 12 examination on Petitioner's right knee, and authored a written report. He took a detailed history of Petitioner's alleged accident on March 5, 2014 with Petitioner stating that his right foot slipped outward and his left foot slipped forward; he teetered for a moment and fell forward on both hands and knees. Petitioner informed Dr. Cherf the injury was witnessed by an unknown individual and reported to his trainer Mr. Washington. Dr. Cherf possessed a statement of Mr. Washington stating he was unaware of any injury sustained by Petitioner, and Petitioner stated Mr. Washington was lying because he had not complete an injury report. Petitioner informed Dr. Cherf he worked the remainder of the day and the next, but was then bedridden for a month. He secured an attorney who referred him to Dr. Silver for treatment. RX1.

Dr. Cherf reviewed Petitioner's MRI films and the report, and where the MRI report described a loose body in the suprapatellar bursa, Dr. Cherf believed the image showed a soft tissue lesion because it differed in density than bone or articular cartilage. Its location, at the anterior capsule just posterior to the fat pad, is not a bursal area and appeared attached, not loose; and there was no apparent location from which the loose body could have come. Petitioner complained of pain in the right knee, radiating into his thigh for the prior month. Examination revealed no soft tissue swelling or bruising. Squatting was limited but Petitioner did not exhibited muscle atrophy and had a full range of motion of the knee. Dr. Cherf reviewed right knee x-rays showing moderate to advanced osteoarthritis in the medial compartment, consistent with idiopathic osteoarthritis.

Upon response to specific questions, Dr. Cherf diagnosed Petitioner as having right knee idiopathic osteoarthritis, degenerative medial meniscus tear and soft tissue lesion, without traumatic loose body. According to Petitioner's treating doctor, the petitioner appeared to suffer a work-related right knee contusion with a sprain/strain, while a MRI showed no evidence of traumatic injury. Dr. Cherf opined that while it was possible that Petitioner had a temporary exacerbation of the underlying osteoarthritis without permanent aggravation, a work injury could not be attributed to causing Petitioner's osteoarthritis symptoms.

On December 17, 2014, Dr. Silver again wrote for surgical authorization, noting Petitioner's positive McMurray's test, tenderness and crepitation with swelling. PX3.

Dr. Cherf issued an addendum report dated December 18, 2014, in response to additional questions, explaining that if Petitioner's injury had traumatically induced or aggravated Petitioner's osteoarthritis, the MRI would show some evidence of bone edema or soft tissue edema or large effusion. However, these conditions were not evident, nor were there loose bodies, as explained previously. It was his opinion that Petitioner should not require restrictions relative to the alleged

work injury, and there was no basis to increase Petitioner's permanent partial impairment rating pursuant to the additional four factors enumerated under Section 8.1b.

In a separate report issued December 29, 2014, Dr. Cherf outlined the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition and its permanent partial impairment protocol, outlining the basis for Petitioner's PPI rating. Rx3.

Petitioner's medical exhibits state outstanding charges from AthletiCo Physical Therapy for $65,419.00, Elmwood Park Same Day Surgery totaling $1,138.61, Infinite Strategic Solutions billed at $1,469.46, Orthopedic Specialists of North Shore billed in the amount of $1,785.00, RX Development in the amount of $26,283.49 and University of Chicago Hospital billed in the amount of $2,158.00. They total $98,253.56, with an outstanding balance of $66,170.46, prior to Section 8.1 Fee Schedule reduction. Petitioner presented no evidence in support of the reasonableness of these bills or the necessity of the treatment provided. PX1.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a casual connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also, Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

It is the burden of every Petitioner before the Worker's Compensation Commission to establish, with evidence, every disputed issue litigated at trial, including the issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Commission* (1969), 44 Ill.2d 207 at 214, 254 N.E.2d 522, *Edward Don v Industrial Commission* (2003) 344 Ill.App.3d 643, 801 N.E.2d 18. For treatment of an employee's workplace injury to be compensable under workers compensation laws, Petitioner must establish the condition is caused by the work injury and not some other cause or condition. *Hansel & Gretel Day Care Center v Industrial Commission*, (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244. The Commission is not required to accept the opinion of a treating physician over that of an examining physician, and may give greater weight to an IME physician where the facts warrant. *Prairie Farms Dairy v. Industrial Commission*, 279 Ill.App. 3d 546, 664 N.E.2d 1150 (1996).

Petitioner testified to a slip and fall work injury wherein he landed on both hands and knees, against pavement. It took his one to two minutes to regain his footing due to the slippery surface and he had right knee pain immediately following the event. Petitioner then testifies that he informed James Washington that he was late getting back to the fuel truck because he had fallen. By Petitioner's own testimony he did not report being injured at work, did not report pain in his knee following the fall to the ground, and did not believe he had sustained a meaningful injury. Petitioner did not allege or describe a twisting event at trial and his mechanism of injury, as recorded in the University of Chicago Hospital emergency treatment records, states that he suffered a blunt trauma not a twisting event. When examined by Petitioner's Section 12 expert, Dr. John Cherf, the mechanism of injury was recorded in detail, i.e., Petitioner's right foot slipped outward (to the right) and his left foot slipped forward; he teetered for a moment and fell forward on both hands and knees, affecting his knees bilaterally.

In relating Petitioner's knee pain and need for treatment, Dr. Silver described the injury as a twisting episode resulting in meniscal tear and loose body of the knee. Dr. Silver found the totality of Petitioner's symptoms related to that twisting episode and did not relate Petitioner's mechanism of injury as an impact or blunt trauma to the knees bilaterally, as recorded in the emergency treatment and therapy records.

Dr. Cherf reviewed Petitioner's MRI films and the report, and advised that the MRI did not reveal a loose body in the suprapatellar bursa, as posited by Dr. Silver as evidence of trauma and the basis for surgery. Dr. Cherf advised that the MRI showed a soft tissue lesion and not a loose body in the suprapatellar bursa. He knew this because the object differed in density from a bone or articular cartilage loose body, was not loose but was attached; and because its location at the anterior capsule

just posterior to the fat pad, is not a bursal area and therefore there was no location from which the loose body could have derived. Dr. Cherf further explained had an injury traumatically induced or traumatically aggravated Petitioner's osteoarthritis, the MRI would have shown bone edema, soft tissue edema or large effusion; and that the MRI showed none of these conditions but did reveal a soft-tissue lesion, establishing that the knee condition was not traumatically induced.

Dr. Cherf's clinical examination also revealed no evidence of knee trauma. He documented the absence of soft tissue swelling, bruising, or muscle atrophy, and that Petitioner exhibited full range of motion of the right knee. Dr. Cherf reviewed x-rays of April 3, 2014, which showed moderate to advanced osteoarthritis in the medial compartment, consistent with idiopathic osteoarthritis. He opined that Petitioner's symptoms and need for treatment stemmed from the advanced state of his idiopathic osteoarthritis, which was neither traumatically induced nor aggravated by a fall. Despite possessing Dr. Cherf's report, Dr. Silver did not address these details, which patently contradicted his claim of a traumatically induced right knee condition.

While Dr. Silver repeatedly recorded Petitioner's treatment appointments in letters to Respondent's agents, he provided little detail of his examination and findings customarily contained in treatment records. Dr. Silver did not document the condition of the knee on visual inspection. His records did not address either the presence or absence of soft tissue swelling, bruising, muscle atrophy or any reduction in strength or tested range of motion of the right knee. Conversely, Dr. Cherf documented the absence of evidence of right knee trauma, including the absence of soft tissue swelling, bruising, muscle atrophy, weakness or restricted range of motion, noting full range of motion in Petitioner's right knee.

Dr. Silver has opined that Petitioner's right knee condition is a meniscal tear with a loose body at the suprapatellar bursa, but issued his diagnosis and causation opinion without elaboration or support, simply stating the right knee twisting event caused Petitioner's conditions. He does not delineate between new and pre-existing knee pathology or whether his interpretations of Petitioner MRI and x-ray results are based on visualizing the actual images or simply the diagnostic report; and he does not document visual evidence of traumatic injury such as bruising, contusion, abrasion or any evidence of trauma to the knee. In addition, Petitioner's records of initial treatment at University of Chicago reveal no evidence of trauma, both on visual inspection and x-ray imaging. While Dr. Silver performed his own x-rays, he appears not to have taken into account, Petitioner's April 3, 2014 right knee x-rays, which specifically ruled out signs of acute injury, while showing only swelling related to osteoarthritis.

Consistent with the University of Chicago ER records, Dr. Cherf's reports document the absence of trauma on visual inspection and with diagnostic testing. He confirmed the absence of muscle atrophy not addressed by Dr. Silver, the absence of visual evidence of trauma also not addressed by Dr. Silver, and outlined in detail the true nature of the MRI findings and the mechanism of injury as described by Petitioner. Dr. Silver appears to have accepted and parroted Petitioner's history that he had a fall at

work, causing his symptoms and conditions, without questioning the true nature of the aggravation or performing a critique of the MRI findings, as he interpreted them. Conversely, Dr. Cherf detailed his physical examination findings, the basis for his interpretation of the MRI; and the impossibility of a loose body in the suprapatellar bursa, both on its location and appearance. With Dr. Cherf performing greater investigation into the nature and cause of Petitioner's right knee condition and the mechanism of injury alleged to have occurred March 5, 2014; and providing greater detail on the nature of his diagnosis and the objective diagnostic support for his determinations, Dr. Cherf's opinions appear both better explained and well founded.

The Arbitrator is entitled to give greater weight to Respondent's Section 12 physician where the facts warrant; and in this case, Dr. Cherf's delineated opinions are more reliable than Dr. Silver's unsupported conclusions. The Arbitrator finds Dr. Cherf's opinions and conclusions more persuasive than those of Dr. Silver, based on the quality of the opinions and support provided by Dr. Cherf.

Petitioner has failed to prove, by and preponderance of the evidence that an accident occurred, which arose out of and in the course of his employment by Respondent. In that the petitioner has failed to prove an accident, the remaining disputed issues are moot and will not be addressed.

16IWCC0088

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC17812
SIGNATURE PAGE

Signature of Arbitrator

May 22, 2015
Date of Decision

MAY 26 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stephen Jones,

Petitioner,

vs. NO: 14WC 18567

State Of Illinois/Shawnee C.C., **16IWCC0045**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 2015 is hereby affirmed and adopted.

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

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

DATED: JAN 2 0 2016
o172016
DLG/mw
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JONES, STEPHEN
Employee/Petitioner

Case# **14WC018567**

16IWCC0045

STATE OF ILLINOIS/SHAWNEE C C
Employer/Respondent

On 6/25/2015, 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 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 25 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0045

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

STEPHEN JONES
Employee/Petitioner

v.

State of Illinois/Shawnee C.C.
Employer/Respondent

Case # 14 WC 018567

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. 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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 13, 2015**. By stipulation, the parties agree:

On the date of accident, **April 16, 2014**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained 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 **$55,247.00**, and the average weekly wage was **$1,062.45**.

At the time of injury, Petitioner was **30** years of age, ***single*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been (or will be) provided by Respondent.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$637.47**/week for a further period of **15** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **3% loss of the body as a whole**.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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

6/19/15
Date

JUN 25 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

STEPHEN JONES
Employee/Petitioner

v. Case # 14 018567

STATE OF ILLINOIS/SHAWNEE C.C.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FACTS

Petitioner is a 30 year old Correctional Officer who works at Respondent's Shawnee Correctional Center. (RX3). He has been employed in that capacity for 5 years. (RX3). The Parties stipulated that Petitioner sustained compensable nasal, right eye, and lip injuries that arose out of and in the course of his employment as a Correctional Officer for Respondent on 4/16/14. (T 11; AX1). Petitioner testified that he responded to a sergeant's radio call for assistance in handling an inmate. (T. 11). The verbal conflict between inmate and sergeant escalated to physical contact, and the inmate rushed the sergeant, and Petitioner was required to place the inmate against the wall. (T.11). The inmate then swung around and struck the Petitioner in the face twice. (T. 11). Petitioner took the inmate to the ground where he sustained more blows to the face and chest. (T. 11).

Following the accident, Petitioner saw his family physician, Dr. Mark Smith at Logan Primary Clinic, for a swollen right eye, swollen bridge of the nose, and trouble breathing. (T. 11, 12). Dr. Smith recommended that he follow up at the hospital. (T. 12; PX3). However, upon Petitioner arriving at Logan Primary, Logan Primary called Respondent, Shawnee Correctional Center "to confirm that the incident had happened." (T. 12). At this point, "Shawnee Correctional Center denied that it had happened." (T. 12).

Petitioner was concerned that he was not going to be treated so he left. (T. 12). Petitioner stated, "I was so afraid that it wasn't going to be taken care of, so I drove home." (T. 12). Following the accident Petitioner continued to notice pain around the top of his eyebrows and noted trouble breathing, especially through his nose. (T. 12, 13). Petitioner reported not experiencing such pain before the incident at 4/16/14. (T. 13).

On 6/16/14, Petitioner came under the care of a board certified orthopedic specialist, Dr. David Raskas, who performed a physical examination. (T. 14; PX4). While Dr. Raskas did not believe that Petitioner's neck condition required additional treatment, he strongly recommended follow up treatment with Dr. Nayak or another otolaryngologist for what was likely a nasal fracture (T.

14; PX4). Petitioner testified that despite calling the 800 number for Respondent's reporting, he had not yet received care. (T.14).

Petitioner testified to continued symptoms. He still has pain around the arches of his eyebrows, along with difficulty breathing, which hinders his regular activities of running, biking, rock climbing, and outdoor sports in general. (T. 15). Petitioner states that he gets more allergy infection due to breathing primarily through his mouth. (T. 15). Petitioner states that he gets occasional headaches. (T. 16). For the headaches and for the difficulty breathing, Petitioner occasionally uses saline solutions and takes Ibuprofen. (T. 16).

CONCLUSION

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of § 8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner continues to be employed by Respondent, State of Illinois Shawnee Correctional Center, and is able to work the same position at which he was formerly employed. Petitioner is able to perform his work, however he has difficulty breathing and occasional headaches for which he uses saline solutions and Ibuprofen. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes that Petitioner was 30 years old at the time of the accident. Because Petitioner has a number of working years ahead of him during which he must cope with his disability, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of § 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence of reduced earning capacity in the record. The Arbitrator notes that Petitioner's earnings have not been affected and the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of § 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's testimony is credible and entirely consistent with the findings in his medical records. Dr. Raskas, a board certified orthopedic specialist, noted the Petitioner's main difficulty was with breathing and recommended a referral to an otolaryngologist. Petitioner has not seen one and continues to live with a significant breathing problem as well as headaches, for which he takes Ibuprofen and uses saline spray.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability equivalent to the 3% loss of his body as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Barbara Thrush,
Petitioner,
vs.

16IWCC0051

NO: 14 WC 20713

Menards,
Respondent.

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 medical expenses, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 24, 2015, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $22,300.00. 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.

DATED: JAN 22 2016
KWL/vf
O-1/12/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

CORRECTED **16IWCC0051**

THRUSH, BARBARA
Employee/Petitioner

Case# **14WC020713**

MENARDS
Employer/Respondent

14IWCC0713

On 4/24/2015, 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 0.09% 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:

0154 KROL BONGIORNO & GIVEN LTD
CHARLES GIVEN
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602-3506

0445 RODDY LAW LTD
MICHAEL S POWALISZ
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

16IWCC0051

PMO 4/20/15

Barbara Thrush,
Employee/Petitioner

v.

Menards,
Employer/Respondent

Case # **14** WC **20713**

Consolidated cases: **none**

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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **11/14/14**. 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 **8/22/13**, 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 with respect to her right shoulder ***is*** causally related to the accident, but Petitioner's current condition of ill-being with respect to her cervical spine ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**30,460.19**; the average weekly wage was $**585.77**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services related to the right shoulder.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services relating to the right shoulder.

Respondent shall be given a credit of $**9,502.70** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**9,502.70**. (Arb.Ex.#2).

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $390.51 per week for 25 weeks, commencing 1/7/14 through 6/30/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from ~~8/23/14~~ 8/23/13 through 11/14/14, and shall pay the remainder of the award, if any, in weekly payments. PMO 4/24

Respondent shall be given a credit of $9,502.70 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $351.46 per week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in §8(d)2 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.

Peter O'Malley
Signature of Arbitrator

4/20/15
Date PMO 4/20/15

APR 24 2015

16IWCC0051

STATEMENT OF FACTS:

At the time of her injury, Petitioner was a 49 year old General Laborer and Warehouse Employee who had worked for Respondent since April 1999. On August 22, 2013, Petitioner was painting while standing on a picker approximately 5 feet off the ground. She was wearing a harness that went over her bilateral shoulders, under the bilateral buttocks, and buckled over her chest. Her right foot slipped and fell through the floor board causing her entire leg, up to her right hip, to fall through the board. Her left leg was still on the picker's platform board when this happened causing the harness to catch her. Petitioner twisted back and to the right and felt immediate pain in her right shoulder. The harness caused bruising to her right arm, right shoulder, right shoulder blade and right thigh. Petitioner is left hand dominant.

Petitioner's initial medical treatment was on September 9, 2013 when she was examined by Dr. Charles Woodward at Provena Mercy Medical Center. Petitioner was referred to this clinic by the Respondent. Petitioner complained of right shoulder pain and was unable to raise her arm past 45 degrees. She was prescribed a MRI of the right shoulder and provided with light duty work restrictions of no lifting over 5 pounds with the right arm and no pushing or pulling over 10 pounds. Respondent was able to accommodate the restrictions. (PX1).

A MRI of the right shoulder was performed at Provena Mercy Medical Center on September 19, 2013. The MRI revealed: 1. Fluid signal intensity within the subacromial/subdeltoid bursa, 2. High signal intensity in the anterior distal most aspect of the supraspinatus tendon suggestive of at least degenerative changes and tendinopathy. Partial intrasubstance injury/tear extending to the bursal surface cannot be excluded. There is also probable tendinopathy involving the subscapular tendon distally, and 3.There is at least degenerative change and possibly a labral tear involving the anterior superior labrum. (PX1).

On examination with Dr. Woodward on September 20, 2013, Petitioner had a positive Neer test and a positive Hawkins sign. Dr. Woodward prescribed and performed a cortisone injection to the right shoulder. After the injection Petitioner had a decrease in the pain. Dr. Woodward prescribed a course of physical therapy. (PX1).

Petitioner's shoulder complaints did not improve with physical therapy and on October 29, 2013, Dr. Woodward referred Petitioner to Dr. John Pinello at Castle Orthopaedics for an orthopedic evaluation. (PX1).

Petitioner was examined by Dr. Pinello on November 4, 2013. The doctor prescribed and performed an injection into the subacromial space and provided the Petitioner with light duty work restrictions of no use of the right arm. Respondent was able to accommodate the restrictions. (PX2).

Dr. Pinello re-examined Petitioner on November 19, 2013. The injection did not provide lasting relief. Range of motion in the right shoulder was limited with pain. The doctor recommended conservative treatment with the continued use of Voltaren and recommended additional physical therapy. (PX2).

On December 16, 2013, Petitioner sought a second opinion with Dr. Jeffrey Grosskopf, an orthopedic surgeon with Grosskopf Orthopedics. Dr. Grosskopf prescribed a right shoulder surgery and allowed for light duty work through the date of the surgery. Respondent was able to accommodate the restrictions. (PX3).

On January 7, 2014, Petitioner underwent right shoulder surgery performed by Dr. Grosskopf at Valley Ambulatory Surgery Center. The procedures performed included arthroscopic superior labral repair, supraspinatus tendon debridement, and acromioplasty. Petitioner postoperative diagnoses included a superior

labral tear extending into the anterior upper edge of the labrum, a 10% undersurface supraspinatus tendon tear in the anterior third, and impingement syndrome. Petitioner was taken off of work. (PX3).

Petitioner began a course of physical therapy at West Physical Therapy on January 16, 2014. (PX6).

On March 3, 2014, Petitioner underwent an injection to the right glenohumeral joint performed by Dr. Grosskopf. She was having pain at 6/10 with constant pain in the posterior upper arm and anterolateral shoulder. (PX3).

On April 3, 2014, Dr. Grosskopf prescribed and performed an injection to the right subacromial space. After five minutes Petitioner had less shoulder pain with motion and less pain into the triceps and radial forearm. Petitioner was referred to Dr. Yuan Chen, a pain management doctor because Dr. Grosskopf thought a cervical spine issue may be contributing to the pain and symptoms. Petitioner was prescribed a cervical MRI. (PX3).

The cervical spine MRI was performed on April 10, 2014 and revealed mild anterior spurring at C3-C6 with no localized herniations. (PX3).

Dr. Grosskopf re-examined Petitioner on April 14, 2014. Petitioner had pain in the base of the neck but no radiation into the arm. Range of motion in the cervical spine was reduced 25%. Petitioner was referred to Dr. Chen and advised to continue physical therapy. (PX3).

At the request of the Respondent, Petitioner visited Dr. Sean Salehi for purposes of a Section 12 examination on May 15, 2014. On examination, Petitioner was unable to raise the right arm over the horizontal plane and she had tenderness over the right shoulder, right clavicle and right armpit. Dr. Salehi opined that "the mechanism of injury described is consistent with having resulted in what appears to be primary right shoulder pathology. There is nothing in the history or documentation to suggest cervical complaints… No treatment for the cervical spine is warranted, and instead all focus should be made on the shoulder pathology which falls beyond my area of expertise. Since I do not believe there is a work injury regarding the cervical spine I will not use the term MMI regarding this region of the body. There are no work restrictions as it relates to his cervical spine." (RX1).

Petitioner was re-examined by Dr. Grosskopf on May 29, 2014. Her greatest pain was in the axilla. She had stiffness on the right side and tightness that was slowly resolving. Dr. Grosskopf related the pain complaints to the stretch trauma suffered at the time of her original injury. Dr. Grosskopf ordered a referral to Dr. Chen for pain management evaluation. Petitioner was prescribed Ultram and advised to continue physical therapy. Petitioner was kept off of work. (PX3 & PX4).

Petitioner's last physical therapy appointment was at West Physical Therapy on June 2, 2014. Petitioner attended 56 therapy sessions and at the last examination she was having scapular impairment, right lower cervical closing restrictions and tenderness over the right subscapularis musculature. No additional therapy sessions were authorized by the insurance company. (PX6).

At the request of Respondent, Petitioner was examined by Lawrence Lieber on June 30, 2014 for purposes of a Section 12 examination. On examination of the right shoulder, flexion and range of motion were decreased at the extremes due to pain. She had positive AC tenderness, positive greater tuberosity, positive impingement, positive O'Brien, positive reverse O'Brien, positive apprehension and positive Speed test. Strength was affected by pain. Dr. Lieber opined, "There appears to be a direct causal relationship between the Petitioner's subjective complaints, subsequent right shoulder surgery, and that of the isolated August 22, 2013 work event." Petitioner

was found to be at maximum medical improvement for the right shoulder condition and found 5% permanent partial impairment of the right upper extremity that converts to 3% impairment for the individual as a whole. (RX2 & RX3).

Dr. Grosskopf re-examined Petitioner on July 3, 2014. Petitioner's greatest pain was in the axilla. Dr. Grosskopf reviewed the report of Dr. Salehi and expressed confusion that the IME doctor did not address the periscapular pain which was Petitioner's biggest pain issue. Dr. Grosskopf prescribed MethylPrednisolone and advised Petitioner to remain off of work. (PX4).

On July 31, 2014, Petitioner was examined by Dr. Grosskopf. In reviewing the §12 report, Dr. Grosskopf opined, "Ms. Thrush clearly describes her worst pain in her axilla and medical scapular border. In Lieber's report, this pain is not reported at all and the pain mentioned is not described accurately. He describes her motion as decreased due to pain, yet he does not record her motion as he does for her normal shoulder. He gives her a 5% impairment of her right upper extremity, he documents some weakness and unknown degree of lost motion AND then states in paragraph 7 of his plan, 'there is no objective evidence of any functional impairment of the right shoulder area which would restrict this individual from returning to full employment, with no restrictions.' This report contradicts itself and did not even mention or address her biggest pain complaint! Unfortunately, her work comp benefits have been stopped. She has no alternative other than to try light duty work as she has no income and no health benefits since the above occurred." Petitioner was prescribed Ultram and allowed a light duty work release effective August 4, 2014 with restrictions of no lifting over 10 pounds. (PX4).

Petitioner returned to work in a light duty capacity effective August 4, 2014. Petitioner has continued to work in a light duty capacity through the date of the hearing.

Petitioner was re-examined by Dr. Grosskopf on August 21, 2014. Petitioner had pain from the shoulder blade to the axilla. There was right sided neck ache and stiffness. Petitioner was once again referred to Dr. Chen for pain management evaluation. (PX4).

Petitioner was examined by Dr. Yuan Chen on September 30, 2014. Petitioner complained of pain in the neck, right shoulder, scapula and anterior chest wall area. The pain was without numbness or tingling sensations but was with significant weakness in the right upper extremity. On physical examination there was significant tenderness on palpation in the right cervical paraspinal area. Range of motion was limited for extension, lateral flexion and rotation due to the significant discomfort in the neck and right scapula. Petitioner was diagnosed with cervical facet dysfunction and prescribed a set of cervical medial branch nerve blocks for facet treatment. The doctor's goal with the injections was to allow the deposit of the anti-inflammatory medication precisely into the irritated area to offer the Petitioner adequate pain relief. (PX5).

Petitioner was re-examined by Dr. Grosskopf on October 2, 2014. On physical examination Petitioner had tenderness on palpation at the bicipital groove. There was active abduction to 150 degrees, active forward flexion to 155 degrees, active internal rotation and external rotation at 90 degrees of abduction was 80 degrees. No weakness in the right shoulder was observed. No pain was elicited during a Neer impingement test and Speed's test was negative. Her c-spine examination remained unchanged. She had slight motion restriction with pain into the right neck and right shoulder blade with extension and bending to the right. Petitioner was allowed to continue working light duty with no lifting over 10 pounds, no over the shoulder work and no working more than 40 hours per week. (PX4).

Petitioner was re-examined by Dr. Grosskopf on November 13, 2014. Dr. Grosskopf recommended to continue treatment on the cervical spine with Dr. Chen and continued the work restrictions no lifting over 10 pounds, no over the shoulder work and no working more than 40 hours per week. (PX8).

As of the hearing date, Petitioner had continued complaints of pain and discomfort in her right shoulder and cervical spine. She is unable to lift her right arm overhead or reach for items that are over her head. She experiences an increase in shoulder pain while walking her dogs and playing with her three year old grandson. She experiences headaches and has a constant pain in the neck that she rates as a 5/10. Sleeping is difficult and she has a hard time turning her neck while driving. For pain relief she takes Tramadol at night and Ibuprofen during the day. When her pain levels are high she uses ice for pain relief.

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

Petitioner testified that she never had problems with her right shoulder before the accident on August 22, 2013. On the date of the accident, Petitioner was painting while standing on a picker approximately 5 feet off of the ground. She was wearing a harness at the time of the accident that went over her bilateral shoulders, under the bilateral buttocks, and buckled over her chest. Her right foot slipped and fell through the floor board causing her entire leg, up to her right hip, to fall through the board. Her left leg was still on the picker's platform board when this happened causing the harness to catch her. Petitioner twisted back and to the right and felt immediate pain in her right shoulder. The harness caused bruising to her right arm, right shoulder, right shoulder blade and right thigh.

At the request of Respondent, Petitioner visited Dr. Lawrence Lieber on June 30, 2014 for purposes of a §12 examination. Dr. Lieber opined that "[t]here appears to be a direct causal relationship between the Petitioner's subjective complaints, subsequent right shoulder surgery, and that of the isolated August 22, 2013 work event." (RX2).

Petitioner is also alleging that her current cervical condition is related to her work accident of August 22, 2013. However, the first mention of a cervical problem in the medical records is April 3, 2014. This is almost eight (8) months after the original accident. Petitioner underwent a cervical MRI that revealed mild anterior spurring at C3-C6. No localized herniations were revealed. Dr. Grosskopf referred Petitioner for pain management related to the cervical spine with Dr. Chen. (PX3 & PX4). Dr. Chen examined Petitioner on September 30, 2014 and diagnosed her with cervical facet dysfunction. She was prescribed a set of cervical medial branch nerve blocks for facet treatment. (PX5).

At the request of Respondent, Petitioner visited Dr. Sean Salehi on May 15, 2014 for purposes of a §12 examination. Dr. Salehi opined that "the mechanism of injury described is consistent with having resulted in what appears to be a primary right shoulder pathology. There is nothing in the history or documentation to suggest cervical complaints… No treatment for the cervical spine is warranted, and instead all focus should be made on the shoulder pathology which falls beyond my area of expertise. Since I do not believe there is a work injury regarding the cervical spine I will not use the term MMI regarding this region of the body. There are no work restrictions as it relates to his cervical spine." (RX1).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current right shoulder condition is causally related to the work accident of August 22, 2013. However, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that her current condition of ill-being

with respect to her cervical condition and need for medical treatment for same is not causally related to the work accident of August 22, 2013.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner presented medical bills from TOP Pain Center, IWP, and Grosskopf Orthopaedics. (PX4, PX5 & PX7). All of the outstanding medical bills are related to treatment for the cervical spine and post-date the §12 examination with Dr. Salehi.

Therefore, based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner failed to prove her entitlement to medical expenses related to her cervical spine, including prospective medical treatment in the form of the cervical medial branch nerve blocks prescribed by Dr. Chen. As a result, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claims that she is entitled to TTD benefits for the period between January 7, 2014 and August 3, 2014, a period representing 29-6/7 weeks. Respondent claims the benefits should have been terminated on May 22, 2014. (Arb.Ex.#1).

The Arbitrator has reviewed the evidence and finds Petitioner is entitled to TTD benefits for 25 weeks, representing the period between January 7, 2014 through June 30, 2014. The Arbitrator notes that Petitioner was found MMI with respect to the right shoulder condition effective June 30, 3014, the date of the §12 examination and impairment rating by Dr. Lieber. (RX2 & RX3). Prior to June 30, 2014, no doctor had released Petitioner to return to work full duty with respect to the shoulder condition. Dr. Salehi released Petitioner on May 15, 2014 for the cervical condition but deferred any issues on the shoulder to a shoulder specialist. Petitioner was off of work and receiving medical treatment for the right shoulder condition through June 30, 2014 when Dr. Lieber found Petitioner to be at maximum medical improvement.

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner was temporarily totally disabled from January 7, 2014 through June 30, 2014, for a period of 25 weeks pursuant to §8(b) of the Act.

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

The Arbitrator notes that even though this matter was tried pursuant to §19(b) of the Act, the parties agreed that if the Arbitrator determined that Petitioner's condition had reached maximum medical improvement, the Arbitrator could rule on the issue of nature and extent. Based on the Arbitrator's finding to the effect that Petitioner failed to prove that her current condition of ill-being with respect to her cervical spine was causally related to the accident (issue "F", supra), and that Petitioner's condition with respect to her right shoulder had reached MMI as of June 30, 2014 (issues "F" & "K", supra), the Arbitrator finds it appropriate to make a determination as to the nature and extent of the injury.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that the record contains an impairment rating by Dr. Lieber of 5% of the right upper extremity, which the doctor indicated translated to 3% impairment of a whole person pursuant to the most current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. (RX2). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a general laborer and warehouse employee at the time of the accident and that she returned to work in that capacity, and continues to do so as of the hearing date.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 49 years old at the time of the accident. (Arb.Ex.#1).

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that there is no evidence that Petitioner's future earnings capacity has been appreciably diminished as a result of the accident.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner underwent right shoulder surgery performed by Dr. Grosskopf at Valley Ambulatory Surgery Center on January 7, 2014. The procedures performed included arthroscopic superior labral repair, supraspinatus tendon debridement, and acromioplasty. Petitioner postoperative diagnoses included a superior labral tear extending into the anterior upper edge of the labrum, a 10% undersurface supraspinatus tendon tear in the anterior third, and impingement syndrome. (PX3). Petitioner completed a course of physical therapy at West Physical Therapy. (PX6).

Petitioner was examined by Dr. Lieber at the request of Respondent on June 30, 2014. On examination of the right shoulder, flexion and range of motion were decreased at the extremes due to pain. She had positive AC tenderness, positive greater tuberosity, positive impingement, positive O'Brien, positive reverse O'Brien, positive apprehension and positive Speed test. Strength was affected by shoulder pain. (RX2).

Petitioner was examined by Dr. Grosskopf on October 2, 2014. On physical examination Petitioner had tenderness on palpation at the bicipital groove. There was active abduction to 150 degrees, active forward flexion to 155 degrees, active internal rotation and external rotation at 90 degrees of abduction was 80 degrees. (PX4).

The determination of PPD is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of PPD, consideration is not given to any single enumerated factor as the sole determinant. Therefore, after applying §8.1b of the Act and considering the relevance and weight of all these factors, including Dr. Lieber's AMA impairment rating, the Arbitrator finds that sustained permanent partial disability to the extent of 12.5% person-as-a-whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The parties submitted into evidence an agreed stipulation to the effect that Respondent paid $9,502.70 in temporary total disability benefits in this claim. (Arb.Ex.#2). The Arbitrator notes that this amount supersedes the amount the parties had originally agreed to in the Request for Hearing form (Arb.Ex.#1).

Therefore, Respondent is entitled to a credit for TTD paid in the amount of $9,502.70.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brandon Ridgeway,
Petitioner,

vs.

NO: 14WC 25215

DuQuoin Impact Incarceration Program,
Respondent,

16IWCC0082

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2015, is hereby affirmed and adopted.

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

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

DATED: FEB 1 - 2016
o012116
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RIDGEWAY, BRANDON
Employee/Petitioner

Case# 14WC025215

16IWCC0082

DuQUOIN IMPACT INCARCERATION PROGRAM
Employer/Respondent

On 7/2/2015, 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 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
FARRAH HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

JUL 2 - 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0082

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Brandon Ridgeway
Employee/Petitioner

v.

DuQuoin Impact Incarceration Program
Employer/Respondent

Case # **14** WC **25215**

Consolidated cases: **N/A**

The only disputed issue is the nature and extent of the injury. 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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 13, 2015**. By stipulation, the parties agree:

On the date of accident, **June 23, 2014**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained 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 $**66,711.91**, and the average weekly wage was $**1,282.93**.

At the time of injury, Petitioner was **35** years of age, ***married*** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been (or will be) provided by Respondent.

Respondent shall be given a credit of $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $**721.66**/week for a further period of **20** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **4% loss of the body as a whole.**

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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

6/22/15
Date

JUL 2 - 2015

Brandon Ridgeway v. DuQuoin Impact Incarceration Program
IWCC No. 14-WC-25215

Petitioner is a 35-year-old correctional officer at DuQuoin Impact Incarceration Program. Petitioner alleged a date of accident of June 23, 2014, for injuries he sustained to his back after slipping and falling on water. This case proceeded to a full hearing before Arbitrator Edward Lee at the Herrin docket on May 13, 2015. The issues at trial included causal connection as to nature and extent, medical bills, and nature and extent.

On June 24, 2014, Petitioner presented to Dr. Jodi Fox-Altug at SIMCA. He reported that he was running the shower line at work on a wet floor on 6/23/14 when he slipped and fell flat on the floor. Petitioner reported a sharp pain and numb sensation in the left gluteal area. He reported he was very stiff. Petitioner reported pain in the lumbar spine radiating to the left lower extremity. Petitioner reported that the pain was interfering with his sleep and work. Physical examination revealed tenderness of the spinous process at L3 and the transverse process on the right at L3. Soft tissue palpation on the left produced tenderness of the paraspinal region at L3. Petitioner exhibited pain with both active and passive ranges of motion. Petitioner was assessed with low back pain. X-rays were recommended. Petitioner was started on a Medrol taper. Ice was recommended. Petitioner was to stay off work for one week. Petitioner was to return for reevaluation.

On June 24, 2014, Petitioner underwent x-rays of the lumbosacral spine at Union County Hospital. The findings revealed slight narrowing of the L5-S1 disc space. There was no fracture. There was minor spondylosis. There was slightly asymmetric SI joint sclerosis. The radiologist's impression was: "[m]inor disc space narrowing with minimal arthritis."

On July 1, 2014, Petitioner returned to Dr. Jodi Fox-Altug for a follow-up on back pain with some improvement. Petitioner reported he was experiencing tightness across the lumbar area. Petitioner noticed some burning in the right hip when prolonged sitting. Petitioner had not lifted or worked out all week. He still felt tight. Physical examination revealed tenderness of the spinous process at L4 and the transverse process on the right at L4. Petitioner exhibited tenderness of the paraspinal region at L4. Petitioner reported pain with both active and passive ranges of motion. Dr. Fox-Altug reviewed the x-rays of the lumbar spine which revealed minimal disc height change at L5. Petitioner reported some burning in the right hip. Dr. Fox-Altug recommended that Petitioner continue NSAID and was referred to physical therapy. Dr. Fox-Altug recommended an MRI of the lumbosacral spine. Petitioner was to remain off work and was scheduled for a follow-up in two weeks.

On August 4, 2014, Petitioner presented to Dr. David Raskas with a chief complaint of some tightness in his back and occasional numbness in his left glut. Petitioner reported a consistent history of the accident on June 23, 2014, and his subsequent medical treatment. Petitioner reported that he had not returned to work since the accident. Petitioner's pain score was a 3-4/10. Petitioner reported exercising 4 times a week as tolerated. His hobbies included weight training, bike riding and golf. After a physical examination, Dr. Raskas' impression was Petitioner suffered from a lumbar strain/low back strain. Dr. Raskas recommended work conditioning for two weeks. At that point, Petitioner could return to work regular duty.

On August 18, 2014, Petitioner returned to Dr. Raskas after completing physical therapy. Petitioner's pain score was a 1. He reported that it got a little bit flared up on Friday. His left lower back area, but it just went away. Petitioner thought he was recovering well from his lumbar strain. Physical examination revealed full range of motion. Petitioner had normal strength and normal gait. He moved around the room easily. He went from sitting to standing and standing to walking without any dyskinetic motion of difficulty. Petitioner was returned to work without restrictions. He was to return in six to eight weeks. If everything was okay, he would be released from care at that point.

On October 7, 2014, Petitioner returned to Dr. Raskas. He returned to work full duty after the last appointment and was back to weight lifting. Petitioner had minimal back discomfort. His back pain seemed to be triggered with running. Petitioner reported that he works at a boot camp and runs several miles per week. Petitioner reported that his symptoms improve after taking an anti-inflammatory medicine. Petitioner had been taking Meloxicam but no longer had a prescription for this. Petitioner had done well recovering from his low back strain. He was back to work full duty and regular activities of daily living at home. Physical exam revealed full range of motion. Petitioner exhibited normal strength and gait. He moved around the room easily. He was given a prescription for Meloxicam. Petitioner was placed at maximum medical improvement. If he needed additional refills on Meloxican, he was instructed to contact his primary care physician.

Petitioner testified that he experiences tightness in his back with mowing grass, weed eating, shoveling. He testified that he can't run over a mile anymore. Petitioner testified that if he overdoes it, he sometimes experiences a sharpness down his left butt cheek. Petitioner testified that he takes Aleve. Petitioner testified that while he runs with the inmates, this is not a requirement of his job and that it is voluntary.

Therefore, the Arbitrator concludes the following:

1. In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a) [obtained through the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. 820 ILCS 305/8.1b(b). The Arbitrator finds no percentage of impairment pursuant to the AMA in the record. Petitioner was thirty years old on the date of accident. As a result of the alleged accident, Petitioner sustained injuries to his low back. There was no evidence that Petitioner sustained any impairment in his future earning capacity. The testimony of Petitioner with regard to continuing complaints was corroborated by the medical records. Given Petitioner's medical treatment and complaints, he is entitled to 4% loss of use of the man as a whole.

2. Respondent shall pay for reasonable and necessary medical bills as outlined in Petitioner's Exhibit #1, pursuant to the Illinois Medical Fee Schedule. Respondent shall receive a credit for all medical bills previously paid, including any bills paid by group health. Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carlos Lopez,

Petitioner,

vs. NO: 14 WC 27884

16IWCC0100

Channel Distribution,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, with expansion, as stated below, said Decision being attached hereto and made a part hereof.

Not unlike the practitioner's that appear before us, the Commission is equally troubled by the language of the Illinois Supreme Court in the matter of *Interstate Scaffolding v. Workers' Compensation Commission*, 236 Ill.2d 132, 135-36, 923 N.E.2d 266, 268 (2010) and the Appellate Court in its progeny. We have been left with a fact specific decision that has been alleged to be all encompassing and all powerful. To say the least, the decision has left room for great consternation amongst the panels.

In the matter before us, we possess a record that is neither illusive nor unclear. Rather, the record demonstrates that the Decision of the Arbitrator was simple and straight forward.

The primary issue before the Commission is whether or not the Petitioner left his position of employment voluntarily. By his theory of the case, the Petitioner would have us believe that this was either a forced resignation or a firing. The Commission finds it impossible to believe that a resignation is either forced or a firing, when the Petitioner had an opportunity to discuss his status with his then attorney and, after that conversation, decided to separate from the Respondent.

If the Petitioner's decision to terminate was voluntary, how then would he be entitled to receive continuing TTD benefits? To so find would create a legal absurdity. A voluntary resignation vitiates any obligation on the part of the employer to pay TTD, when the Petitioner is capable of light work and has been provided work within his restrictions. To find the opposite would encourage resignations with an expectation of the payment of continuing TTD benefits ad infinitum.

The Commission recognizes the plight of the Petitioner. His employment capacity is extremely limited and he may be entitled to TTD at a point in time in the future. If he is found to be temporarily totally disabled in the future, he will be entitled to TTD.

By the record before us, the Petitioner was not fired and was not forced to resign. He did so voluntarily. He did so with the advice of his counsel. He did so despite the fact that he was only capable of light work. He did so despite the fact that the Respondent was providing work within his restrictions. He did so despite the fact that he was not released to return to work at MMI or full duty. He did so despite the fact that he was given an opportunity to rectify any issues he had with the TSA.

Not unlike the Petitioner, this Commission is also obligated to consider the plight of the Respondent.

Here, the employer was providing light duty work to the Petitioner as he was not at MMI. Here, the Petitioner was notified by the TSA that the Petitioner was legally disqualified from working in any capacity for the Respondent as Petitioner had provided false or invalid identification information. Here, the entire work staff of the Respondent was TSA Certified. Here, other employees who had worked for the Respondent and received similar letters from the TSA were given an opportunity to straighten out their TSA status or they were terminated. Here, the Petitioner was given that same opportunity and instead chose to resign.

Therefore, Petitioner effectively removed himself from his position with Respondent by his own volition, thereby relinquishing his rights to additional temporary total disability benefits subsequent to his resignation. The Commission specifically finds that Petitioner's separation from Respondent's employ did not represent "constructive termination" in that he was allowed the opportunity to rectify the TSA's concern regarding his immigration status, and chose not to. As a result, the Commission views Petitioner's resignation as akin to an individual's retirement or voluntary refusal to work in a position within his restrictions. As such, this case is distinguishable from the cases of *Interstate Scaffolding*, supra and *Matuszczak v. Workers' Compensation Commission*, 22 N.E.3d 341, 387 Ill.Dec. 296 (2nd Dist. 2014), wherein the claimants were terminated from their employment for cause. Accordingly, the Commission affirms the Arbitrator's determination that Petitioner failed to prove his entitlement to ongoing TTD benefits subsequent to his resignation on August 13, 2014.

All else otherwise affirmed and adopted.

16IWCC0100

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's claim for additional temporary total disability benefits from August 14, 2014 through December 9, 2014, the date of arbitration, is hereby denied.

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.

DATED: FEB 4 - 2016

Michael J. Brennan

Kevin W. Lamborn

o:11/24/15
TJT/pmo
51

DISSENT

This case once again presents us with a fact scenario wherein workers' compensation benefits due an injured worker, specifically temporary total disability benefits, have been cut off by an employer and its insurer prior to an individual's attainment of maximum medical improvement for conduct unrelated to his work injury. Since the majority opinion seeks to justify the cessation of these benefits based on an analysis of the circumstances surrounding the termination of employment (i.e. the reasons why he lost his job), and not on the question of whether or not the claimant's condition had stabilized, in clear contravention of the dictates of *Interstate Scaffolding* and *Matuszczak*, infra, I respectfully dissent.

The evidence shows that Petitioner had worked for Respondent for approximately eleven years, driving a forklift and loading containers. At the time of his employment separation and the cessation of TTD benefits, Petitioner was working for Respondent in a light duty capacity following his undisputed work injury. The record shows that pursuant to background checks issued by the TSA in the summer of 2014, Petitioner was asked to submit information concerning his immigration status. Since Petitioner admittedly did not have the proper immigration papers, he was left with the choice of either resigning or being fired. After consulting with his first attorney, Petitioner chose to resign so as to avoid having to explain a firing to future potential employers. Petitioner thereupon signed the preprinted "voluntary" resignation form supplied to him by Respondent on August 13, 2014.

In *Interstate Scaffolding*, the Illinois Supreme Court held that "... when an employee who is entitled to receive worker's compensation benefits as a result of a work-related injury is later terminated for conduct unrelated to the injury, the employers' obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized and has reached [MMI]." *Interstate Scaffolding v. Workers' Compensation Commission*, 236 Ill.2d 132, 135-36, 923 N.E.2d 266, 268 (2010).

16IWCC0100

In attempting to distinguish *Interstate Scaffolding* and *Matuszczak*, the Arbitrator focused on the supposed "volitional" nature of the separation on the part of Petitioner, and the fact that "[t]he claimant's inability to work for his pre-injury employer is linked inextricably to his own personal decisions and actions ..." (Arb.Dec., p.3). However, the court in *Matuszczak* specifically noted that "while the Commission may examine the facts of a particular case and find the claimant refused light-duty work offered by his employer, in doing so, it should consider the claimant's conduct without reference to, or reliance on, his termination from employment. As discussed, ***the simple fact that a claimant committed a voluntary act and, as a result, was properly discharged is not a valid basis for terminating or suspending TTD.***" *Matuszczak v. Workers' Compensation Commission*, 22 N.E.3d 341, 387 Ill.Dec. 296 (2nd Dist. 2014) (Emphasis added). Indeed, the *Matuszczak* court went on to state that "[i]n reaching its decision, the court [in *Interstate Scaffolding*] rejected this court's finding that the critical inquiry in determining a claimant's entitlement to TTD benefits when leaving the workforce was whether the departure was voluntary." *Matuszczak*, 22 N.E.3d at 345; citing *Interstate Scaffolding*, 923 N.E.2d at 268.

In addition, as in *Matuszczak*, this is not a case where the claimant refused work within his physical restrictions. Indeed, Petitioner was working in a light duty capacity for Respondent at the time of his "voluntary" termination and in all likelihood would have continued to do so up to the date of his subsequent surgery.

Furthermore, one has to question whether, as a practical matter, Petitioner was really given much of a choice in the matter, other than his preferred method for ending his employment with Respondent. While Petitioner's failure to maintain the necessary immigration papers can in no way be condoned, there is no requirement under the Act that one show proof of citizenship to be entitled to benefits. In addition, after having already employed Petitioner for approximately eleven years, without the apparent need to verify his immigration status, there is no evidence to show that Respondent did not have jobs available within Petitioner's restrictions in an area that would not be subject to TSA and national security concerns. Indeed, Respondent's human resource administrator, Cyndy Kuborn, acknowledged that at the time of his "resignation" Petitioner had been working a desk job doing paperwork while on light duty, a position where he admittedly would not be left unattended with cargo and which would presumably satisfy the TSA's security concern relative to his regular job as a fork lift driver. And while Ms. Kuborn testified that everyone in the building was TSA certified, there is no evidence that this was necessarily mandated by the TSA for all job classifications, particularly those that did not involve being around cargo.

Instead, Respondent used the TSA's request for immigration papers as a pretext to unilaterally cut off TTD benefits prior to the stabilization of Petitioner's condition, and as such the decision of the Arbitrator should be reversed and TTD benefits awarded from August 14, 2014 through the date of arbitration on December 9, 2014. To the extent the majority opinion attempts to engage in a public policy debate by dwelling on certain moral considerations at the expense of the clear dictates of the appellate and supreme courts in *Interstate Scaffolding* and *Matuszczak*, I dissent.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

LOPEZ, CARLOS
Employee/Petitioner

Case# **14WC027884**

CHANNEL DISTRIBUTION
Employer/Respondent

16IWCC0100

On 1/12/2015, 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 0.11% 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:

4375 LAWRENCE MACK PC
LARRY MACK
233 S WACKER DR SUITE 2101
CHICAGO, IL 60606

4412 ACCIDENT HOLDINGS INC
NICOLE BUBAN-HANLON
200 W MADISON ST SUITE 3850
CHICAGO, IL 60606

16IWCC0100

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Carlos Lopez
Employee/Petitioner

v.

Channel Distribution
Employer/Respondent

Case # 14 WC 27884

Consolidated cases: _____

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 **Joshua Luskin**, Arbitrator of the Commission, in the city of **Chicago**, on **December 9, 2014**. 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. [ ] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0100

FINDINGS

On the date of accident, **2/5/14**, 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 $**33,273.24**; the average weekly wage was $**639.87**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services incurred to date. Prospective medical care has not been disputed as of the date of trial and as such no findings regarding any such services are made at this time.

Respondent shall be given a credit of $**7,922.20** for TTD, $**556.64** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**8,478.84 (all appropriate benefits accrued through 8-13-2014)**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

For reasons set forth in the attached decision, the respondent is not liable for temporary disability benefits from August 14, 2014 through the date of trial.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary or permanent disability, if any.

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

January 12, 2015
Date

ICArbDec19(b)

JAN 12 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARLOS LOPEZ, Petitioner,	)	
vs.	)	No. 14 WC 27884
CHANNEL DISTRIBUTION CORP., Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Section 19(b) of the Act. Prior to the hearing, the parties acknowledged that the only matter presently in dispute was the entitlement of the claimant to temporary disability benefits, and that as of the date of trial, the claimant was pending surgery which had previously been authorized by the respondent as causally related to the original injury.

STATEMENT OF FACTS

The petitioner, 37 years old at the time of the accident, began working for the respondent, a warehouse and distributorship, in early 2005. His job involved driving a forklift and loading containers in furtherance of their shipping and receiving activities.

On February 5, 2014, the claimant suffered an undisputed workplace accident, resulting in an ankle surgery with hardware implantation. The respondent paid for the medical care in question as well as temporary disability benefits following the accident. After his accident and during the petitioner's recovery, the claimant was released to light duty work by his medical provider, Dr. Karnezis. The respondent accommodated the claimant's work restrictions at that time. On the date of trial, December 9, 2014, the petitioner testified that he was expecting to undergo a second surgery to remove the hardware and remains on light duty per his doctor's recommendations. See also PX1. The respondent acknowledged and has authorized the hardware removal procedure.

In the summer of 2014, the Federal Transportation Security Administration (TSA) sent letters to the respondent concerning background checks and certification for its employees; as the respondent is involved in international shipping and receiving, TSA certification is required for anyone handling cargo. See also RX4. The petitioner received one such letter, advising his immigration documents were possibly fraudulent, and requesting he submit any information he had regarding this issue. See RX1.

Following the receipt of this letter, the employer advised the claimant on or about August 4, 2014 that he had three options: he could present sufficient proper paperwork to clear the situation with the TSA, he could resign, or he could be fired. See also RX2 and RX3. The claimant left with the letter to consider his options.

The claimant signed his Application for Adjustment of Claim on August 5, 2014; see Arb.Ex.II. He discussed this matter with his first attorney, and admitted at the date of hearing that he did not have proper immigration papers. He believed his options were to resign or to be fired. Following discussions with his attorney, the claimant elected to resign rather than be fired; he testified that he believed it would be better for him to tell potential future employers that he resigned, rather than report that he had been fired. He handed in his resignation on or about August 13, 2014. See also RX2, RX3.

Following his resignation, the TSA sent the claimant another letter suspending his security certification to work with cargo. See RX4.

The petitioner testified that he had no intention to leave his employment, and absent the TSA investigation would not have resigned. At the time the petitioner resigned, he had been working light duty but could not perform his usual job duties. The respondent has not paid temporary disability benefits, whether partial or total, since his resignation. The petitioner is not presently working, nor looking for work, and testified that he expects to undergo the surgical hardware removal in December 2014.

Ms. Cindy Kuborn, the respondent's Human Resources Administrator, testified on behalf of the respondent company. She knew the petitioner as one of the respondent's employees and knew that he had been injured at work. She testified he had returned to work on light duty, which the respondent had a policy to accommodate if possible. She testified the TSA had sent similar letters regarding other employees and that the respondent, following consultation with an employment attorney, had offered its employees leaves of absence to straighten any issues out with the TSA, or offered the employees resignations; she admitted that an employee who refused to do either would have been fired. She testified the handwritten notes on RX3 were her notes. She testified that absent the TSA investigation the claimant would still be working for the respondent.

OPINION AND ORDER

As stipulated by the parties, the sole issue in dispute at this time is the question of the petitioner's entitlement to temporary total disability benefits from August 14, 2014 through the date of trial.

The claimant admitted that he had the meeting regarding his options and received the resignation offer form on August 4, 2014. He testified he discussed his options with counsel and thereafter decided to sign the voluntary resignation form and return it to the employer on August 13, 2014.

The claimant argues that while he did sign and tender the voluntary resignation form, he would have been fired had he not done so. As such, the claimant argues[1], this resignation constituted a constructive termination, and as the claimant is still under medical work restrictions inconsistent with his usual occupation and is not yet at MMI, this case should fall within the holding of *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 266 Ill.2d 132, 923 N.E.2d 266 (2010). Accordingly, per that argument, TTD would be due and owing following August 14, 2014.

The Arbitrator also notes the recent case of *Matuszczak v. Industrial Commission*, 2014 IL App (2d) 130532WC (2nd Dist. 2014). There, a Wal-Mart employee was terminated while on light duty after the employer discovered that he had stolen cigarettes on several days. The Commission denied the petitioner's TTD request, finding the claimant's theft (and termination for it) to be a constructive rejection of light duty work. The Appellate Court rejected that analysis and reinstituted the TTD, noting that whether the discharge was justifiable was not material to the workers' compensation case. In doing so, they discounted the notion of a constructive rejection of light duty, and in accordance with that reasoning, a constructive termination argument must similarly be discounted for purposes of this analysis.

The Arbitrator has reviewed the above cases in detail. In each of those above-cited matters, the deciding Court noted that regardless of the justifiability of the basis for the employer's decision to terminate the claimant, the ultimate choice to do so rested with the employer. That is, termination of the employee was a volitional action by the employer. But in this case, however, any termination of the employee by the respondent would not be volitional; rather, the respondent is legally prohibited from keeping him on staff under Federal law regarding both immigration and national security.

Moreover, the Arbitrator observes that the above Courts noted that extraneous actions by the claimant (graffiti in the *Interstate Scaffolding* case, theft in the *Matuszczak* case) were not related to the raw ability to perform employment duties, and therefore not sufficient to terminate TTD eligibility. However, both Courts also noted that a claimant's refusal of accommodated work would still be a reason to terminate TTD, recognizing that an employee does maintain some responsibility for his vocational status.

In this case, the evidence is clear that absent the obstacle posed by claimant's immigration status, a status for which he himself had ultimate responsibility and control, he would still be employed, and because of his failure to secure legal immigration status, his employer would be breaking the law to continue his employment. The claimant's inability to work for his pre-injury employer is linked inextricably to his own personal decisions and actions; therefore, the Arbitrator finds this matter distinguishable from *Interstate Scaffolding* and *Matuszczak*. The requested TTD benefits from August 14, 2014 through the date of trial are denied.

[1] In so arguing, he apparently concedes that if he had legal immigration status (either naturalization or a work visa), he would have been able to resolve the TSA screening concerns and would not have been in the position to have to make such a choice.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randy Bolen,
Petitioner,
vs.

NO: 14 WC 31814
16IWCC0067

D & L Drainage, LLC,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, notice, medical expenses, evidence and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2015, is hereby affirmed and adopted.

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.

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.

DATED: JAN 28 2016
KWL/vf
O-1/25/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF 19(b) ARBITRATOR DECISION

16IWCC0067

BOLEN, RANDY
Employee/Petitioner

Case# 14WC031814

D & L DRAINAGE LLC
Employer/Respondent

On 7/1/2015, 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 0.11% 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:

4707 LAW OFFICE OF CHRIS DOSCOTCH
DAMON YOUNG
2708 N KNOXVILLE AVE
PEORIA, IL 61604

0264 HEYL ROYSTER VOELKER & ALLEN
DANA J HUGHES
300 HAMILTON BLVD PO BOX 6199
PEORIA, IL 61601-6199

STATE OF ILLINOIS)
)SS.
COUNTY OF Peoria)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0067

Case # 14 WC 31814

Randy Bolen
Employee/Petitioner

v.

D & L Drainage, LLC.
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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **May 20, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

16IWCC0067

FINDINGS

On the date of alleged accident, **January 5, 2014**, 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 not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this alleged accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the alleged accident.

In the year preceding the alleged injury, Petitioner earned $**27,040.00**; the average weekly wage was $**520.00**.

On the date of alleged accident, Petitioner was **48** years of age, ***married*** with **0** dependent children.

ORDER

The Arbitrator has found that the Petitioner failed to prove that an accident occurred which arose out of and in the course of his employment with the Respondent and failed to prove any current condition of ill-being which is causally related to his employment by the Respondent. The Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Arbitrator Anthony C. Erbacci

June 22, 2015
Date

14 WC 31814
ICArbDec19(b)

JUL 1 - 2015

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FACTS:

On January 5, 2014 the Petitioner was employed by the Respondent as a laborer, having been so employed since July of 2013. The Petitioner testified that his job duties consisted primarily of digging ditches in farmer's fields. The Petitioner testified that January 5, 2014, which was a Sunday, was a cold day and that he worked that day digging ditches with "Doug", a co-worker. The Petitioner testified that his hand began to hurt him and that, while they were on their way home, he told "Doug", a co-worker, that his hand hurt. The Petitioner testified that he thought at the time that it could have been frostbite. The Petitioner testified that the next day, he went to work and told Bill Doubet, the Respondent's owner, that his fingers "were all messed up". The Petitioner testified that he continued to work his regular job with the Respondent "off and on" until May of 2014 when he quit and started another job at We Start Farms doing general carpentry work. The Petitioner testified that he continued to work and his hand continued to hurt and be swollen.

On August 7, 2014, the Petitioner sought medical treatment with Dr. Gross at OSF Medical Group. The Petitioner was noted to have complaints of arthritis with pain and stiffness in the fingers of both of his hands and some locking of the right ring finger. It was also noted that the Petitioner's arthritis was "a chronic problem" with the "current episode" starting one year ago and gradually worsening. The Petitioner was diagnosed as having osteoarthritis and a right ring trigger finger and he was prescribed medications. Referral to a hand surgeon was also considered.

On September 10, 2014, the Petitioner was referred to Hand Surgery at Midwest Orthopedics for his right ring trigger finger. The Petitioner testified that he did not see anyone at Midwest Orthopedics because he had no insurance and could not afford to pay for the visit. The Petitioner testified that the swelling in his hand was reduced but he continued to experience locking of the right ring finger.

The Petitioner next came under the care of Dr. Robert Seidl on February 12, 2015. Dr. Seidl noted the Petitioner's history of an injury to his right hand in January of 2014 while employed by the Respondent. Dr. Seidl noted that the Petitioner's work included digging ditches and holes and that "this was in cold weather when it occurred".Dr. Seidl also noted that "When he continued to work for several months at that job, his increased work activities would aggravate that injury causing more pain, swelling as well as active triggering." Dr. Seidl diagnosed the Petitioner as having a right 4th trigger finger and he opined that "given his activities in January and his symptoms that arose at that time, that his work at a minimum aggravated this condition causing and/or aggravating." Dr. Seidl prescribed a surgical release of the A-1 pulley for the Petitioner.

The Petitioner testified that he was refered to Dr. Seidl by a friend. The Petitioner also testified that he would like to avail himself of the surgery prescribed for him by Dr. Seidl.

One of the Respondent's co-owners, Bill Doubet, testified that none of the Respondent's employees were working on January 5, 2014, which was a Sunday. In

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rendering this testimony, Mr. Doubet relied on a written calendar that he prepares documenting his whereabouts each and every day. His calendar reflected that it was snow and blowing with a high of eight degrees on January 5, 2014. Mr. Doubet testified that he was sure, based on those weather conditions, that his employees were not working on January 5th of 2014. Mr. Doubet testified that, for the same reason, neither he nor any of his employees were working on Monday January 6th of 2014, which, according to his calendar, was an even colder day. Mr. Doubet testified the Petitioner did not report a work-related accident at all during the course of his employment with the Respondent and that he first became aware of the Petitioner's alleged accident when he received a letter from the Petitioner's attorney dated September 8, 2014, approximately eight months after the date of the Petitioner's alleged work accident.

Janet Doubet, the Respondent's other co-owner, also testified that, based upon the documentation she keeps in the normal course of the Respondent's business, the Petitioner was not working for the Respondent on January 5, 2014, nor was he working on January 6th of 2014, the day on which he alleged he told Bill Doubet about his alleged accident.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his calim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden here. Specifically, the Arbitrator finds that the Petitioner failed to prove that on January 5, 2014 an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent.

In so finding, the Arbitrator notes that the Petitioner sought no medical treatment for his alleged injuries until he saw Dr. Gross on August 7, 2014, six months after his alleged injury. Dr. Gross' office note of that date contains absolutely no mention of a work injury or the Petitioner's work and, instead, indicates that the Petitioner's problem is a "chronic" one with the "current episode" starting one year ago. The Arbitrator also notes the credible and persuasive testimony of Bill and Janet Doubet, the Respondent's co-owners, that the Petitioner was not working on January 5, 2014, the date of the alleged accident, or on January 6, 2014, the date he allegedly told Bill Doubet about his accident. The Arbitrator further notes that the first mention of a work accident or injury in the Petitioner's medical records appears in in the February 12, 2015 office note of Dr. Seidl, more than one year after the Petitioner's alleged accident. Even then, there is no actual description of an alleged accident but merely a reference that an injury occurred while digging in cold weather.

Based upon the foregoing, and having considered the totality of the credible evidence

16IWCC0067

adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Arbitrator has found that the Petitioner failed to prove that an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent. Thus determination of the remaining disputed issues is moot. Assuming, arguendo, that an accident did occur which arose out of and in the course of the Petitioner's employment with the Respondent, the Arbitrator finds that the Petitioner failed to prove any condition of ill-being which is causally related to that alleged accident.

In so finding, the Arbitrator notes that the medical treatment records of Dr. Gross indicate that the Petitioner suffered from a chronic condition of osteoarthritis and that the Petitioner saw Dr. Gross on August 7, with complaints related to this longstanding arthritic condition. The medical treatment records contain no description of a work-related accident, or any acute incident whatsoever. While Dr. Gross did diagnose the Petitioner with a right fourth trigger finger and refer him for orthopedic evaluation and treatment of that condition, there is no indication that the condition is related to anything other than the Petitioner's arthritis, which was described as a constant and gradually worsening condition in the Petitioner's bilateral hands.

The Petitioner's own testimony lends further support for the Arbitrator's finding of no causal connection between the Petitioner's condition of ill-being with respect to his right fourth finger and his work duties for the Respondent on or about January 5, 2014. The Petitioner testified that following the alleged accident, he continued to work for the Respondent through May of 2014. The Petitioner sought no medical treatment for his right fourth finger condition during this time. In May of 2014, the Petitioner took a job working as a carpenter for We Start Farms. This job for We Start Farms required use of the Petitioner's right hand to perform carpentry duties. The Petitioner next sought medical treatment for his hands in August of 2014, approximately three months after he began working as a carpenter for We Start Farms. The Petitioner was able to continue to work as a laborer for the Respondent until he terminated that employment in May, and it was not until after he worked for three months as a carpenter for We Start Farms that he sought medical treatment for his right hand/right finger condition. These facts suggest that the Petitioner's work duties for the Respondent in January of 2014 did not cause the condition or contribute to the symptoms that lead the Petitioner to seek medical treatment for his right hand or right fourth finger in August of 2014.

While the Arbitrator notes the opinions of Dr. Seidl, the Arbitrator finds those opinions to be unpersuasive in the instant matter. The Arbitrator notes that the Petitioner did not see Dr. Seidl until February of 2015, nearly 13 months following the alleged work injury, and that there is no specific description of a work accident contained in Dr. Seidl's note of that visit. It is not

clear from Dr. Seidl's note that he understood the mechanism of injury and the basis of his opinion is not indicated.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that the condition of ill-being with respect to his right fourth finger is causally connected to his work duties with the Respondent on or about January 5th of 2014.

As the Arbitrator has found that the Petitioner failed to prove that an accident occurred which arose out of and in the course of the Petitioner's employment by the Respondent and failed to prove any condition of ill-being which is causally connected to his work duties with the Respondent on or about January 5th of 2014, determination of the remaining disputed issues is moot.

The Petitioner's claim for compensation is denied, and no benefits are awarded herein.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Edward E. Hafer,
Petitioner,
vs.
City of Springfield,
Respondent,

NO: 14WC 36980

16IWCC0070

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 5, 2015, is hereby affirmed and adopted.

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

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

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.

DATED: JAN 2 8 2016
MJB/bm
o-1/25/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HAFER, EDWARD E
Employee/Petitioner

Case# 14WC036980

CITY OF SPRINGFIELD
Employer/Respondent

16IWCC0070

On 5/5/2015, 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 0.07% 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:

1157 DELANO LAW OFFICES LLC
CHARLES H DELANO IV
1 SE OLD STATE CAPITOL PLZ
SPRINGFIELD, IL 62701

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
620 E EDWARDS ST PO X 335
SPRINGFIELD, IL 62705

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

EDWARD E. HAFER,
Employee/Petitioner

v.

CITY OF SPRINGFIELD,
Employer/Respondent

Case # **14** WC **36980**

Consolidated cases: _____

16IWCC0070

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/14/15**. 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 **5/12/14**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $**59,234.28**; the average weekly wage was $**1,139.12**.

On the date of accident, Petitioner was **62** years of age, *married* with **no** dependent children.

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

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

Respondent shall be given a credit of $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent and manifested itself on 5/12/14. Petitioner's claim for compensation is denied.

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

4/29/15
Date

MAY 5 - 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT: 16IWCC0070

Petitioner, a 62 year old, left hand dominant, utility person, alleges he sustained an accidental injury to his bilateral hands due to repetitive work activities that arose out of and in the course of his employment by respondent andt manifested itself on 5/12/14. Petitioner has worked for respondent for approximately 28 years, and as a utility person for 24 of those years. Petitioner works from 7:00 am - 3:30 pm and gets two 15 minute breaks and 30 minutes for lunch.

Petitioner's duties as a utility person include janitorial duties for 2 to 2 1/2 hours each morning. This involves cleaning and mopping bathrooms. He also spends 5 hours a day sweeping, shoveling, and other duties as assigned. He testified that his duties vary by season. In the summer he is outside a lot mowing, weed whacking, and cleaning. When outside he is on the riding tractor 75% of the time, and spends the remaining 25% of the time weed whacking. Petitioner reported that the activities he does in the spring and summer are different from those he does in the fall/winter. In the fall/winter his first 2 to 2 1/2 hours are still janitorial duties, and the remaining hours of the day could be cleaning snow, shoveling, and sweeping inside, and plant maintenance/cleanup. During the spring/summer months sometimes petitioner would be required to do some inside work. Petitioner performed work at all CWLP properties, including Plant 4, Dallman, Lakeside and the maintenance building. His duties at each location varied.

Petitioner testified that after performing his janitorial duties each morning his duties are as assigned and vary from day to day. He stated that he may not shovel every day, and the gaps could be up to a week.

With respect to the janitorial work, petitioner testified that this work does not bother his hands too much. He testified that when he is on the tractor the vibration causes his hands to go to sleep when he holds the wheel tight on angled ground. He also reported difficulty with his hands when using the weed whacker. He reported that a lot of grip strength is needed to hold the machine with both hands and squeeze the trigger. This would also cause his hands to go numb, and sometimes be painful.

In the winter/fall, if there is snow or ice, he would remove that before doing his janitorial duties. Then he would perform whatever orders there were for sweeping different areas or shoveling. When shoveling, petitioner would need to grip firmly when scrapping or picking up rock, ash and coal. Petitioner would also shovel wet slag out from under the pipes and platforms, and this also required firm gripping of the shovel. Even while the Bobcat was taking the slag out of the building petitioner would continue to shovel the slag until it was all gone. After this was completed he would hose down the basement. When petitioner performed these duties his hands would go numb and hurt. Petitioner would also perform sweeping duties, and safety checks on the equipment in the plant.

Petitioner testified that during a typical day he does a lot of heavy gripping, about 50% of the day. He admitted that prior to the alleged date of accident his hands felt best in the morning.

On 5/20/14 petitioner presented to Dr. Lytchakov, his primary care physician complaining of left hand/wrist and elbow pain with numbness and tingling, mostly localized to the 1-4 fingers, with more in the 3rd and 4th digits lately. He reported that it bothers him at night and the numbness has been present for years, and the pain started recently. He reported worsening pain in the 3rd and 4th fingers when he holds a shovel/broom. Dr. Lytchakov completed a Loss Control Medical Slip. Dr. Lytchakov's diagnosis was possible carpal tunnel syndrome versus cervical radiculopathy. Petitioner was prescribed a brace and referred to a Dr. Becker, a neurologist. Petitioner was instructed to avoid repetitive bending in left wrist and pressure on the palm. Petitioner was continued on regular duty work.

On 5/20/14 petitioner presented to physical therapy at Springfield Clinic Physical Therapy Department. Therapist Lightfoot assessed possible carpal tunnel syndrome and gave petitioner a left quick lace wrist splint.

On 5/29/14 petitioner presented to Dr. Cecile Becker with complaints of numbness and tingling in bilateral fingers and some pain in the left elbow area, for the last year. He reported that on 5/12/14 he was picking up a piece of sheet metal with his left hand. He had stingers radiating into his left arm and hand. He stated that before this he already had numbness in his hands at night, worse on the left. Since the incident on 5/12/14 the numbness worsened. He reported a little left grip weakness. Following an examination, Dr. Becker assessed numbness and tingling in petitioner's hands bilaterally, worse on the left, consistent with carpal tunnel syndrome. Dr. Becker ordered an EMG and nerve conduction study.

On 5/29/14 petitioner underwent an EMG/nerve conduction study. The interpretation was bilateral carpal tunnel syndrome severe on left and moderate on the right. Also noted was mild to moderate ulnar mononeuropathy at the right elbow.

On 6/18/14 petitioner presented to Dr. Brett Wolters. He complained of bilateral hand numbness that was going on for two years. He reported that he was working at buildings and grounds at CWLP. He reported that he does a lot of picking up of objects, turning of valves, sweeping, shoveling, mowing and weeding. He stated that 2 months ago her was picking up some sheet metal and had severe shooting pains and numbness into his left hand. He tried splints that did not help. He awakens with bilateral numbness and tingling. Petitioner had right symptoms, not as bad. Petitioner was diagnosed with bilateral carpal tunnel syndrome, severe on left, and moderate on the right. He was further diagnosed with mild to moderate right cubital tunnel syndrome, presently asymptomatic. Dr. Wolters recommended a left carpal tunnel release and right wrist splint.

On 7/28/14 petitioner presented to Dr. Mitchell Rotman for a Section 12 examination at the request of the respondent. Petitioner reported that he injured his left hand picking up a piece of sheet metal on 5/12/14, but the cause of his present condition was his repetitive work activities. He reported that when he picked up the piece of steel he noted a stinger going down the top of the hand into his fingers. Since then things have gotten worse. He reported numbness and tingling in his hands, and occasional elbow pain. He complained of bilateral hand pain.

Petitioner gave a history of working for respondent for 25 years. He gets two 15 minute breaks and a 30 minute lunch. He maintains offices and buildings, as well as grounds. He believes his work is hand intensive. He identified the most common activity that he does as either sweeping or mopping every day. He reported that it might take him 2 1/2 hours to clean the office areas. He also reported that he might have to shovel coal, about two hours a week. He stated that the mopping and use of a sweeper involves heavy gripping, but the heaviest gripping is with shoveling activities. He shovels coal or ash into a wheelbarrow or a Bobcat, and sweeps or mops concrete floors in the work area. Petitioner reported that there are only a few areas that he does not clean and those are the bunker room, the crusher house and the presit area. Other activities he performs include lawn mowing, weed whacking, lifting a power washer, and using hand tools for several jobs that may vary.

Dr. Rotman reviewed the Supervisor's Report of Accident, and the Job Description for a Building and Grounds Utility Person for CWLP, which showed a multitude of activities. He noted that the job involved mowing, cleaning up, trimming, bush removal and other tasks required to maintain the 15 grounds at the power plant complex and at offsite locations. He noted that the job also involved maintaining the cleanliness of buildings at the power plant and offsite locations and performing building maintenance including roofing, tiling and other specialized work as directed, clearing snow, reporting unfavorable conditions, inspecting safety and firefighting equipment, ordering supplies and materials, and assisting others in other activities. The equipment aids and tools used included power lawnmowers, weed whips, hand shears, shovels, rakes, brooms, squeegees, floor buffers and scrubbers, small hand tools, a snow plow, bucket truck, tractor, Bobcat and forklift. The job required a lot of standing, walking, grasping, stooping, climbing, pushing, pulling, reaching, and exerting up to 75 pounds of force at times. Job 1 was maintaining the overall cleanliness of the buildings, and is performed 55% of the time. Job 2 was mowing, cleaning up, trimming and brush removal with regards to maintaining the grounds is performed 15% of the time. Petitioner spends 70% of his time doing these 2 duties, and these jobs require 90% grasping , 60% reaching, 45% lifting, 25% pulling and 10% actual repetitive motions. Six jobs (1, 2, 3, 5, 7, 8) require grasping or applying pressure to an object with the fingers and palm 90% of the time, and four of those (1, 2, 3, 7) also required reaching 60% of the time.

Dr. Rotman also reviewed Dr. Lytchakov's records of 5/20/14 and 5/29/14, Dr. Becker's record of 5/29/14, and Dr. Wolters record of 6/18/14. Following a physical examination and x-ray of the left elbow, Dr. Rotman was of the opinion that petitioner's main problem was bilateral carpal tunnel syndrome, with some changes about the right elbow on the nerve studies that were not causing petitioner any clinical problems with his cubital tunnel. He also noted hypertrophic osteoarthritis of the left elbow that was also not causing petitioner any significant problems that would require treatment. He was of the opinion that petitioner would benefit from bilateral carpal tunnel releases. He noted advanced carpal tunnel on the left which has been coming on for several years. He noted moderate carpal tunnel syndrome on the right.

Dr. Rotman did not believe the lifting up of the piece of sheet metal would have caused the condition noted on the left. He believed it just caused some discomfort from a chronic advanced preexisting condition which would be considered idiopathic. Dr. Rotman was of the opinion that risk factors of idiopathic carpal tunnel would be petitioner's age of 62, and his obesity issues due to a BMI of 35.87. He identified petitioner's work risk factors as occasional heavy gripping activities at work over the last 25 years. He noted that petitioner's activities at time would be more repetitive than others, depending on which job he might be doing at work. He also noted that some of the gripping activities would vary day to day and during the course of the day. He was of the opinion that petitioner might have significant breaks of time between hand intensive activities depending on what he was doing on a day to day basis. Dr. Rotman was certain that there were job activities that petitioner has that involve heavier gripping than others, such as shoveling coal versus mopping or sweeping offices, which would involve lighter grip activities.

Dr. Rotman was of the opinion that it was unclear whether petitioner's work activities truly are aggravating factors for his idiopathic bilateral carpal tunnel condition. He was of the opinion that if petitioner's job involved a significant amount of heavy gripping during the course of the day, then he would opine that petitioner's work activities could be an aggravating factor for the condition. In the alternative, if petitioner's job duties did not involve repetitive heavy gripping for a significant portion of the day at work, then his opinions would change.

Petitioner was diagnosed with carpal tunnel syndrome. Dr. Rotman referred petitioner for carpal tunnel releases. Petitioner was continued on regular duty work.

On 8/26/14 petitioner returned to Dr. Lytchakov for his annual physical and discussed his carpal tunnel. He again recommended the carpal tunnel surgery.

On 9/8/2014 Dr. Rotman drafted an addendum report after reviewing a job site analysis performed by Memorial Industrial Rehab and a video of petitioner's job duties. The video showed petitioner doing some dry

mopping with both hands that involved only light grasping. It noted that petitioner stopped on many occasions to move furniture and change rooms. It also noted that petitioner used his right hand to move chairs and trash cans. Other times he used both hands. It noted that after petitioner got done sweeping, he switched to a wet mop to clean floors. It noted that petitioner used a water bucket with both hands on the handle and then used a right hand to depress the lever on the mop bucket to squeeze out water. Petitioner then used both hands to move the mop around the floor. Petitioner again took frequent brief pauses to move furniture and obstacles. Petitioner was then seen cleaning bathroom fixtures by applying cleaning solution with a spray bottle.

Dr. Rotman noted that petitioner shovels the clinker at many different areas around the power plant, and various amounts of material are to be shoveled from the floor to the ground to the receptacle areas. The time spent shoveling depended on the amount of material that needed to be removed. He believed this was done at a self directed pace and allowed time for breaks and pauses. The job analysis also included an assessment of several tools petitioner used. It also noted that petitioner was not exposed to physiologic significant levels of commonly held risk factors that might be related to carpal tunnel syndrome such as prolonged awkward wrist positions, prolonged high levels of repetition or high levels of exertion and force through the hands and wrists. The job analysis indicated that other intrinsic health factors were the source of petitioner's carpal tunnel problems. This report was filled out by a therapist, Nathan Yeager. Dr. Rotman viewed the video that showed petitioner performing only his morning janitorial duties.

Based on the job video and job analysis Dr. Rotman was of the opinion that the type of work described and seen on the video is not a risk factor for idiopathic carpal tunnel syndrome. He only saw forces that were on the lighter side, and work that was not repetitive enough or hand intensive enough to be an aggravating factor. He noted that hand use was on the lighter side. Dr. Rotman was of the opinion that even though petitioner's work was repetitive at times with use of a mop and handle, it would not be considered heavy enough to be an aggravating factor, since it was interspersed with moving furniture, and generally self paced. He also noted that petitioner was seen going from one place to another and had several breaks in between. He believed petitioner had a fairly easy job without a lot of significant hand force, and is not the type of work that would be considered an aggravating factor for idiopathic carpal tunnel.

On 10/29/14 petitioner followed-up with Dr. Wolters. He was still complaining of numbness and tingling in his hands. He reported that he was dropping keys and brooms would slip out of his hands. Petitioner noted that he usually cleans the office for about 2-2 1/2 hours every morning. These activities are his lighter type activities. Petitioner reported that the rest of the day he does heavy gripping type activities including sweeping, shoveling of slag and coal, mowing, using a weed whacker, 0 turn tractor, weed whipper, or sweeping large

areas of flooring. Petitioner reported that when he sweeps the large flooring areas it takes him about 5 hours to do the areas that are the size of a large football field. He reported that gripping of the shovel for the coal activities is the most vigorous activity that he does during these activities, and he does it once or twice a week for up to 3-5 hours a day. Dr. Wolters opined that petitioner's carpal tunnel was work related. He was further of the opinion that the video Dr. Rotman reviewed only showed a portion of petitioner's job duties, that included the janitorial duties in the morning. Dr. Wolters recommended bilateral carpal tunnel releases.

On 10/30/14 petitioner's Application for Adjustment of Claim was filed. Petitioner alleged carpal tunnel to his bilateral hands due to repetitive trauma that manifested itself on 5/12/14.

On 1/15/15 the evidence deposition of Dr. Mitchell Rotman, an orthopedic surgeon with a subspecialty in the upper extremity, was taken on behalf of the respondent. Dr. Rotman opined that when someone has advanced carpal tunnel, as petitioner did, it does not take a whole lot of activity to bring out the symptoms. Dr. Rotman opined that petitioner does a lot of things all day, and they are on the lighter side. Dr. Rotman opined that petitioner's job duties for respondent did not cause or aggravate petitioner's bilateral carpal tunnel condition.

On cross examination, Dr. Rotman agreed that the video he reviewed only showed petitioner cleaning a toilet, a mirror, and a sink, and mopping and squeezing water out of a mop bucket and mopping again. He admitted that it did not show petitioner using a lawnmower, weed whips, hand shears, shovels, rakes, brooms, floor buffers or floor scrubbers, etc. On the day the video was taken petitioner was cleaning for the first half of the day and shoveling clinker for the second half of the day, but the video did not show petitioner shoveling clinker, which was one of the things that bothered him most. Dr. Rotman had no idea as to the amount of time petitioner spent doing specific tasks. He admitted that weed whacking, due to its vibration, and shoveling, may trigger symptoms in petitioner. Dr. Rotman was of the opinion that if petitioner was doing heavy gripping for a significant portion of the work week his opinions could change.

On 1/30/15 petitioner returned to Dr. Lytchakov for history and physical prior to his carpal tunnel surgery. On 2/6/15 petitioner underwent a left carpal tunnel release, performed by Dr. Wolters. On 2/20/15 petitioner underwent a right carpal tunnel release, performed by Dr. Wolters.

On 3/6/15 petitioner followed-up with Dr. Wolters after his right carpal tunnel release. He stated that he was doing well and had no complaints of any significant pain. He denied any numbness or tingling, and stated that he was not taking any medications. Dr. Wolters assessed status post bilateral carpal tunnel release. He released petitioner to full duty work without restrictions as of 3/30/15.

Respondent offered into evidence during Dr. Rotman's deposition a video of petitioner performing his janitorial duties in the morning. He testified that the video did not show any activities petitioner performed after his 2 to 2 1/2 hours of janitorial duties. Petitioner reported that it did not show the sweeping he did of the sawdust and diesel mix. He testified that he used a larger broom for this activity and would sweep an area as big as a football field. Petitioner reported that this activity required a lot of hand pressure to hold on to the broom. This activity also required heavy gripping.

Randall Lewis, Operations Coordinator-Buildings and Grounds Supervisor, was called as a witness on behalf of respondent. Lewis is petitioner's supervisor. He agreed with the work duties petitioner described. Lewis does go to all work sites where his crew of 10 may be and walks by to make sure everything is being done that needs to be done. Lewis assigns tasks to the crew every day after morning routine. Most jobs, other than safety checks, have 2 or more people assigned. He testified that every four weeks the crews are rotated to different areas and it takes a while to come back around to the same work area. However, in the summer they may all be doing yard work. Lewis testified that he assigns the crew to a task, but the crew decides who does what part of the task.

Lewis assigns work orders that reflect what needs to be done. He testified that they are entered into the system by the areas that need the work, and he prints them out and assigns the jobs to the crew. The workers then sign off on the work sheet and indicate what time they spent on that job. Lewis testified that he just keeps track of the work.

Petitioner offered into evidence Work Order Cost Reports for the period 2/26/13 through 5/16/14. Petitioner testified that these work orders do not account for all his hours and the work he did during this period. He stated that sometimes when the work order has not been received before the work is assigned the crew will allocate their time on those tasks to ground tickets and sweep sheets. He testified that up to 50% of his day can be logged to ground tickets and sweep sheets.

Today, petitioner reports diminished strength in his hands. He testified that the tingling and numbness went away. He reported difficulty opening jars, gripping hard, and grabbing stuff. He indicated that his main problem is the weakness he was experiencing.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

As a general rule, repetitive trauma cases are compensable as accidental injuries under the Illinois Worker's Compensation Act. In Peoria County Belwood Nursing Home v. Industrial Commission (1987) 115 111.2d 524, 106 Ill.Dec 235, 505 N.E.2d 1026, the Supreme Court held that "the purpose behind the Workers'

Compensation Act is best serviced by allowing compensation in a case … where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction.." However, it is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

Since petitioner is claiming an injury to his bilateral hands due to repetitive work activities, in Illinois, recovery under the Workers' Compensation Act is allowed, even though the injury is not traceable to a specific traumatic event, where the performance of the employee's work involves constant or repetitive activity that *gradually* causes deterioration of or injury to a body part, assuming it can be medically established that the origin of the injury was the repetitive stressful activity. In any particular case, there could be more than one date on which the injury "manifested itself". These dates could be based on one or more of the following, depending on the facts of the case:

1. The date the petitioner first seeks medical attention for the condition;
2. The date the petitioner is first informed by a physician that the condition is work related;
3. The date the petitioner is first unable to work as a result of the condition;
4. The date when the symptoms became more acute at work;
5. The date that the petitioner first noticed the symptoms of the condition.

On 5/20/14 petitioner presented to Dr. Lychakov with complaints of left hand/wrist and elbow pain with numbness and tingling that bothers him at night. He reported that the numbness had been present for years, and the pain started recently. He reported worsening pain in the 3rd and 4th fingers when he holds a shovel/broom. Dr. Lychakov diagnosed a possible carpal tunnel syndrome versus cervical radiculopathy. At no time during this visit did petitioner report an injury on 5/12/14. Petitioner began physical therapy on 5/20/14, and again made no mention of the alleged injury on 5/12/14. It was not until 5/29/14 that petitioner, for the first time, reported that on 5/12/14 he was picking up a piece of sheet metal with his left hand and felt stingers radiating into his left arm and hand. He reported that before 5/12/14 he already had numbness in his hands at night, worse on the left, that worsened after 5/12/14. Dr. Becker assessed possible left carpal tunnel syndrome and ordered an EMG/NCV that revealed bilateral carpal tunnel syndrome, severe on left and moderate on the right.

When petitioner presented to Dr. Wolters on 6/18/14 he reported that the bilateral hand numbness had been going on for two years. Although petitioner reported that he did a lot of picking up of objects, turning of valves, sweeping, shoveling, mowing and weeding, he did not indicate how often he performed each of these tasks. Petitioner specifically reported that other than the janitorial duties he performed for 2-2.5 hours a day, his duties varied.

Petitioner's Job Description for Building and Grounds Utility Person for CWLP indicates that petitioner was responsible for a multitude of activities. These activities include mowing, cleaning up, trimming, bush removal and other tasks required to maintain the 15 grounds at the power plant complex and at offsite locations; maintaining the cleanliness of buildings at the power plant and offsite locations; and performing building maintenance including roofing, tiling and other specialized work as directed. Petitioner's duties also included clearing snow, reporting unfavorable conditions, inspecting safety and firefighting equipment, ordering supplies and materials, and assisting others in other activities. The equipment aids and tools petitioner used includes power lawnmowers, weed whips, hand shears, shovels, rakes, brooms, squeegees, floor buffers and scrubbers, small hand tools, a snow plow, bucket truck, tractor, Bobcat and forklift. These activities require a lot of standing, walking, grasping, stooping, climbing, pushing, pulling, reaching, and exerting up to 75 pounds of force at times. Job 1 was maintaining the overall cleanliness of the buildings, and is performed 55% of the time. Job 2 was mowing, cleaning up, trimming and brush removal with regards to maintaining the grounds is performed 15% of the time. Petitioner spends 70% of his time doing these 2 duties, and these jobs require 90% grasping , 60% reaching, 45% lifting, 25% pulling and 10% actual repetitive motions. Six jobs (1, 2, 3, 5, 7, 8) require grasping or applying pressure to an object with the fingers and palm 90% of the time, and four of those (1, 2, 3, 7) also required reaching 60% of the time. The force of grasping or pressure that was applied was not described.

Petitioner reported that each day he would spend 2-2.5 hours performing janitorial duties in the office area. He specifically testified that the janitorial work was his lighter type work, and did not bother his hands too much. Although petitioner testified that the activities he performs the rest of the day include heavy gripping type activities that include sweeping, shoveling of slag and coal, mowing, using a weed whacker, zero turn tractor, weed whipper, or sweeping large areas of flooring, he failed to provide any evidence to support a finding as to the frequency, duration, and manner in which petitioner performed these activities the remainder of the day. In fact, petitioner testified that the job duties he would perform for the remainder of the day were assigned and varied from day to day, without any specifics. Even when he gave various histories of the work duties he performed at trial and to the healthcare providers the time he stated h spent on various tasks, other than the

janitorial duties, varied. Lewis even testified that every four weeks the crews are rotated to different areas and it takes a while for them to return back around to the same area. Lewis also testified that although he assigns tasks each day he left the crews decide who does what on each task.

Petitioner provided Dr. Wolters a list of activities that he performed. Despite the fact that petitioner did not provide specific and detailed information concerning these work activities, including the frequency, duration, and manner in which he performed these duties, Dr. Wolters opined that petitioner's carpal tunnel was work related. The arbitrator finds it significant that there is no evidence to support a finding that Dr. Wolters ever reviewed petitioner's Job Description for a Building and Grounds Utility Person for CWLP. As a result, the arbitrator gives less weight to the opinions of Dr. Wolters, finding they are not based on a specific and detailed information concerning petitioner's work activities.

In the alternative, Dr. Rotman, before rendering his opinions, took time to review the Supervisor's Report of Accident, the Job Description for a Building and Grounds Utility Person for CWLP, Dr. Lytchakov's records of 5/20/14 and 5/29/14, Dr. Becker's record of 5/29/14, Dr. Wolters record of 6/18/14, and a video that showed petitioner performing his janitorial duties. He also took a history from petitioner, and examined petitioner. Based on this collection of information Dr. Rotman was of the opinion that petitioner's activities involved occasional heavy gripping activities, and activities that at times may be more repetitive than other activities, depending on which job petitioner may be performing, which petitioner and Lewis both testified varied from day to day. Dr. Rotman could not state with any medical certainty whether petitioner's activities were an aggravating factor for his carpal tunnel syndrome because petitioner's activities, which were many, varied from day to day and season to season. Although Dr. Rotman agreed that some of petitioner's duties did require heavy gripping, it is unknown with what frequency petitioner performed these duties. Dr. Rotman opined that petitioner's intrinsic health factors were the source of petitioner's carpal tunnel. These health factors included his age of 62, and his obesity based on a BMI of 35.87. Based on Dr. Rotman's thorough review of the medical records, a review of petitioner's Job Description, and his examination of petitioner, the arbitrator gives greater weight to the opinions of Dr. Rotman.

Based on the above, as well as the credible record, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent that manifested itself on 5/12/14. The arbitrator finds petitioner performed lighter janitorial duties for the first 2-2.5 hours a day, and a multitude of other activities the remainder of the day, based on the assignments give by Lewis. Although many of these activities may require heavy gripping, and some vibration, specific and detailed

information concerning these work activities, including the frequency, duration, and manner in which they were performed was not provided. Additionally, the arbitrator finds it significant that Lewis testified the crews were rotated every four weeks to different areas, and that they may not come back to the same work area for a while. The arbitrator finds it significant that that petitioner could not state with any certainty the work duties he did every day after he completed his janitorial duties, and the duration of time he spent doing them every day, as well as the manner in which he performed them, due to the multitude of different tasks that he could perform on any given day. For example, even when petitioner referred to the task of shoveling coal, within the record itself, he provided different details regarding the time he spent doing this task in a given week that varied from 2-10 hours a week.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
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 TOTAL BENEFITS ARE IN DISPUTE?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Given the fact that the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his bilateral hands due to repetitive work activities, that arose out of and in the course of his employment by respondent and manifested itself on 5/12/14, the arbitrator finds these remaining issues moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
KANKAKEE

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Kimberlin,

Petitioner,

vs. NO: 14WC 39268

Crown Cork & Seal,

Respondent,

16IWCC0063

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, incurred medical, prospective medical, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further 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, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 13, 2015, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but 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.

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 $2,500.00. 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.

DATED: JAN 2 7 2016
o012016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

KIMBERLIN, JAMES
Employee/Petitioner

Case# **14WC039268**

CROWN CORK & SEAL
Employer/Respondent

16IWCC0063

On 3/13/2015, 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 0.09% 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:

2208 CAPRON & AVERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

1120 BRADY CONNOLLY & MASUDA PC
MARK F VIZZA
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

16IWCC0063

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

James Kimberlin,
Employee/Petitioner

v.

Crown Cork & Seal,
Employer/Respondent

Case # **14** WC **39268**

Consolidated cases: **none**

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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Kankakee**, on **1/14/15**. 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

16IWCC0063

FINDINGS

On the date of accident, **7/23/14**, 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 $**42,871.40**; the average weekly wage was $**824.45**.

On the date of accident, Petitioner was **57** years of age, ***single*** with **no** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**1,479.81** for other benefits, for a total credit of $**1,479.81**. (Arb.Ex.#1).

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act. (Arb.Ex.#1).

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $549.63 per week for 6-1/7 weeks, commencing 12/3/14 through 1/14/15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7/24/14 through 1/14/15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner is entitled to prospective medical treatment in the form of a right total knee arthroplasty as prescribed by Dr. Puri, and Respondent shall pay the reasonable and necessary medical expenses associated therewith pursuant to Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

3/10/15
Date

ICArbDec19(b)

16IWCC0063

STATEMENT OF FACTS:

Petitioner is a forklift operator who has worked for the respondent since 1996. He testified that on July 23, 2014, while descending from his forklift from a height of more than three feet, he felt a "pop" and immediate pain in his right knee. At the time he felt the pain, his left foot was already on the ground and his right leg had swung over and was in the process of straightening out immediately before his right foot alighted on the ground. The petitioner testified that the pain in his knee was so severe that he thought he had fractured it. He was taken to the emergency room of Presence St. Mary's Hospital.

The emergency room records reflect that petitioner "was getting off of his forklift at work and as he landed on his left leg he felt and heard a pop." X-rays of petitioner's right knee showed no fractures or dislocations, but marked degenerative joint disease. The attending physician suspected an injury to the collateral ligament or meniscus, and she referred petitioner to Dr. Panuska at the occupational health clinic for further care. (PX1).

Petitioner testified that he had previously undergone surgery to his right knee in 1970, and a second surgery in 1974. He believed that these procedures were to repair his cartilage. (Although the treating medical records reference a third knee surgery, the petitioner clarified that this was directed at his left knee.) The petitioner testified that he had no symptoms and received no medical treatment to his right knee for the period from 1975 until his accident at work on July 23, 2014.

On July 24, 2014, Dr. Panuska at the St. Mary's Occupational Health Clinic noted that the petitioner's right knee was swollen and tender. He noted that x-rays of the knee revealed "pretty much bone on bone." He provided the petitioner with a Neoprene knee support and imposed light duty restrictions. (PX 2)

On July 28, 2014, Dr. Panuska noted that the petitioner's right knee was still swollen. The petitioner reported that it was getting worse. An MRI was prescribed. (PX 2) When the petitioner returned to Dr. Panuska on August 6, 2014, authorization for the MRI was still pending and the knee was still swollen. (PX 2)

Petitioner underwent an MRI of his right knee on August 22, 2014. It revealed moderate to severe osteoarthritic changes, a small tear of the medial meniscus, moderate joint effusion and diffuse soft tissue edema. (PX 2) Upon reviewing the MRI on August 26, 2014, Dr. Panuska referred the petitioner to Dr. Rajeev Puri for an orthopedic consult. On September 8, 2014, authorization for the petitioner's visit to Dr. Puri was still pending and Dr. Panuska noted that the right knee was still swollen. (PX 2)

On September 30, 2014, the petitioner was seen by Dr. Puri. The history reflected that the petitioner "has had sx on knee before, but had no sig problems with knee prior to accident on July 2014, stepped off and pop and fall." Dr. Puri diagnosed osteoarthritis, administered a cortisone injection and imposed a restriction of sitting work only. (PX 3)
On October 15, 2014, Dr. Puri prescribed a right total knee arthroplasty. On November 4, 2014, he noted that he was "awaiting final approval or IME." (PX 3)

Petitioner was examined at the request of the respondent pursuant to Section 12 of the Act on November 17, 2014 by Dr. Lawrence Lieber. Dr. Lieber felt that the petitioner's work accident had resulted in only a minor strain of the right knee. He felt that the principal diagnosis was degenerative arthritis and that the petitioner's accident was "not a substantial contributing factor" regarding this diagnosis. In addition, he felt that the petitioner's degenerative knee condition was "neither caused, related or accelerated" by the work accident. He felt that the petitioner had reached maximum medical improvement with regard to the minor strain of his right knee and that he was capable of returning to work without restriction.

Petitioner testified that the respondent had accommodated his light duty restrictions until December 2, 2014, but that as of December 3, 2014 they refused to do so on account of the fact that they considered the restrictions to be non-work related. The petitioner remains off work and desires to proceed with the surgery to his right knee.

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

Petitioner testified that on July 23, 2014 he was loading a truck and was getting off a forklift when he felt excruciating pain in his right knee. He indicated that the injury occurred while he was getting ready to swing his right leg over while still holding onto the forklift. He noted that he thought he had broken his knee and noticed that it was painful to walk. He testified that the step off the forklift was 3-1/2' to 4' off the ground and that it was awkward to step off in the first place.

Prior to the accident in question, Petitioner had undergone two (2) surgeries on his right knee, the first in 1970 to repair a torn cartilage following a football injury and the second in 1970 to repair several torn ligaments. Petitioner testified that it took six (6) weeks to recover from the more recent surgery, and that recovery was "a piece of cake." He noted that he was released thereafter without restrictions and that he did not have any problems or symptoms, or need to see a physician for his right knee from that date until the present date of accident, or a period of approximately 40 years.

While merely stepping down from a normal height, such as descending a set of stairs, is not typically considered an increased risk associated with one's employment, it appears that petitioner's injury involved more than simply stepping down off a normal step. Instead, petitioner testified that the distance from which he was required to step down in descending from his forklift was between three and a half and four feet. It was while straightening his leg in the midst of this descent that petitioner felt a pop in his right knee. His left foot was already on the ground, his right foot was nearly so. Based on this rather awkward position, and the distance off the ground, the Arbitrator finds that the activity in question did indeed expose petitioner to an increased risk of injury due to the nature of his job activities. Needless to say, members of the general public are not required to step down from a height of nearly four feet and to do so on a regular and continuous basis.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on July 23, 2014.

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

The respondent's examining physician, Dr. Lawrence Lieber, has opined that the petitioner's right knee condition was neither caused nor aggravated by his accident at work, and that the work accident consisted merely of a minor strain. This opinion is impossible to reconcile with the facts.

Although the petitioner had undergone two prior surgeries to his right knee, he testified that he has not seen a doctor for his right knee since 1975, a period of 40 years. In addition, he testified that his right knee was asymptomatic until his accident on July 23, 2014. There is no evidence to the contrary and, in fact, the treating medical records generally corroborate this testimony.

The records of St. Mary's Occupational Health and Dr. Puri further confirm what the petitioner testified to: that his right knee has been painful and swollen at all times since the accident on July 23, 2014. It is unclear how Dr. Lieber can characterize the petitioner's injury as a minor strain when the medical records confirm that the right knee has remained swollen and painful for several months since the accident.

Simply stated, prior to the accident the petitioner's right knee was asymptomatic; ever since the accident, his right knee has been painful and swollen. It is apparent that the degenerative joint disease reflected on the x-rays and MRI pre-existed the accident, but was rendered symptomatic by the accident to the point at which surgery is now required. The fact that Dr. Puri is seeking authorization from "workers' comp" to perform the total knee arthroplasty strongly suggests that he thinks so as well.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being with respect to his right knee is causally related to the accident at work on July 23, 2014.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that his job as a forklift driver required him to work 52 hours one week, followed by 41 hours the next week. During every two week block of time, therefore, the petitioner worked a total of 93 hours, or an average of 46.5 hours per week. He testified that any overtime hours in excess of 40 per week were mandatory and not optional. He also testified that his straight time hourly rate of pay was $17.73. No documentary evidence was introduced on the issue of the petitioner's wages.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's average weekly wage as calculated pursuant to §10 of the Act was $824.45 ($17.73 x 46.5 hours/week), for an annual salary of $42,871.40 ($824.45 x 52 weeks).

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

While this was marked as an issue in dispute on the Request for Hearing form (Arb.Ex.#1), no medical bills were submitted into evidence. Thus, no medical expenses are awarded herein. The issue would appear to be more one of prospective medical treatment (issue "K", infra).

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner has moderate to severe osteoarthritis in his right knee for which his treating orthopedic surgeon, Dr. Puri, has prescribed a total knee arthroplasty. The respondent has refused to provide authorization for this procedure based on the disputes they have raised regarding the compensability of the accident and whether the underlying condition was caused or aggravated by the accident. Having determined that the petitioner's accident on July 23, 2014 did arise out of and in the course of his employment; and having further determined that the petitioner's current condition of ill-being in his right knee is causally connected to that accident; the Arbitrator further determines that the petitioner is entitled to undergo the surgery as prescribed by Dr. Puri.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner is entitled to prospective medical treatment in the form of a right total knee arthroplasty as prescribed by Dr. Puri, and Respondent shall pay the reasonable and necessary medical expenses associated therewith pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner has been subject to various work restrictions since he was injured on July 23, 2014. The respondent initially provided the petitioner with light duty work until they received the examining report of Dr. Lieber, at which time they informed the petitioner that they would no longer accommodate his restrictions. The petitioner last worked on December 2, 2014.

Petitioner has not yet reached maximum medical improvement. He remains under the care of Dr. Puri who is awaiting authorization for a right total knee arthroplasty.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from December 3, 2014 through January 14, 2015, the date of hearing, for a period of 6-1/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JANET CARAWAY,

Petitioner,

vs. NO: 14 WC 43373

SOUTHERN ILLINOIS UNIVERSITY,
CARBONDALE,

16IWCC0109

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective medical, and notice, and being advised of the facts and applicable 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.

The Commission issued a separate decision for case 13 WC 39289. The Commission notes that the lone difference between case 13 WC 39289 and 14 WC 43373 is the date of manifestation. The facts for both cases are otherwise identical in that they alleged a repetitive trauma injury due to repetitive bending, squatting, and kneeling. The Commission therefore incorporates and adopts its findings of fact and conclusions of law from case 13 WC 39289. The Commission affirms the Arbitrator's finding that petitioner failed to provide timely notice of her alleged August 19, 2013 accident. The Commission further finds that Petitioner failed to prove accident and causal connection for the reasons set forth in case 13 WC 39289. Petitioner's claim for compensation is therefore denied.

16IWCC0109

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed May 5, 2015, is hereby modified as stated above, and otherwise affirmed and adopted.

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

DATED: FEB 8 - 2016

MJB/tdm
O: 12-14-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) ARBITRATOR DECISION

JANET CARAWAY
Employee/Petitioner

Case# **14WC043373**

13WC039289

SIU-C
Employer/Respondent

16IWCC0109

On 5/5/2015, 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 0.07% 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:

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAY 5 - 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Janet Caraway
Employee/Petitioner

v.

SIU-C
Employer/Respondent

Case # **14** WC **43373**

Consolidated cases: **13 WC 39289**

16IWCC0109

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 11, 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. [x] 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. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **8/19/2013**, 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.

Timely notice of this accident ***was not*** given to Respondent.

In the year preceding the injury, Petitioner earned $**21,285.00**; the average weekly wage was $409.33.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

Respondent has not paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a general credit for any medical bills paid through its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove that she provided timely notice of her accident to Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

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.

Nancy Lindsay
Signature of Arbitrator

May 3, 2015
Date

ICArbDec19(b)

MAY 5 - 2015

Findings of Fact and Conclusions of Law

At the commencement of the hearing Petitioner presented a Motion to Consolidate her two claims and without objection from Respondent, the claims were consolidated. The parties requested one decision for both cases[1]. The only difference between the two claims is the alleged date of accident, with the case of 13 WC 39289 having a date of accident of July 23, 2013 and the case of 14 WC 43373 having a date of accident of August 19, 2013. Both cases allege repetitive trauma injury to Petitioner's right knee.

In this case Petitioner alleges she sustained a repetitive trauma injury to her right knee which manifested on August 19, 2013 due to her job duties as a day care worker for Respondent. The issues in dispute are accident, notice, causation, prior medical treatment and prospective medical treatment. Two witnesses testified at the hearing: Petitioner and Linda Drust. Respondent had a representative, Jenny Batson, present throughout the hearing.

The Arbitrator Finds:

On January 25, 2013, Petitioner presented to Bianca Bottiaux, PAC at the Center for Medical Arts. (PX2). Petitioner complained of right knee and left foot pain. (PX2). Petitioner indicated that the right knee pain radiated into the right lower leg and the onset of pain was one year prior. (PX2). Petitioner had recently returned from Colorado. Petitioner indicated that the pain was aching and throbbing and aggravated by climbing stairs and movement. Petitioner denied any injury. Her pain was relieved by bracing. (PX2). Petitioner further indicated that associated symptoms were swelling, crepitus, and joint tenderness. (PX2). Ms. Bottiaux noted Petitioner was 61 years old, 60 inches tall, and weighed 169 pounds. (PX2). Petitioner's left ankle revealed crepitus. Petitioner was referred for an orthopedic consult for right knee degenerative arthritis and left Achilles tendonitis. An appointment/follow-up with Dr. Mignone was scheduled for February 11, 2013. (PX2).

On January 25, 2013, Petitioner underwent an x-ray of her right knee. (PX2). The findings indicated that there was no change from January 13, 2012. (PX2). The impression was: 1) degenerative joint disease and 2) small joint effusion. (PX2).

On May 21, 2013, Petitioner presented to Dr. Roland Barr at the Orthopaedic Institute of Southern Illinois. (PX1). Petitioner complained of pain (primarily medially) that had been going on for several years, but was progressively worsening. Petitioner also

[1] Despite the request of the parties, the Arbitrator is issuing separate decisions as recently requested by the Chairwoman of the IWCC with regard to all consolidated cases.

complained of "quite a bit of heel pain" as well and thought the two might be associated with one another. (PX1). On physical examination, Petitioner had mild swelling of the right knee and a slight varus alignment. (PX1). Petitioner had mild crepitation with range of motion, but range of motion was full. Petitioner also had quite a bit of heel pain which she associated with her knee pain. Petitioner reported having previously undergone x-rays and an MRI. (PX1). Dr. Barr noted that review of Petitioner's right knee x-rays showed advanced medial compartment osteoarthritis with bone-on-bone articulation medially and also spurring of the patellofemoral and lateral compartments. Petitioner was very tender to palpation over her left Achilles tendon. (PX1). Dr. Barr assessed Petitioner with advanced osteoarthritis of the right knee and right Achilles tendonitis. (PX1). Dr. Barr recommended a cortisone injection, which was given at that time. (PX1). Dr. Barr noted that Petitioner asked a lot of questions about whether her right knee problems were associated with her job with Respondent. (PX1). Dr. Barr further noted:

> I explained to her in depth that this is a degenerative type problem that is mostly genetic to normal wear and tear and the demands of getting up and down maybe exacerbate her symptoms, but were not the cause of her arthritis.

Dr. Barr recommended stretching for Petitioner's Achilles tendonitis. (PX1). Petitioner was to follow up in six weeks for her right knee. (PX1).

On July 23, 2013, Petitioner reported to her supervisor Linda Drust that she suffered repetitive trauma to her right knee due to her job duties. (RX1; PX 3).

On July 28, 2013 Petitioner signed her Application for Adjustment of Claim in case # 13 WC 039289. (AX 3)

On August 2, 2013, Petitioner followed up with Bianca Bottiaux, PAC, regarding complaints of right shoulder pain and right knee pain. (PX2). Petitioner indicated that she wanted a second opinion regarding her right knee. (PX2). Petitioner indicated that her right knee symptoms began years earlier and that they had gradually been worsening. (PX2). Ms. Bottiaux noted Petitioner had advanced osteoarthritis in her right knee and that Petitioner had requested a referral to Dr. Nathan Mall in Chesterfield, Missouri. (PX2). Petitioner indicated she would make her own appointment. (PX2).

On August 5, 2013, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form indicating she had injured her right knee through repetitive trauma. (RX1). On this form, Petitioner indicated she notified her supervisor, Linda Drust, of said injury on July 23, 2013. (RX1; PX 3)

Respondent also tendered a "Supervisor's Report of Injury or Illness" at hearing. (RX. 2) This report was filled out by Petitioner's supervisor, Linda Drust. This form also indicates that, "In either July or August 2013, Janet visited my office to report that her knees sometimes bothered her...." (RX. 2)

On August 19, 2013, Petitioner presented to Dr. Nathan Mall at Regeneration Orthopedics. (PX4). Prior to seeing Dr. Mall, Petitioner completed a new patient intake

form. (PX4). On this form, Petitioner indicated that her reason for the visit was for workers' compensation for her right knee. (PX4). Petitioner indicated that she had been injured at work and had previously seen a doctor for her complaint. (PX4). Petitioner indicated that she heard of Dr. Mall's office through her attorney, Jason Caraway. (PX4). Petitioner marked that her problem began due to work injury/work overuse and that she had had this problem before. (PX4).

Dr. Mall noted that Petitioner had been diagnosed with osteoarthritis of the right knee. (PX4). Petitioner indicated that she had worked for many years in an early childhood program doing a lot of sitting, standing, and kneeling. (PX4). Petitioner indicated that her symptoms had been getting worse over the last few months. (PX4). Petitioner also indicated that she had gotten approximately two and a half months of relief from the cortisone injection from Dr. Barr, but that her pain was returning. (PX4). Petitioner denied any prior right knee surgeries or past significant pain in the knee. Petitioner also didn't think she'd ever been to an orthopedic surgeon before going to Dr. Barr. Petitioner denied any prior right knee surgeries or past significant pain in her right knee. Petitioner was noted to be 62 years old, five feet tall, and weighed 175 pounds. (PX4). On physical examination, Petitioner's right knee had full range of motion, tenderness on the medial and lateral side, mild effusion, some patellofemoral crepitus, but no patellar instability. (PX4). Dr. Mall noted that x-rays of the right knee demonstrated near complete loss of the joint space in the medial compartment and that the left knee had some mild osteoarthritis. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall recommended physical therapy and strengthening exercises, anti-inflammatory medication, and occasional cortisone injections. (PX4). A cortisone injection was given to Petitioner that day. (PX4). Dr. Mall also indicated that a total knee arthroplasty will likely be needed eventually. (PX4). Petitioner was to return on a p.r.n. basis when her cortisone shot wore off. (PX4). Petitioner was given no work restrictions. (PX4).

Dr. Mall added a note addressing causation at the end of the August 19, 2013 medical record. (PX4). Dr. Mall indicated that while Petitioner was predisposed to having osteoarthritis in her right knee, he believed that her job duties as an early childhood teacher likely expedited the process and made it occur faster than it normally would have. (PX4). Dr. Mall further stated that even if it was determined that this was a pre-existing condition; he believes that her work activities exacerbated her condition. (PX4).

A copy of Petitioner's Application for Adjustment of Claim in case # 13 WC 39289 was mailed to Respondent on November 20, 2013. (AX 3)

Petitioner's Application for Adjustment of Claim in case # 13 WC 039289 was filed with the Commission on November 26, 2013. (AX 3)

On March 10, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she had been doing well with the cortisone injection, but that it was starting to wear off. (PX4). Petitioner also indicated that she had been off work for her left Achilles tendon which had been repaired. Petitioner reported that her knee actually got

better while off work despite walking on it somewhat unevenly and having it bear a lot of stress. Now that she was walking more normally, Petitioner was noting more right knee pain as well. On physical examination, Petitioner's right knee pain had full range of motion, varus deformity more so on the right than the left, medial joint tenderness, mild effusion, and no patellar instability. (PX4). Dr. Mall's assessment was right knee osteoarthritis. (PX4). Dr. Mall noted that he wanted to give her additional time to see how she does after she no longer had to wear the boot for her left ankle. (PX4). Dr. Mall indicated that he would continue to follow Petitioner and treat with cortisone injections as long as she was getting three months relief from them, after that she will likely need a total knee arthroplasty. (PX4). Again, Dr. Mall noted he believed Petitioner's work duties aggravated her condition. (PX4). Petitioner was given no work restrictions. (PX4).

On May 2, 2014, Petitioner underwent a Section 12 examination with Dr. Richard E. Hulsey regarding Petitioner's right knee. (RX6). In anticipation of the exam Petitioner had prepared a detailed description of her work duties and their impact on her right knee. (PX 8) Dr. Hulsey performed a physical examination, reviewed Petitioner's medical records, and took a verbal history from Petitioner. (RX6). Petitioner also gave Dr. Hulsey a typewritten description of her job duties for Respondent. (RX6, PX8). Petitioner indicated that she would frequently get up and down off the floor in order to care for the children and clean the room. (RX6). Petitioner also told Dr. Hulsey that she would have to kneel and squat frequently throughout the day. (RX6). Petitioner further indicated that she did not have a specific injury, but rather that pain developed over the last several years and gradually became worse. (RX6). On physical examination, Petitioner walked without support, was able to get in and out of her chair without difficulty, had pronounced genu varum deformity of the right knee, lacked full extension, flexed to approximately 125 degrees, tenderness over joint lines, and light crepitation with flexion and extension. (RX6). Dr. Hulsey took x-rays of Petitioner's right knee which showed severe osteoarthritis with total obliteration of the medial compartment and varus deformity, and moderate osteophyte formation off the patella and lateral compartment. (RX6). X-ray of the left knee showed mild changes. (RX6). Dr. Hulsey opined Petitioner had end-stage osteoarthritis in her right knee and would need a total knee replacement. (RX6). Dr. Hulsey further opined that Petitioner's right knee condition is strictly a degenerative process that is common in her age group and that the work activities that she described did not cause or accelerate the arthritic process. (RX6). Dr. Hulsey opined that with the severity of the changes seen on the x-rays any activities of daily living could exacerbate her pain and that Petitioner's need for a total knee replacement was not related to her job duties for Respondent. (RX6).

On May 5, 2014, Petitioner followed up with Dr. Mall. (PX4). Petitioner indicated that she continued to have right knee pain. (PX4). Petitioner also indicated that she had been off work for an Achilles tendon injury and had been somewhat better in terms of her right knee. (PX4). Petitioner was noted to be five feet tall and weigh 185 pounds. (PX4). Petitioner had varus deformity more so on the right than the left, medial joint tenderness, and limited range of motion of the right knee from about five degrees short of full extension to 110 degrees of flexion. (PX4) Dr. Mall's assessment was right knee osteoarthritis aggravation. (PX4). Dr. Mall recommended another cortisone injection that

performed that day and additional physical therapy for quadriceps strengthening. (PX4). Dr. Mall noted that Petitioner's complaints seemed somewhat better while being off work and "this is an indication that her job duties are aggravating her osteoarthritis in her right knee." (PX 4) He believed she would need a total knee replacement eventually. (PX4). Petitioner was to return in three months or when her pain returned. (PX4). Petitioner was given no work restrictions. (PX4). No further medical records were admitted into evidence.

Dr. Hulsey was deposed on September 8, 2014. (RX7). Dr. Hulsey is an orthopedic surgeon board certified in orthopedic surgery. (RX7, p. 6) Dr. Hulsey testified that Petitioner described her job duties as taking care of infants and toddlers, frequently being on her knees, squatting up and down, and cleaning the room at the end of the day. (RX7, p. 13). Dr. Hulsey also testified that Petitioner provided him with a written job description of her duties that he reviewed. (RX7, p. 13). Dr. Hulsey testified that Petitioner did not have any significant complaints or symptoms with her left knee, which he stated was consistent with a degenerative condition, as one side is frequently more affected than the other. (RX7, p. 14). Dr. Hulsey testified that Petitioner had advanced osteoarthritis of the right knee. (RX7, p. 15). He further testified that Petitioner's job duties did not cause or accelerate her condition. (RX7, p. 15). Dr. Hulsey testified that the basis of his opinion was that the degree of kneeling or squatting would not have accelerated the process as this is a long-term degenerative process involving genetics, Petitioner's weight, and other factors. (RX7, p. 15). Dr. Hulsey testified that any activities of daily living could exacerbate her degenerative condition. (RX7, pg. 15). Dr. Hulsey testified that Petitioner's age and weight would be risk factors that could affect her right knee condition. (RX7, p. 16). Dr. Hulsey testified that if Petitioner underwent a total knee replacement it would not be due to her alleged work-related injury or repetitive trauma. (RX7, p. 16). On cross-examination, Dr. Hulsey testified that there are activities that can accelerate the osteoarthritis process, like high impact activities such as running and jumping where the knees see more stress than kneeling and squatting. (RX7, p. 18). Dr. Hulsey further testified that he did not know of any study that suggests kneeling on a floor or squatting accelerated or caused osteoarthritis. (RX7, p. 22). Dr. Hulsey testified that he did not believe that Petitioner's job duties accelerated her osteoarthritis and that she would have needed a knee replacement regardless of her job. (RX7, p. 24).

On cross-examination, Dr. Hulsey was asked if Petitioner's work could have caused her to have symptomatic pain related to her osteoarthritis. Dr. Hulsey responded, "Again, any activity I think she does, whether it's at her job or at home would cause increasing pain and discomfort." (RX 7, p. 20) Dr. Hulsey was asked if Petitioner's work "had anything, no matter how minute, anything at all to do with what you say she needs, which is a total knee?" (RX 7, pp. 20-21) Dr. Hulsey responded, "If you put it that way, then yes, I would say it plays a role in the sense that it's part of her everyday activities." (RX 7, p. 21) He went on to state that activities can aggravate her knee. (RX. 7, p.22)

On December 18, 2014 Petitioner signed her Application for Adjustment of Claim in case # 14 WC 043373. A copy of the Application was sent to Respondent that same

day. The Application for Adjustment of Claim was filed with the Commission on December 24, 2014. (AX 4)

At the hearing Petitioner testified that she has worked at Rainbow's End Child Development Center on the campus of SIU Carbondale for thirteen years. During her time at the day care facility she worked in a number of different classrooms.

Petitioner first worked in the "infant room" for seven years. During this time Petitioner would sit on the floor with the children, rock them to sleep and change their diapers. Petitioner testified she frequently bent to pick up various toys. As Petitioner was the closing teacher, she was charged with cleaning the classroom at the end of each day. This involved picking up toys off the floor, disinfecting them and returning them to the shelves. Each Friday, Petitioner would get down on her hands and knees to clean the thin mat the children played on. Petitioner testified this job in the infant room required her to get up off and down onto the floor a number of times each day.

After her seven years in the infant room, Petitioner was transferred to the "younger toddler" classroom. She worked in this classroom for three years. Again, Petitioner was tasked with picking up toys throughout the day. In this classroom some of the children slept close to the floor on cots. Petitioner testified she was up and down off the floor to assist with picking up and cleaning toys and putting the children to sleep on the cots and reading to them. Petitioner explained she would also kneel to care for the children. There were twelve children in this classroom.

After three years in the "younger toddler" classroom, Petitioner was transferred back to the "infant" room. She returned to the infant room for one year. While back in the infant room for this assignment, her duties did not change from her previous time in the classroom.

Petitioner next worked in the "older toddler" classroom. Again, Petitioner would bend down and get up and off the floor to assist the children while going to sleep on cots. Petitioner also got up and down off the floor to read to the children. Again, Petitioner was charged with cleaning the classroom and would bend down to pick up toys so that they could be disinfected. Once again, Petitioner would get up and down from the floor to read to the children. There were fifteen children in this classroom.

Petitioner further testified that in each of her assigned classrooms there were other teachers as well. Petitioner also testified that she was not solely responsible for putting all of the children in her classrooms to sleep.

Prior to beginning work for Respondent Petitioner suffered no major trauma or accident to her right knee. Petitioner testified that her knee pain became noticeable after approximately six months of employment with Respondent. She testified this knee pain worsened over her thirteen year career at the day care facility and occurred while performing her job duties for Respondent.

Petitioner testified she sought active medical care for her right knee in 2013. She first treated with her primary care physician, Dr. Migone, on January 25, 2013. She

acknowledged that she said nothing specific about her knee pain being associated with her work activities at that time.

Petitioner then saw an orthopedist, Dr. Barr, on May 21, 2013. Petitioner testified that while she was at her appointment with Dr. Barr and that she asked him if her knee pain was related to her work and that he did not inform her that her current condition was work-related.

Sometime after this appointment, Petitioner received a letter from Dr. Barr's office with a copy of the medical record dictated from her appointment on May 21, 2013. Petitioner testified that within thirty days or so of receiving this report she had a formal conversation with her supervisor, Linda Drust. Petitioner testified she spoke to Ms. Drust on July 23, 2013, regarding her right knee problem. Petitioner testified that in this conversation, Ms. Drust indicated that she had been checking into some new flooring for the classrooms.

After seeing Dr. Barr, Petitioner returned to see her primary care physician, Dr. Migone, on August 2, 2013. (PX 2) Petitioner testified that Dr. Migone referred her to Dr. Mall. Petitioner testified that her granddaughter had seen Dr. Mall. Petitioner's granddaughter is the child of Petitioner's attorney, Jason R. Caraway.

Over the course of her treatment with Dr. Mall, Petitioner has received three injections to her right knee which she testified only provided temporary relief of her symptoms. In addition, Petitioner underwent a month of physical therapy as ordered by Dr. Mall as well.

Petitioner testified that while being treated by Dr. Mall, she had a non-work-related accident in December of 2013 when she fell and tore her Achilles tendon in December 2013. Petitioner testified she did not fall on her right knee in this accident and did not injure her right knee in any way. Petitioner ultimately underwent surgery for her Achilles injury and was off work for an extended period of time. Petitioner was released to return to work for her Achilles injury in May of 2014. Petitioner did not return to work, however, and, instead, decided to retire due to her achilles tendon.

On cross-examination, Petitioner admitted that she was not the only teacher in any of the rooms that she worked in. Petitioner also admitted that the teacher to child ratio was one teacher to four children in both the infant and the toddler rooms. Petitioner admitted that there were always other teachers in the room with her and that student workers would come in and out throughout the day. Petitioner also admitted that she was not responsible for putting all of the children to sleep. Further, Petitioner admitted that in the infant room there were only cribs, in the smaller toddler room there were both cribs and cots, and in the older toddler room there were only cots. Petitioner testified that she worked eight years in the infant room, which did not have cots. Petitioner testified that there were adult size chairs to sit in in all the rooms.

Petitioner presently has trouble getting in and out of bed and can only walk short distances. She occasionally feels a sharp pain in her knee. She would like to undergo the surgery recommended by Dr. Mall.

Petitioner acknowledged being examined by Dr. Hulsey and she identified Petitioner's Exhibit 8 as the job description she typed up and gave to Dr. Hulsey to review.

Linda Drust was called by Respondent to testify. Ms. Drust is the current director of the day care Petitioner was employed by. Ms. Drust began her employment at the day care in March 2012. Ms. Drust testified that Petitioner did report a work place injury on July 23, 2013 and that her "son wanted her to start a paper trail". Ms. Drust testified that in addition to other teachers being present in Petitioner's classrooms, student workers also were present. Ms. Drust testified that while getting up and down was a significant part of Petitioner's job, it did not require her to be directly on her knees for extended periods of time. When asked about Petitioner's cleaning duties, Ms. Drust testified at the time Petitioner performed these duties, she was not employed by Respondent. Ms. Drust further testified she had no direct personal knowledge of Petitioner's job prior to 2012.

The Arbitrator Concludes:

Issue (E) Was timely Notice provided:

Petitioner failed to provide timely notice of her alleged August 19, 2013 accident to Respondent. Notice of an injury must be given within 45 days of the alleged accident. Notice of an alleged accident cannot be given before the accident has occurred. Petitioner failed to provide any testimony as to when and how she provided notice of her August 19, 2013 accident to Respondent. Petitioner's claim for compensation is denied.

Issue (C) Accident and Issue (F) Causal Connection:

Based upon the Arbitrator's determination on notice above, the issues of accident and causal connection are moot.

Issue (K) Prospective Medical Care:

Based upon the Arbitrator's determination on notice above, the issue of prospective medical care is moot.

Issue (J) Medical Expenses:

Based upon the Arbitrator's determination on notice above, the issue of medical expenses is moot.

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STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Priscilla Kelly,
Petitioner,

vs. NO: 98 WC 07320

16IWCC0072

Jewel Food Stores,
Respondent.

DECISION AND OPINION PURSUANT TO §19(h) and 8(a)

This matter comes before the Commission on Petitioner's §19(h) and 8(a) Petition. The underlying claim arises out of a September 20, 1997 accident which was originally tried before Arbitrator Kinnaman in May 2005. On June 13, 2005, Arbitrator Kinnaman awarded Petitioner $16,929.27 for connected medical services, 92 & 1/7 weeks of TTD for time lost during calendar years 1997-1999, and permanent partial disability of 45% loss of use of the person as a whole. On review, the Commission issued a Decision (case reference number 07 IWCC 1154) on August 31, 2007 reducing the permanency award to 37.5% loss to the person but affirming the other aspects of the Arbitrator's award. The claimant originally filed the 19(h)/8(a) Petition on December 7, 2009; following numerous continuance requests, a hearing was eventually held before Commissioner Tyrell in Geneva on September 26, 2014 and the hearing was continued to January 30, 2015 for additional evidence before proofs closed on that latter date.

The record demonstrates that at the time of the original accident, the claimant was employed by Respondent as a deli clerk/manager. On September 20, 1997, she was placing product in the cooler and felt radiating pain from her left hand up her arm. She sought treatment at Mercy Center on October 4, 1997 for pain in her left scapula/shoulder and thereafter began shoulder and neck treatment which culminated in cervical discectomy and fusion at C6-7 in May 1998, followed by a partial hemilaminectomy and foraminotomy at that level in October 1998. She reported ongoing pain complaints thereafter despite the surgery. On April 15, 1999, an FCE suggested she could occasionally lift 20 pounds and no more than 10 pounds frequently, putting her at the light functional demand level. Thereafter, she continued to treat for myofascial pain syndrome with trigger point injections and prescriptions for Lidoderm and Duragesic patches, Neurontin, Oxycontin, and anti-inflammatory medications. The Arbitrator observed in her decision, and the records reflect, that several doctors expressed concern over Petitioner's chronic narcotic use. At the original hearing on May 18, 2005, the claimant testified she continued to suffer pain in her neck and left shoulder; however, she had been working as a customer service manager for FTD beginning in 1999, had continued to work full time in that capacity for approximately six years with occasional overtime, and was earning comparable wages to her pre-injury occupation.

Following the original hearing and the August 31, 2007 issuance of the Commission's Decision, Petitioner filed the instant 8(a), 19(h), 19(k), 19(l), and 16 fee petition on December 7, 2009. However, the review hearing on these petitions was not initiated until September 26, 2014, and proofs were not closed until January 30, 2015, clearly more than 30 months after the Commission Decision was entered; at the September 2014 hearing date, Respondent noted the timely filing of the 19(h) but objected to proceeding under §19(h), based upon the time limitations found in that provision and noting that the hearing was at that point 85 months after the issuance of the Commission's Decision. At that 2014 hearing date, the Petitioner objected to the admission of Dr. Candido's §12 report, so proofs were left open until January 30, 2015, for admission of the transcript of Dr. Candido's deposition as well as additionally obtained medical records obtained from Dr. Chenelle's office. These records included documentation of treatment for a back injury Petitioner suffered in a fall at a casino in 2009. Petitioner insists that this fall did not affect her shoulder or neck, despite two lumbar surgeries (including multi-level fusion) and a settlement of her claim against the casino for $300,000.

At the 19(h)/8(a) hearing, the claimant testified she worked for FTD following the original arbitration hearing until January 2009, when she ceased working. She had treated with multiple medical providers following the original hearing, paying some expenses personally and routing others through group health insurance. While the Arbitrator's original decision noted that the claimant was continuing to treat with Dr. Chinthagada, the petitioner admitted to having compliance problems with his treatment protocol, culminating in his discharging her from the pain program shortly after the original hearing date in 2005, for violation of the program's narcotics control standards, including usage of multiple pharmacies and seeking additional medications from other providers.

The petitioner asserted a history of medical treaters including Dr. Lewis, whom she was suggested to see by the respondent's store manager, and who referred her to Dr. Glessner, Dr. Krieger, and Dr. Mazur, who referred her to Dr. Witt. She also saw Dr. Schiffman on her own, who referred her to Dr. Kazan. She acknowledged Section 12 examinations with Dr. Shea, Dr. Chenelle, Dr. Konowitz, and Dr. Candido. The claimant chose to treat with Dr. Chenelle, who performed neck surgery and referred her to Dr. Chinthagada. She thereafter saw Dr. Branshaw, who referred her to Dr. Oken, who

referred her to a Dr. Mocek in Arkansas, where the petitioner was considering relocating, and she also sought treatment at Delnor Hospital.

The petitioner testified that after the original accident she worked for FTD for 11 years, achieving the rank of a director running 3 departments. Her job there entailed interstate travel, extensive computer work, and routine twelve hour workdays. She asserted that she had not worked anywhere since January 2009, but that FTD did not terminate her until 2010, when she failed to return from a leave of absence. She received both short and long term disability after she ceased work and applied for Social Security Disability, which was granted in July 2011 retroactive to 2009. She testified she had not looked for employment since she stopped working.

Dr. Oken testified in his 2014 deposition that he first began treating the claimant on September 20, 2005. He initially noted medication usage, but in 2009 recommended trigger point injections to the neck, which were performed. While the petitioner had continued use of medication following the original hearing, Dr. Oken admitted her medication usage increased following the 2009 fall at the casino, noting both dosage increases as well as the prescription for the Flector patch, which had not been prescribed before then. He opined that this could be due to back problems, or to tolerance for opiate usage. He continued to treat her until January 2014, and noted that his later treatment notes reflected medical care for both her low back as well as her neck. He observed her strength and reflexes were normal, but opined she was not capable of gainful employment. Notably, the Commission observes that his original intake records from 2005 also include complaints of low back symptoms.

Dr. Konowitz performed a Section 12 examination at the Respondent's request in 2010. He noted waxing and waning symptoms which had periodically been treated with trigger point injections. At the time he saw her; she was recovering from a fall on a wet floor in a restaurant and was contemplating future lumbar surgery to address those symptoms. He assessed her with myofascial pain and recommended weaning her off narcotics. He concluded she could continue to work in a light duty capacity. In a supplemental report, he noted there had been no change in her neck and scapular conditions between December 2003 and May 2010.

Dr. Candido performed a Section 12 examination at the respondent's request. He generated a report, which was tendered to the claimant's attorney on November 11, 2011. No indication of an objection to the report was made either at the time or until the September 2014 hearing date, when a hearsay objection was made. The hearing was bifurcated to allow the deposition. Dr. Candido noted her medical history and symptom patterns. He opined that her primary complaints were related to myofascial pain, not related to the original accident; he noted that there were no findings of cervical radiculopathy or discogenic pain, which would be needed to make a finding of causal connection. He further noted that the treatment provided by Drs. Branshaw and Oken was not related to cervical stenosis or cervical nerve root compression or irritation, and as such was not related to the workplace accident. He recommended she be weaned off opiates and advised that cessation of smoking would also assist in the resolution of the myofascial muscular pain. He further opined that a pain pump would not be indicated for a diagnosis of myofascial pain given current medical literature. He believed she could work light duty as outlined by Dr. Konowitz and in the earlier original treatment records.

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The Commission concurs with the analyses rendered by Drs. Konowitz and Candido and does not assess a material change in the petitioner's physical condition related to the original injury which would require amendment to the permanent partial disability assessment earlier rendered in this case. Obviously, the petitioner has had ongoing health concerns, including two significant lumbar surgeries, but these are found to be related to an independent intervening incident and not related to the injury in the case at bar. In accordance with the above reasoning, the Petitioner's request for additional benefits under 19(h) benefits is denied.

Petitioner requests payment of medical expenses under Section 8(a); she admits that some of her bills were paid by Medicare, some by her now ex-husband's group insurance, and asserts that some were paid out of pocket. Respondent argues against liability for the claimed expenses in at least three ways: (1) Petitioner exceeded the "two-doctor rule" per Section 8(a) of the Act; (2) Petitioner failed to prove the identified treatment was reasonable, necessary and causally related to her work accident; and (3) the medical bills should not have been admitted as offered.

The Petitioner testified that she first treated with Dr. Lewis, to whom she was referred by her general manager. Petitioner's attorney referred to Dr. Lewis as a "co-choice." The Commission finds sufficient evidence in the record to support a finding that Dr. Lewis was respondent-referred. The Petitioner testified she sought treatment on her own from Dr. Schiffman, who would be her first choice of provider and who also referred her to Dr. Kazan.

Petitioner urges the Commission to find that Dr. Chenelle was also respondent-referred and should therefore be excluded from the choice of physicians analysis. The Commission disagrees with this argument. Respondent originally sent Petitioner to Dr. Chenelle for a §12 exam, not for treatment. It was only at the Petitioner's own request that Dr. Chenelle became a treating physician, eventually performing her second cervical surgery, and therefore Dr. Chenelle is the claimant's second choice of physician. Dr. Chinthagada's treatment course was a referral from Dr. Chenelle, but Dr. Chinthagada discharged Petitioner for violating her opioid contract with his office, which both ended that referral chain and further suggests that the treatment the claimant was interested in pursuing, was not medically supported.

The Petitioner then sought treatment with Dr. Branshaw, who referred her to Dr. Oken, who in turn has now referred her to Dr. Mocek in Arkansas. She has also sought ongoing care at Delnor Hospital. These providers are all outside the Section 8(a) referral chains; the medical bills associated with their offices are therefore denied.

The claimant attempts to argue, in the alternative, that Drs. Kreiger and Oken are both affiliated with Marianjoy and are therefore in the same practice or office setting and thus are a singular provider. The Commission does not find that argument persuasive, given that Dr. Oken testified in his deposition that Dr. Kreiger serves in a separate office and the two do not share records or patients, and that Dr. Kreiger did not refer the claimant to Dr. Oken.

Medical records and claimed expenses following the unrelated 2009 fall in the casino demonstrate ongoing and increasing use of pain medication following that time, and the Commission notes that such would be unrelated to the original injury, despite the claimant's dubious denials of increased symptoms to that anatomy. The records reflect extensive treatment for her low back with Drs. Branshaw, Chenelle, and Oken; the claimant admitted she settled her PI case against the casino for $300,000, although she testified she only cleared $100,000 after the medical liens and attorneys' fees. Dr. Oken's records in January 2014 clearly note ongoing complaints in the lower back and thighs; her allegations that her ongoing disability related exclusively to the 1997 accident defy credulity. Moreover, the claimant has persisted in her attempts to secure ever-increasing narcotic medication despite the persuasive recommendations of Drs. Chinthagada, Konowitz, and Candido.

The Petitioner identified medical bills and offered them as PX "G" and the Respondent objected to the admission of the exhibit. These include:

1) Dr. Branshaw, $2894.00;
2) Marionjoy/Dr. Oken, $36,294.00;
3) Delnor Hospital, $58,630.23;
4) IWP, $36,741.42;
5) Unicare Live and Health Insurance Group Health Lien, $37,805.43;
6) Pharmacy Bills (assorted), $148,319.50

The bills related to Dr. Branshaw and Marianjoy were contained in the subpoenaed exhibits containing the medical records of those providers, but the remaining bills were neither certified nor produced subject to a subpoena. Petitioner testified that she provided Respondent's billing information to her medical providers, but Respondent denied receiving bills prior to hearing, either directly from the providers or from Petitioner's attorney.

The expenses associated with Dr. Branshaw, Marionjoy/Dr. Oken, Delnor Hospital, and their prescriptions are denied as excessive in accordance with the above reasoning. The pharmacy bills appear related to the above providers and primarily post-date the intervening accident and are therefore denied. Any costs borne by the group carrier which apply against Dr. Lewis or his referral chain shall be paid by the respondent to the claimant pursuant to Section 8.2 of the Act; expenses paid to Drs. Branshaw and Oken, or Delnor Hospital, are denied as noted above, as are expenses related to those pharmacy bills.

The Petitioner requests the Commission assess penalties and fees against Respondent for failure to pay medical bills and disability benefits following the Commission's Decision. However, while Arbitrator Kinnaman found, and the Commission confirmed, that Dr. Chinthagada's pain management treatment was reasonable and necessary and causally related to Petitioner's work injury, Dr. Chinthagada thereafter discharged the claimant from treatment for noncompliance, having violated the narcotics control protocol. Dr. Oken did not review Dr. Chinthagada's treatment records and began an independent program, for which the Respondent was not liable. The medical bills were not provided to the Respondent, despite repeated requests, until the date of the hearing. The Respondent further correctly noted a significant intervening incident and secured Section 12 examinations of the claimant contravening her medical care, and properly objected to perceived violations of Section 8(a) referral requirements. The respondent's position was neither vexatious nor unreasonable; the request for penalties and fees is denied.

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IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) petition is denied and the 8(a) petition is granted to the extent discussed in the above Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's request for penalties and fees are denied.

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

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

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.

DATED: JAN 28 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

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