ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC020658
Case Name	Rodrigo Rodriguez v. H & S Concrete Construction
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	***Corrected Decision***
Commission Decision Number	23IWCC0295
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Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Katrina Robinson

DATE FILED: 7/21/2023

/s/ Deborah Baker, Commissioner

Signature

23IWCC0295

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 Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify Temporary Disability, Medical, Permanent Disability, Penalties and Attorney's Fees	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RODRIGO RODRIGUEZ,

Petitioner,

vs. NO: 18 WC 20658

H & S CONCRETE CONSTRUCTION,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

This matter comes before the Commission pursuant to Petitioner's timely filed Petition for Review of the Decision of the Arbitrator. Therein the Arbitrator found Petitioner's current low back condition is causally related to his undisputed June 27, 2018 accident but he reached maximum medical improvement as of July 9, 2019. The Arbitrator awarded temporary total disability ("TTD") benefits and medical expenses through July 9, 2019, and found Petitioner sustained 40% loss of use of the person as a whole, though the Arbitrator ordered Respondent to pay 50% of the award directly to Petitioner's ex-wife through her divorce attorney. Petitioner's alternative requests for further TTD benefits and prospective medical care or maintenance benefits with vocational rehabilitation, as well as his request for penalties and attorney's fees were denied. Notice having been given to all parties, the Commission, after considering all issues and being advised of the facts and law, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Petitioner is a Spanish-speaking gentleman; he testified through an interpreter. T. 24. Petitioner has been a member of Laborers Local 68 since 2001. T. 27. On May 10, 2015, he began working for Respondent, a concrete construction company; Respondent's business is seasonal in that its employees go on unemployment during winter. T. 26, 72. Petitioner's duties involved using a variety of equipment as well as tools to lay concrete. T. 27.

The parties stipulated that Petitioner sustained an accidental injury on June 27, 2018. Arb.'s Ex. 1. Petitioner was pushing a wheelbarrow full of wet concrete (T. 32) when the incident

occurred: "It was very muddy…we had to put a ramp because the wheelbarrow was heavy and it was not going anywhere. And I had my working boots, and then I slipped. And I fell, and that's when I felt, you know, the pain in my lower back." T. 30. Petitioner explained the wheelbarrow started to tip over and he ended up falling to his knee. T. 32-33. Petitioner testified he worked the remainder of his shift and did not seek treatment that day because he thought it was "nothing serious." T. 36. Petitioner reported for work the next day, a Thursday, but was unable to complete his workday, nor was he able to go to work Friday. T. 37. Petitioner testified that on Sunday, one of the owners phoned him about coming to work, "I told him that I wasn't able to work, and that's when he sent me to see the doctor." T. 37, 39.

On July 2, 2018, Petitioner presented to his family physician, Dr. Miguel Burgos, and gave a history of a sudden onset of low back pain while moving a heavy load at work. After an examination, Dr. Burgos obtained lumbar spine X-rays, prescribed Prednisone, and imposed work restrictions of no bending, pushing, or pulling. Pet.'s Ex. 1. The parties stipulated that Petitioner was temporarily totally disabled as of July 2, 2018. Arb.'s Ex. 1.

Petitioner followed up with Dr. Burgos on July 16, 2018 and reported his pain was worsening and had begun radiating to his left leg. Dr. Burgos adjusted Petitioner's medications and ordered physical therapy, which Petitioner commenced at ATI on July 19, 2018. Pet.'s Ex. 1, Pet.'s Ex. 4. On July 23, 2018, Petitioner returned to Dr. Burgos and reported no improvement in his symptoms. Dr. Burgos referred him to Dr. Ryon Hennessy; in the interim, Petitioner was to continue physical therapy. Pet.'s Ex. 1.

On July 30, 2018, Petitioner was evaluated by Dr. Hennessy of Orthopedic Specialists. The record reflects Petitioner complained of low back pain and left lower extremity radicular pain associated with a June 27, 2018 injury at work when he slipped and twisted while wheelbarrowing cement across a wet wooden plank. Dr. Hennessy noted Petitioner had an initial "twinge" in his back, which had progressed to low back pain going down the left leg following the S1 dermatome. Dr. Hennessy recommended a lumbar spine MRI as well as further physical therapy, and authorized Petitioner off work. Pet.'s Ex. 2.

The lumbar spine MRI was completed on August 21, 2018. The radiologist's impression was 1) L3-4 - central disc protrusion with moderate central spinal stenosis; 2) L4-5 - mild central spinal stenosis with narrowing of the lateral recesses, left paramedian disc protrusion noted and moderate bilateral foraminal stenosis; 3) L5-S1 - small central disc protrusion and mild bilateral foraminal stenosis; and 4) chronic appearing subtle anterior wedge deformity of L1. Pet.'s Ex. 2. On August 24, 2018, Petitioner followed up with Dr. Hennessy and, with a member of the doctor's staff translating, Petitioner reported physical therapy had not been beneficial and his symptoms persisted. Dr. Hennessy reviewed the MRI images and noted his agreement with the radiologist's findings of a "quite significant" protrusion at L3-4 causing moderate stenosis as well as facet arthropathy and protrusions at L4-5 and L5-S1 causing significant lateral recess and foraminal stenosis, though the doctor "thought there was a little more stenosis than the radiologist listed centrally." Pet.'s Ex. 2. Concluding the L5-S1 level was the source of Petitioner's pain, Dr. Hennessy recommended an epidural steroid injection ("ESI") as well as an EMG; in the meantime, Petitioner was to remain off work and continue with physical therapy. Pet.'s Ex. 2.

On September 14, 2018, Petitioner was evaluated by Dr. Naveen Tipimeni, a pain management specialist in Dr. Hennessy's practice group. Dr. Tipimeni noted Petitioner

complained of severe axial low back pain radiating down the left lateral leg to the ankle. After an exam and review of the MRI, which the doctor noted was consistent with Petitioner's pain complaints, Dr. Tipimeni recommended proceeding with a left L4-5 injection and prescribed Tramadol. Pet.'s Ex. 2.

On September 25, 2018, the bilateral lower extremity EMG was performed, and it was consistent with lumbosacral radiculopathy minimally involving the left L4-L5 nerve roots, with possible L3 radiculopathy as well. Pet.'s Ex. 2. Petitioner returned to Dr. Hennessy on October 8, 2018 and reported his symptoms were unchanged. He further advised the injection recommended by Dr. Tipimeni was denied by the workers' compensation insurance carrier. Dr. Hennessy noted the EMG revealed left L5 radiculopathy which correlated with Petitioner's symptoms. Dr. Hennessy again recommended an ESI, ordered further physical therapy, and maintained Petitioner's off work status. Pet.'s Ex. 2.

On October 25, 2018, Dr. Frank Phillips performed a §12 examination and record review at Respondent's request. Dr. Phillips' examination findings included tenderness to palpation, pain with range of motion, and a positive straight leg raise on the left; the doctor also noted Petitioner had no Waddell signs. On review of the August 21, 2018 MRI, Dr. Phillips noted it was a poor quality scan but demonstrated a central disc protrusion at L3-4 with some effacement of thecal sac with mild stenosis, diffuse disc bulging at L4-5 somewhat more prominent on the left side with mild contact with the thecal sac, and a central disc bulge at L5-S1. Dr. Phillips opined Petitioner likely sustained a lumbar sprain/strain with radiculopathy on the left side with a possibility of a disc injury, probably most pronounced at L3-4. Dr. Phillips further opined the diagnosis was causally related to the work injury. Dr. Phillips recommended a series of epidural steroid injections as well as completion of the previously started three-month course of physical therapy. Resp.'s Ex. 1, Dep. Ex. 2.

Dr. Hennessy re-evaluated Petitioner on November 21, 2018 and noted he continued to complain of pain following the L5 nerve distribution; the doctor also noted there had been no approval for the epidural injections. Dr. Hennessy referred Petitioner to pain management for the injections and recommended further physical therapy. Pet.'s Ex. 2.

On December 10, 2018, Dr. Phillips authored an addendum following his review of three additional medical records: the EMG, one physical therapy note, and Dr. Hennessy's October 8, 2018 office note. Dr. Phillips indicated the additional records confirmed his prior opinions that the work accident caused a lumbar sprain/strain with an element of radiculopathy, and a course of ESIs was reasonable and related to the injury in question. Dr. Phillips further opined Petitioner was limited to modified duty, avoiding repetitive bending and lifting more than 30 pounds. Resp.'s Ex. 1, Dep. Ex. 3.

The record reflects the epidural steroid injections first prescribed in August 2018 and confirmed as appropriate by Respondent's §12 physician in October 2018 were not approved until late January 2019. Pet.'s Ex. 2. On February 1, 2019, Dr. Tipimeni performed a left L4 and L5 transforaminal epidural steroid injection. Pet.'s Ex. 2. When Petitioner followed up with Dr. Tipimeni two weeks later, he reported excellent relief from the injection; specifically, his radiating left leg pain had completely resolved and not returned, and his axial low back pain had temporarily improved by 70% then returned to baseline. Dr. Tipimeni recommended proceeding with a second injection at L5-S1. Pet.'s Ex. 2.

On March 1, 2019, Petitioner was re-evaluated by Dr. Hennessy. Petitioner reported the injection provided moderate benefit but his low back pain had been slowly increasing and his left leg radicular pain had also returned though it was not as severe as prior to the injection. Petitioner's primary complaint was right lower back pain. Dr. Hennessy recommended proceeding with the second injection and maintained Petitioner's off work status. Pet.'s Ex. 2.

Petitioner underwent an L5-S1 interlaminar epidural steroid injection at Midwest Anesthesia & Pain Specialists on April 30, 2019 (Pet.'s Ex. 3) and followed up with Dr. Hennessy 10 days later. Petitioner advised the doctor that he had no relief from the second ESI and complained of radicular pain down the left leg as well as a new onset of occasional numbness into the fifth digit. Dr. Hennessy opined surgery may be appropriate and ordered an updated lumbar spine MRI. Pet.'s Ex. 2.

The MRI was done on June 11, 2019. The radiologist's impression was: 1) Disc desiccation noted at L1-2, L2-3, L3-4, L4-5 and L5-S1 levels; 2) Schmorl's node at T11-12 to L2-3 levels; 3) At L1-2 and L2-3 levels, there is a 1-2 mm diffuse disc protrusion with effacement of the thecal sac. Spinal canal and neural foramina are patent; 4) At L3-4 and L4-5 levels, there is a 2-3 mm diffuse disc protrusion with effacement of the thecal sac. Spinal canal and neural foramina are patent; 5) At L5-S1 level, there is a 2-3 mm diffuse disc protrusion with annular tearing effacing the thecal sac. Disc material and facet hypertrophy causing bilateral neuroforaminal narrowing that effaces the left and right L5 exiting nerve roots; and 6) Present scan when compared with previous scan shows no significant neural foraminal narrowing at L3-4 and L4-5 levels in the current scan seen previously. No other significant interval change noted. Pet.'s Ex. 2.

On June 14, 2019, Dr. Hennessy reviewed the MRI films and his interpretation was significant degenerative disc disease at L4-5 and L5-S1 with stenosis and annular tears at both levels contributing to the stenosis as well as the facet arthropathy, as well as mild stenosis at L3-4. Noting Petitioner continued with back pain predominantly in the left S1 distribution, Dr. Hennessy recommended an L4-5 and L5-S1 decompression and fusion. The record reflects Dr. Hennessy advised Petitioner the surgery had a 75 to 80% chance of improving his pain. Petitioner indicated he wished to consider the surgery and obtain a second opinion. Pet.'s Ex. 2.

On July 9, 2019, Dr. Phillips performed a second §12 examination and record review at Respondent's request. The report indicates the history was obtained through a translator and Petitioner described "some intermittent left leg radicular symptoms but feels these symptoms are quite manageable and not his primary concern"; Petitioner's main complaint was persistent and consistent axial back pain rated at 6/10. On examination, Dr. Phillips noted Petitioner was pain focused, reporting pain "with barely palpating the skin over lower lumbar spine"; range of motion was decreased and produced discomfort at end range, and straight leg raising on the left caused pain into the posterior thigh. Dr. Phillips reviewed the 2019 MRI and noted underlying mild congenital stenosis throughout the lumbar spine, a small central/right-sided disc protrusion at L5-S1 with a high intensity zone and some canal narrowing related to mostly the congenital stenosis, congenital stenosis with diffuse disc bulging at L4-5 with no evidence of any herniation, and congenital stenosis with a central disc protrusion at L3-4 effacing the thecal sac with some stenosis related to the underlying congenitally narrow canal. Dr. Phillips indicated his diagnosis of a work-related lumbar sprain/strain with an element of radiculopathy was unchanged, though radiculopathy was no longer a significant component of Petitioner's symptoms as Petitioner voiced

only complaints of back pain. Dr. Phillips further opined Petitioner's persistent complaints remained causally related to the work accident, but he disagreed that decompressive surgery would address Petitioner's axial back pain: "I believe with his congenital stenosis and mild degenerative changes, he is a poor candidate for a fusion. Based on review of the imaging studies I am not even certain what levels would actually be operated on." Resp.'s Ex. 1, Dep. Ex. 4. Dr. Phillips concluded Petitioner had reached maximum medical improvement ("MMI") and could no longer perform heavy manual labor; Dr. Phillips suggested a 20-pound lifting restriction and recommended an FCE to delineate Petitioner's functional levels. Resp.'s Ex. 1, Dep. Ex. 4.

When Petitioner was re-evaluated by Dr. Hennessy on October 28, 2019, he described a symptom complex consistent with his description to Dr. Phillips: Petitioner advised physical therapy had improved his radicular symptoms "quite a bit," leaving him with only occasional radiculopathy, and his primary issue was back pain. The record reflects Petitioner brought a copy of Dr. Phillips' §12 report for Dr. Hennessy to review, and Dr. Hennessy agreed with Dr. Phillips about Petitioner's history, the readings of the MRI "for the most part," and that Petitioner had plateaued with conservative care, however they came to different conclusions on surgery. Dr. Hennessy advised Petitioner that his options were to continue pursuing surgical authorization or have an FCE as Dr. Phillips has opined; noting Petitioner wished to have surgery, Dr. Hennessy maintained Petitioner's restrictions and directed that he lose weight pending surgery. Pet.'s Ex. 2. Petitioner has thereafter attended four- to six-week follow-up appointments with Dr. Hennessy while awaiting approval for surgery. T. 57. Dr. Hennessy continues to authorize Petitioner off work pending surgery. Pet.'s Ex. 2.

Petitioner testified his workers' compensation benefits were terminated in 2019, and he thereafter began a self-directed job search. T. 68-69. Petitioner testified he makes the employer contacts himself and because he does not write well in English, his friend, Maria Nava, helps him by documenting the information on the job search log. T. 70. He identified Petitioner's Exhibit 7 as his job search logs. T. 69. Petitioner typically goes to potential employers in the mornings. T. 77-78. An "in-person" contact means he went to the business, asked for an application, then filled out the application. T. 77. For "phone" contacts, he speaks to Spanish-speakers when possible and if none is available, he tries "to comprehend a little bit in English." T. 78. Petitioner testified he can "understand a little bit; but at the moment that I want to speak it, I stutter a lot and I'm not able to communicate." T. 84. Petitioner has a smart phone, but "is not very savvy as far as smart phone. Sometimes I need to ask my nieces on it, about it." T. 81. Petitioner confirmed the logs accurately reflect his job search efforts. T. 82. Petitioner has not gotten any interviews, nor has he secured formal employment, however he has earned occasional wages working odd jobs for a friend. T. 80, 61. Petitioner testified his friend, whom he has known since childhood, does residential side projects such as walls or built-in grills, and the friend would sporadically ask Petitioner to assist. T. 64, 66. Petitioner's role was to pick up around the job site, and when his friend noticed Petitioner was in pain or tired, he would tell Petitioner to sit down and rest. T. 64-65. He explained he worked for a few hours one or two days a week then would rest for the next two or three weeks. T. 65. Petitioner estimated that he performed work during five weeks and earned a total of $1,500. T. 65-66. Petitioner last worked with his friend in October 2020, when winter weather started and his friend stopped working for the season. T. 67.

On January 29, 2020, Dr. Hennessy authored a narrative report at Petitioner's Counsel's request. Resp.'s Ex. 10. Dr. Hennessy noted Petitioner's imaging studies revealed degenerative changes with an L4-5 disc protrusion and facet arthropathy causing some central and more

importantly foraminal stenosis, worse on the left, as well as an L5-Sl annular tear, disc protrusion, and facet arthropathy, with the left facet arthropathy being "the offending pathologic structure in my opinion as he had no significant right sided complaints." Pet.'s Ex. 5. Dr. Hennessy opined the June 27, 2018 accident permanently aggravated Petitioner's previously asymptomatic pre-existing condition and reiterated his surgical recommendation: "As he has failed these nonoperative measures, and his symptoms are objectified by the MRI in my opinion, it is my opinion as an orthopedic surgeon that it is reasonable and necessary for Mr. Rodriguez undergo [sic] lumbar decompression and spinal fusion at L4-5 and L5-S1." Pet.'s Ex. 5.

On March 11, 2020, Petitioner met with Kathleen Mueller ("Mueller"), a certified rehabilitation counselor with Independent Rehabilitation Services, for a vocational rehabilitation assessment. T. 75. Mueller's April 24, 2020 report reflects Petitioner's highest level of education was eighth grade in Mexico, he had minimal computer skills and did not have a computer at home, and he had a singular work history in the Very Heavy Physical Demand Level as a construction laborer with his most recent wages at Respondent being approximately $46.00 per hour. Noting she was instructed to base her conclusions on Dr. Phillips' 20-pound lifting restriction, Mueller opined that restriction precluded Petitioner from returning to his pre-accident line of work and he therefore suffered a loss of trade. Mueller conducted a transferable skills analysis utilizing the OASYS program and based on the Fair match results, determined Petitioner's potential earnings would be from $9.25 (the then-current minimum wage in Illinois) to $12.37 per hour; Mueller further noted the low end would increase as of July 1, 2020, when the minimum wage increased to $10.00 per hour. Mueller concluded Petitioner was a candidate for vocational rehabilitation services, and if approved, she would develop a Rehabilitation Plan and begin providing Petitioner with job readiness training, job seeking skill training, and job placement assistance. Mueller further noted she would recommend a GED/ESL program as well as short term computer training courses when available given the evolving COVID-19 pandemic. Pet.'s Ex. 6.

On June 4, 2020, Dr. Phillips performed a third §12 examination and record review at Respondent's request. Dr. Phillips recorded that Petitioner voiced similar complaints as he had previously, with axial low back pain being his primary symptom along with intermittent pain radiating down the left leg. On examination, Dr. Phillips noted Petitioner was "somewhat pain focused" but did not have any positive Waddell signs; exam findings included mild tenderness to palpation, decreased extension that reproduced back pain only, and straight leg raise on the left caused pain down the posterior aspect of the left leg. Dr. Phillips indicated his opinions were unchanged, and he continued to believe the work accident resulted in a lumbar sprain/strain injury. Dr. Phillips further reiterated his opinion that a two-level decompression and fusion was not indicated:

> To my review, the MRI shows no clear-cut pathology to explain [Petitioner's] ongoing symptoms. I am not certain as to the source of his ongoing back pain. His MRI shows only very mild degenerative changes of the L4-5 and L5-S1 disc. In addition, although he has radiating left leg pain, I do not see any clear-cut stenosis or neural compression as it relates to the injury in question at either L4-5, or L5-S1 on that side. For these reasons, I believe the proposed surgery has an extremely unpredictable chance of relieving [Petitioner's] symptoms and would recommend against it. Resp.'s Ex. 1, Dep. Ex. 5

Dr. Phillips again opined Petitioner was at MMI and unable to return to unrestricted work

activities, but the doctor updated his recommended lifting restriction to 30 pounds. Dr. Phillips concluded Petitioner had an impairment rating of 3% per the AMA 6th Edition Guidelines. Resp.'s Ex. 1, Dep. Ex. 5.

On July 31, 2020, Mueller conducted an updated transferable skills analysis utilizing Dr. Phillips' 30-pound lifting restriction. In her addendum, Mueller indicated the new restriction yielded two new Direct matches she considered appropriate for Petitioner, Tile Setter and Trimmer, and numerous Fair matches. Mueller opined Petitioner's earning potential under the 30-pound restriction was $10.00 to $13.60 per hour. Mueller further indicated she continued to believe Petitioner was a candidate for vocational rehabilitation services and would benefit from a GED/ESL program, computer training classes, and job placement assistance. Pet.'s Ex. 6.

Dr. Hennessy's August 24, 2020 office note reflects his review of, and disagreement with, Dr. Phillips' June 2020 §12 report. Dr. Hennessy noted his reading of the July 2019 MRI as demonstrating significant foraminal stenosis at left L5-S1 was consistent with the radiologist's while Dr. Phillips' reading was "in contrast to both mine and the radiologist." Pet.'s Ex. 2. Dr. Hennessy again recommended surgery, noting Petitioner had "consistent let [*sic*] L5 radiculopathy seen since the time of injury consistent with the foraminal stenosis predominantly at L5-S1 impinging the left L5 nerve root documented by not only myself but two radiologists in 2018 and 2019." Pet.'s Ex. 2.

Petitioner's last visit with Dr. Hennessy prior to arbitration was on April 21, 2021; Dr. Hennessy continues to recommend surgery. T. 59. Petitioner described his current symptoms. He cannot tolerate sitting or standing for long periods, and his back will hurt if he sits for an hour or an hour and a half. T. 53, 72. His pain goes along the length of his left leg starting at his left thigh down to his shin. T. 60. Petitioner testified he wants to proceed with surgery as recommended by Dr. Hennessy: "Because I'm still young and I want to be able to go back to work. And [Dr. Hennessy's] telling me that 98 percent that I'll be better." T. 56-57.

Maria Nava ("Nava") testified on Petitioner's behalf. Nava has been Petitioner's friend for over 25 years; they are from the same hometown. T. 13-14. Nava completed Petitioner's job search logs. T. 14. She testified Petitioner contacted the prospective employers, then she filled out the forms "because he has a language barrier." T. 15. Nava explained Petitioner understands and speaks "a little bit" of English, however she had "to fill out the form completely because [Petitioner] didn't understand it" nor can Petitioner write in English. T. 20, 22. Nava testified she and Petitioner were in contact most every weekday evening, either on the phone or in person, and he would "tell me where he went and who he spoke to, and I would write down the information." T. 15, 18-19. Nava stated she also assisted Petitioner with online applications: "And that would be in person; we would be in the same place…Sometimes he would come to my work office or sometimes at my house." T. 18. Nava could not recall how many online applications there were, but estimated it happened a couple times a month. T. 18-19. Nava would either email or hand deliver the completed job logs to Petitioner. T. 19.

Karen Taussig ("Taussig") testified on Respondent's behalf. Taussig has been a vocational rehabilitation specialist since 1988; she is a certified rehabilitation counselor with Genex. T. 85-86, 121. Taussig reviewed and verified Petitioner's job search logs at Respondent's request. T. 87. She did not prepare a report and instead testified from her notes. The first set of logs she reviewed was from November 4, 2019 through April 3, 2020; she reviewed the logs in May 2020. T. 90, 92-

93. Taussig summarized the job contact information gleaned from the logs: of the more than 300 contacts, 265 were in-person and of those, 110 noted an application was completed; in addition, 15 online applications were reported as well as one phone contact, and 29 entries did not specify how contact was made. T. 98. Taussig testified she attempted to verify the job logs by phoning some of the listed employers; when she called, she did not ask if there was a Spanish-speaker available. T. 99, 122. Of her 91 phone calls, she was advised the contact name as noted on the log was not accurate 43 times; 17 employers indicated there was no application on file although Petitioner had noted he submitted an application; nine employers refused to provide information regarding the application; nine employers advised that when an in person contact is made, the person is advised to apply online, email a resume, or contact a staffing agency, and Petitioner's logs did not indicate whether that was done; and four employers reported that during the dates Petitioner reported coming in, their offices were not open at all due to [COVID-19]. T. 99-101.

In October 2020, Taussig reviewed and verified a second set of logs, these from May 4, 2020 to July 2, 2020. T. 101-102. Taussig testified there were 129 employer contacts listed, 79 phone contacts and 50 in-person contacts with 21 applications submitted. T. 105. All of the contacts appeared to be cold contacts without the use of want ads or research of advertised job leads. T. 105. Taussig phoned 25 of the 129 employers, or about 19% of the contacts, to verify the logs: "11 of the employers contacted verified that they did not have an application on file for Mr. Rodriguez even though he had reported on his logs he had completed an application. 17 employers verified that there was no contact person by the name that he had reported on the job logs." T. 105-106.

Taussig performed a third review and verification of logs from November 2, 2020 to April 15, 2021. T. 106. She testified there were 321 employer contacts documented on the logs, of which 127 were phone contacts, 27 were in-person, and 162 were mail contacts, which she was unclear on what that meant. Taussig noted 40 of the contacts were from want ads, which she criticized as being "very low," and 29 were well outside the Chicago metropolitan area, which she felt was odd but did not affect her opinion. T. 106-109, 126. Taussig phoned 34 of the 321 employers, or about 10% of the contacts, to verify the logs:

> He did document legitimate accurate company names, addresses, and phone numbers. 16 of the employers verified that he did not document an accurate contact name. There was no one there by the name he provided on the job log. 17 employers verified that if he had called, he would have been directed to apply in person or online. And one employer verified that there was no application on file when he had reported he had submitted an application. T. 110-111.

Taussig opined, based on her review of the job logs, "it appeared that there was information that was not truthful or accurate as evidenced by the feedback from the employers I spoke with." T. 112. Taussig further opined Petitioner did not put forth a good faith job search, and Petitioner did not have a genuine intention to return to work. T. 112-113.

Taussig testified the factors which may hinder an individual's job search efforts include education, work history, and language skills T. 127-129. Taussig noted Petitioner's education was limited to eighth grade in Mexico, which she characterized as very low from a vocational rehabilitation perspective and could hinder his ability to perform a self-directed job search. T. 134-135. Taussig further agreed Petitioner had a singular work history as a union laborer and was

Spanish-speaking, and those factors could hinder his ability to find alternative employment. T. 135. Taussig opined Petitioner would benefit from vocational rehabilitation services such as job readiness training, job seeking skills training, creation of a resume, as well as job placement assistance. T. 136.

The August 3, 2020 evidence deposition of Kathleen Mueller was admitted as Petitioner's Exhibit 8. Mueller has been a certified rehabilitation counselor since 1998; she is also a licensed clinical professional counselor and certified ergonomic assessment specialist. Pet.'s Ex. 8, p. 7-8. Mueller has worked for Independent Rehabilitation Services ("IRS") since 2011. Pet.'s Ex. 8, p. 8. Mueller testified IRS receives the majority of its referrals from attorneys, and it is an equal split as far as referrals from plaintiffs and defense. Pet.'s Ex. 8, p. 9-10.

On March 11, 2020, Mueller met with Petitioner and conducted a vocational assessment interview; Mueller testified an interpreter was present as Petitioner is primarily Spanish-speaking and she is unaware of Petitioner's English proficiency. Pet.'s Ex. 8, p. 19, 58. Mueller thereafter performed a transferable skills analysis utilizing Dr. Phillips' 20-pound lifting restriction and documented her opinions in a report dated April 24, 2020. Pet.'s Ex. 8, p. 20. Mueller subsequently prepared an addendum detailing the results of an updated transferable skills analysis utilizing Dr. Phillips' 30-pound lifting restriction; Mueller testified there were two Direct matches and several Fair matches that she considered appropriate for Petitioner. Pet.'s Ex. 8, p. 39-40. Based on the wage range for these positions, Mueller opined Petitioner's earning capacity was $10.00 to $13.60 per hour. Pet.'s Ex. 8, p. 41.

Mueller opined Dr. Phillips' 30-pound restriction precluded Petitioner from returning to his pre-accident occupation of construction laborer, and he suffered a loss of trade, "the job that he has done for 24 years and will not be able to return to." Pet.'s Ex. 8, p. 42, 43. She further concluded Petitioner's work injury resulted in a loss of earnings and vocational rehabilitation services would increase his earnings capacity. Pet.'s Ex. 8, p. 42. Mueller opined Petitioner is a candidate for vocational rehabilitation and appeared motivated at the interview, stating he was "willing to go to GED class, ESL courses, anything that would help him obtain employment," and noting he needed assistance with computer skills, resume, cover letter, and "[d]id not know how to do a job search." Pet.'s Ex. 8, p. 44. Mueller explained the program would include GED/ESL classes, computer skills training, job readiness training, job seeking stills training, and job placement assistance. Pet.'s Ex. 8, p. 47-49, 53. Mueller emphasized that Petitioner had not had to look for work since 2005 (Pet.'s Ex. 8, p. 49), and the job search process has changed drastically in those 15 years and is now primarily online which "takes some amount of finesse in regards to the resume and cover letter and uploading documents to that software, entering into the fields of that software the appropriate responses, and using e-mail to monitor a job search and job application process." Pet.'s Ex. 8, p. 50-51. Mueller further clarified that Petitioner owning and using a smart phone does not translate to Petitioner being proficient on a computer: "The smartphone is not computer software processing. It's not the ability to amend documents. It's not the ability to work on a computer…you don't have access to your resume and cover letter." Pet.'s Ex. 8, p. 71-72.

Mueller testified it would be "very difficult" for Petitioner to perform an unassisted job search given he does not have a computer, does not know how to use word processing software, and has a language barrier. Pet.'s Ex. 8, p. 51. Mueller explained it is common for her clients to be confused about how to find employment on their own, and Petitioner expressed similar confusion:

"I recall him saying he just didn't know what to do next and he didn't know how to apply for stuff online, didn't have a computer. So I know he was having a difficult time trying to figure out where to go." Pet.'s Ex. 8, p. 70. Mueller did not review Petitioner's job search logs. Pet.'s Ex. 8, p. 92.

The September 9, 2020 evidence deposition of Dr. Ryon Hennessy was admitted as Petitioner's Exhibit 9. Dr. Hennessy is board certified and has a general orthopedic surgery practice; approximately 30 percent of his practice involves spine care, of which 60-70 percent involves the lumbar spine. Pet.'s Ex. 9, p. 6-8. He performs 20-30 spine surgeries per year. Pet.'s Ex. 9, p. 9.

Dr. Hennessy testified Petitioner came under his care on July 30, 2018, and surgery was first considered at the May 10, 2019 re-evaluation, when Petitioner reported no relief from a second lumbar ESI: "At that point he had failed physical therapy, activity modification, medications and time off work; and I recommended - - we wanted to talk about surgery. His first MRI was an open scan. So I recommended a second MRI in a closed scanner and then return to talk about possible surgery." Pet.'s Ex. 9, p. 28. The higher quality MRI was done on June 11, 2019, and Dr. Hennessy reviewed the images and report on June 14, 2019: "he had significant degenerative disc disease at L4-5 and L5-S1 with stenoses and annular tears and facet arthropathy. And I also found that he had L3-4 mild stenosis but did not thinking [*sic*] it was a symptomatic level and, therefore, did not need to be included in an operation." Pet.'s Ex. 9, p. 30. Dr. Hennessy noted the radiologist indicated the central canal was open, but in "my opinion, the L4-5 and L5-S1 lateral canals, lateral recesses and foramina were narrowed." Pet.'s Ex. 9, p. 46. Dr. Hennessy testified his diagnosis of lumbar radiculopathy emanating from the L4-5 and L5-S1 levels was unchanged, and he recommended decompression and fusion of L4-5 and L5-S1. Pet.'s Ex. 9, p. 31. Dr. Hennessy concluded the June 27, 2018 work accident permanently aggravated Petitioner's pre-existing condition:

> When the wheelbarrow wrenched his back at work, his symptoms began immediately and were reported in a timely fashion. They were consistent across Dr. Burgos [sic] and developed from back pain into a lumbar radiculopathy within a week or two, which is also consistent with an acute injury, and then remained consistent for the last two and a half years well, under two and a half years, just under two and a half years. Pet.'s Ex. 9, p. 39-40.

Dr. Hennessy is still recommending surgery. Pet.'s Ex. 9, p. 35.

Dr. Hennessy testified he had reviewed Dr. Phillips' reports and disagrees with Dr. Phillips' opinion that Petitioner is at MMI and not a surgical candidate:

> …he used the rational that spinal fusion is not always successful. I agree with that; but no surgery is always successful; and the numbers that I quoted were, in workmen's compensation, greater than half and up to 75 percent of patients who undergo spinal fusion as I'm recommending for Mr. Rodriguez do improve. So in some respects, well, I agree with Dr. Phillips that there's - - it's not 100 percent guaranteed that he will improve as no surgery has 100 percent guarantee. This has a very significant - - a very high rate of success in this particular patient who has consistent symptoms that were objectified; and we all agree they were objectified, even Dr. Phillips. Pet.'s Ex. 9, p. 57-58.

The November 24, 2020 evidence deposition of Dr. Frank Phillips was admitted as Respondent's Exhibit 1. Dr. Phillips is a board-certified orthopedic surgeon; his practice is focused on treatment of spinal disorders, and he performs over 300 spine surgeries per year. Resp.'s Ex. 1, p. 5-7. Dr. Phillips performed four §12 examinations and record reviews at Respondent's request: October 25, 2018; December 10, 2018; July 9, 2019; and June 4, 2020. Dr. Phillips testified consistent with his reports.

Dr. Phillips testified that at the October 25, 2018 §12 examination, he concluded Petitioner sustained a lumbar sprain/strain with a possible element of radiculopathy, which was related to the June 27, 2018 accident. Resp.'s Ex. 1, p. 14. Dr. Phillips testified that diagnosis remains unchanged, though by the July 9, 2019 examination, the focus of Petitioner's complaints had changed: "At this time, either the radicular complaints had essentially resolved or were not bothersome to him and he had persistent low back pain," which was related to the work accident. Resp.'s Ex. 1, p. 25-26. Dr. Phillips confirmed lumbar fusion surgery had been recommended, but he disagreed that Petitioner was a surgical candidate. Resp.'s Ex. 1, p. 28-29. Dr. Phillips concluded Petitioner had reached MMI, and based on his subjective presentation, Dr. Phillips did not think Petitioner could not return to heavy manual labor; Dr. Phillips recommended a 20-pound lifting restriction and suggested an FCE to further define what Petitioner could safely do. Resp.'s Ex. 1, p. 29-30. Dr. Phillips testified that when he examined Petitioner for the third and final time, on June 4, 2020, his diagnosis remained lumbar sprain-strain and the subjective radicular complaints Petitioner previously voiced seemed to not be an issue. Resp.'s Ex. 1, p. 34. The doctor continued to believe Petitioner was at MMI, could work with a 30-pound restriction pending an FCE, and surgery was not indicated. Resp.'s Ex. 1, p. 36-38. Dr. Phillips reiterated his disagreement with proceeding with decompression and fusion as recommended by Dr. Hennessy, explaining a decompression is not warranted because Petitioner does not have leg pain, and there is neither instability nor advanced degeneration sufficient to warrant fusion. Resp.'s Ex. 1, p. 80-82. Dr. Phillips performed an AMA impairment rating and concluded Petitioner had a three percent impairment. Resp.'s Ex. 1, p. 38.

CONCLUSIONS OF LAW

The Arbitrator found Petitioner's current condition is causally related to the accident but Petitioner "has reached maximum medical improvement and is not entitlement [sic] to prospective medical care or vocational rehabilitation services." Arb.'s Dec., p. 16. The Arbitrator found "Petitioner proved himself unreliable, with little credibility, and motivated by secondary gain," and noted "Petitioner's lack of credibility extends to all issues." Arb.'s Dec., p. 18. The Commission views the evidence differently.

I. Credibility

The Commission does not share the Arbitrator's credibility assessment, nor do we agree with the negative inferences in the Decision. The Commission finds nothing "hyperbolic" about Petitioner's testimony; to the contrary, Petitioner was plain spoken and his responses were straightforward. We further disagree that Petitioner was evasive regarding his actual job duties; there was nothing vague or misleading about Petitioner's responses to the few questions he was asked about his duties and the tools he used. T. 27-29. Moreover, the finding that Petitioner exaggerated his schedule seems predicated on Petitioner, along with all of Respondent's laborers,

going on unemployment when Respondent shut down during the winter months (T. 72); the Commission finds a negative inference predicated on Petitioner's acknowledgement that concrete construction is a seasonal endeavor is improper. Additionally, we do not believe Petitioner's completion of job search logs is suggestive of secondary gain motivation; rather, Petitioner testified his attorney instructed him to document his job search efforts to establish his entitlement to continuing workers' compensation benefits while the parties debated the reasonableness and necessity of further treatment versus vocational rehabilitation. T. 74. The Commission further observes some of the Decision's negative inferences are based on inaccurate statements. For instance, the Decision indicates Petitioner claimed to have been looking for work since "mid-July 2019," yet his job search logs do not start until October; we note, however, Petitioner testified he started his job search after his benefits were terminated in 2019 (T. 68-69), and according to Respondent's TTD ledger, that occurred in October (last TTD check was issued October 2, 2019). Resp.'s Ex. 9. As such, Petitioner's timeline testimony is corroborated by Respondent's evidence. The Commission finds Petitioner was credible. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866 (1st Dist. 2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

II. Prospective Medical Treatment and Temporary Total Disability Benefits

There is no dispute as to causation, as Respondent's §12 expert, Dr. Frank Phillips, agrees Petitioner's persistent complaints are related to the undisputed work injury. Rather, the first issue the Commission must resolve is whether Petitioner remains temporarily totally disabled pending surgery as recommended by Dr. Ryon Hennessy or whether Petitioner is at maximum medical improvement with permanent restrictions as Dr. Phillips opined.

Dr. Hennessy diagnosed Petitioner with lumbar radiculopathy emanating from L4-5 and L5-S1 and is recommending a two-level decompression and fusion. Pet.'s Ex. 2. During his deposition, Dr. Hennessy testified the MRIs provide objective evidence of the pathology causing Petitioner's complaints. The doctor first reviewed the 2018 MRI and identified an L4-5 left paramedian disc protrusion, which is the same side as Petitioner's leg pain, causing moderate central spinal stenosis, lateral recess narrowing, and moderate bilateral foraminal stenosis, as well as L5-S1 disc bulges, endplate spurring, a small central protrusion with annular tear, and mild bilateral foraminal stenosis. Pet.'s Ex. 9, p. 44. Dr. Hennessy compared his reading with that of the radiologist and stated they "disagreed in terms of the magnitude" of the findings, but agreed on the overall presentation of the lumbar spine as not normal. Pet.'s Ex. 9, p. 44-45. Dr. Hennessy then summarized his reading of the 2019 MRI: L4-5 stenosis, foraminal narrowing, and hypertrophy of the facet joints, and L5-S1 hypertrophy of the facets with impingement of the left and right L5 nerve roots. Pet.'s Ex. 9, p. 45-46. Dr. Hennessy acknowledged his interpretation differed from the radiologist's; while he opined the L4-5 and L5-S1 lateral canals, lateral recesses, and foramina were narrowed, the radiologist concluded the central canal and foramina were open. Pet.'s Ex. 9, p. 45-46. Dr. Hennessy explained he believed the L5-S1 findings were "more likely the chief pain-generating level," but L4-5 could also be causing Petitioner's symptoms; therefore, to reduce the risk of a subsequent re-operation, he recommended fusing both levels. Pet.'s Ex. 9, p. 66-67. Dr. Hennessy testified the proposed surgery has a "very high rate of success," with a greater than half to 75 percent chance of improving Petitioner's symptoms. Pet.'s Ex. 9, p. 57-58.

Dr. Phillips, in turn, opined Petitioner was not a surgical candidate. During his deposition, Dr. Phillips testified his diagnosis for Petitioner was lumbar strain/sprain with an element of radiculopathy but as of his July 9, 2019 examination, "the radicular complaints had essentially resolved or were not bothersome to him and he had persistent low back pain." Resp.'s Ex. 1, p. 25-26. Dr. Phillips detailed his review of both MRIs. On the 2018 MRI, Dr. Phillips identified mild disc desiccation and narrowing throughout the spine, diffuse disc bulging at L4-5 somewhat more prominent on the left with mild narrowing of the spinal canal, and a central disc bulge at L5-S1, though the doctor emphasized the images were poor quality. Resp.'s Ex. 1, p. 11. Dr. Phillips testified the 2019 MRI revealed Petitioner had a congenitally narrow spinal canal; as to the specific levels, there was a central right-sided disc protrusion with a high intensity zone at L5-S1, and a diffuse disc bulge at L4-5. Resp.'s Ex. 1, p. 24. Dr. Phillips further testified there was no nerve compression noted on the 2019 MRI, and this is consistent with Petitioner's description of primarily low back pain. Resp.'s Ex. 1, p. 25. Dr. Phillips explained he did not believe a lumbar fusion would address Petitioner's current low back pain complaints, nor did the imaging studies reveal findings sufficient to warrant a fusion: "…to be a good candidate you have to have a specific discrete pathology that you know is the source of the pain and address it…I felt there was nothing to suggest that to be the case…." Resp.'s Ex. 1, p. 28-29. Dr. Phillips opined the chances of the proposed surgery being successful are "incredibly small." Resp.'s Ex. 1, p. 37. Dr. Phillips concluded Petitioner was at maximum medical improvement and could work with a 30-pound lifting restriction pending an FCE to precisely define his capabilities. Resp.'s Ex. 1, p. 37.

The Commission finds Dr. Phillips opinions are persuasive and we adopt same. The Commission observes Dr. Phillips is an experienced spine surgeon who only treats disorders of the spine. We find Dr. Phillips' conclusion that surgery is not warranted and instead Petitioner is at maximum medical improvement with a permanent 30-pound restriction is corroborated by the imaging studies and Petitioner's symptoms. The Commission finds Petitioner reached MMI as of October 28, 2019; on that date, Dr. Hennessy reviewed Dr. Phillips' recommendation but rather than ordering the FCE to specify Petitioner's capabilities, Dr. Hennessy continued to pursue surgical authorization. Pet.'s Ex. 2. The Commission further finds Petitioner is entitled to TTD benefits from July 2, 2018 through October 28, 2019. While Petitioner acknowledged he performed sporadic work for a friend while Dr. Hennessy authorized him off work, the Commission finds those *de minimis* earnings constitute occasional wages, which do not preclude an award of TTD benefits. *See Mechanical Devices v. Industrial Commission*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003).

III. Vocational Rehabilitation and Maintenance Benefits

Having determined Petitioner is at maximum medical improvement with permanent restrictions which preclude him from returning to his pre-accident job as a concrete laborer, our analysis turns to Petitioner's request for vocational rehabilitation services and concomitant maintenance benefits. There are two phases to this issue: first, is formal vocational rehabilitation appropriate, and second, was Petitioner's self-directed job search sufficient to merit maintenance benefits.

A. Formal Vocational Rehabilitation

"A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that

rehabilitation will increase his earning capacity." *Greaney v. Industrial Commission*, 358 Ill. App. 3d 1002, 1019 (1st Dist. 2005). Because the primary goal of rehabilitation is to return the injured employee to work (*Schoon v. Industrial Commission*, 259 Ill. App. 3d 587, 594 (3rd Dist. 1994)), if the injured employee has sufficient skills to obtain employment without further training or education, that factor weighs against an award of vocational rehabilitation. *National Tea Co. v. Industrial Commission*, 97 Ill. 2d 424, 432 (1983). The Commission finds both vocational rehabilitation experts, Kathleen Mueller and Karen Taussig, opined Petitioner would benefit from formal vocational rehabilitation.

On March 11, 2020, Mueller met with Petitioner and conducted a vocational assessment interview; on April 24, 2020, she authored a report of her conclusions. Mueller opined Petitioner had a singular work history as a laborer, suffered a loss of trade as a result of the injury, and was a candidate for vocational rehabilitation services which, if approved, would include job readiness training, job seeking skills training, and job placement assistance. Pet.'s Ex. 6. On July 30, 2020, Mueller authored an addendum with an updated transferable skills analysis using Dr. Phillips' 30-pound lifting restriction. Pet.'s Ex. 6. Mueller documented there were additional potential Fair job matches and indicated it "remains this consultant's opinion that Mr. Rodriguez is a candidate for Vocational Rehabilitation Services." Pet.'s Ex. 6. During her deposition, Mueller reiterated her opinion that Petitioner suffered a loss of trade, and she further opined the injury resulted in a loss of earnings and vocational rehabilitation would increase Petitioner's earning capacity. Pet.'s Ex. 8, p. 42. Mueller explained the program would include GED/ESL classes, computer skills training, job readiness training, job seeking stills training, and job placement assistance. Pet.'s Ex. 8, p. 47-49, 53. While Respondent retained Taussig to perform a job search review and verification and not a vocational assessment, the Commission emphasizes that Taussig is a certified rehabilitation counselor and during her testimony, she opined Petitioner would benefit from the vocational rehabilitation services recommended by Mueller. T. 135.

In the Commission's view, the vocational expert opinions establish that formal vocational rehabilitation is appropriate, and Petitioner is motivated to participate in Mueller's program. T. 70. Respondent is ordered to provide and pay for vocational rehabilitation services with Mueller.

B. Self-Directed Job Search

Section 8(a) of the Act grants maintenance benefits while a claimant is engaged in a vocational rehabilitation program. *Greaney v. Industrial Commission*, 358 Ill. App. 3d 1002, 1019 (1st Dist. 2005). A claimant's self-initiated and self-directed job search or vocational training may constitute a "vocational-rehabilitative program" under section 8(a). *Roper Contracting v. Industrial Commission*, 349 Ill. App. 3d 500, 506 (5th Dist. 2004). Petitioner claims he conducted a valid self-directed job search and is therefore entitled to maintenance benefits. The Commission agrees.

The Commission emphasizes Petitioner's job search must be considered in context. As of October 2019, Petitioner had been authorized off work for over a year, and neither Dr. Hennessy nor Dr. Phillips believed Petitioner was physically able to return to work as a concrete laborer. Pet.'s Ex. 2, Resp.'s Ex. 1. Despite the mandate of Commission Rule 9110.10(a), there is no vocational rehabilitation assessment from that period in the record. Instead, Petitioner, who is primarily Spanish-speaking, has a singular work history in heavy manual labor, and most recently looked for work a decade and a half prior to the incident at issue (Pet.'s Ex. 6, p. 49), was left to

look for work on his own. Our review of the evidence reveals Petitioner was given no guidance and was not even provided with a bilingual job search form; rather, Petitioner had to communicate his employer contacts to Nava, who then recorded the information second-hand on the forms. In spite of these obstacles, Petitioner made over 750 employer contacts during his six-month job search. The Commission has considered Taussig's job search verification, and we do not find it persuasive. Initially, we note Taussig contacted only 19 percent of Petitioner's listed employer contacts. T. 99, 105-106. Of that 19 percent, Taussig testified there were several instances where the contact name documented on Petitioner's job log was not accurate, however, the Commission finds this is likely a consequence of, and attributable to, Petitioner having to report the information to Nava, who then transferred it to the job log. The Commission reiterates that we find Petitioner credible, and we find Petitioner performed a good faith job search under the circumstances. The Commission finds Petitioner is entitled to maintenance benefits from October 29, 2019 through May 13, 2021, the date of arbitration.

IV. Medical Expenses

Petitioner's Exhibit 11 contains medical bills for treatment rendered through the hearing date. Consistent with our maximum medical improvement determination, the Commission finds only those expenses incurred through October 28, 2019 are reasonable and necessary. The Commission observes Respondent urges us to find only the first 12 physical therapy appointments were reasonable and necessary. We decline to do so. Our review of the evidence reveals the extended course of physical therapy was a significant factor in reducing Petitioner's radicular complaints. Pet.'s Ex. 2, Pet.'s Ex. 3, Pet.'s Ex. 4. The Commission finds the full complement of physical therapy at ATI was reasonable and necessary.

V. Penalties and Attorney's Fees

Petitioner argues §19(l) and §19(k) penalties and §16 attorney's fees are warranted for Respondent's refusal to pay benefits for over a year. The Commission agrees, in part.

Section 19(l) of the Act provides as follows:

> If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay…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 *** have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. *820 ILCS 305/19(l)*.

Section 19(k) of the Act provides, "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." *820 ILCS 305/19(k)*. Section 16 of the Act provides for an award of attorney fees when an award of additional compensation under 19(k) is appropriate. *820 ILCS 305/16*. As the Supreme Court of Illinois explained in *McMahan v. Industrial Commission*,

> Viewing the statute as a whole, we believe that section 19(k) and section 19(l) were actually intended to address different situations. The additional compensation authorized by section 19(l) is in the nature of a late fee. The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." If the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory.
> In contrast to section 19(l), section 19(k) provides for substantial penalties, imposition of which are discretionary rather than mandatory. See *Smith v. Industrial Comm'n*, 170 Ill. App. 3d 626, 632, 121 Ill. Dec. 275, 525 N.E.2d 81 (1988). The statute is intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose. This is apparent in the statute's use of the terms "vexatious," "intentional" and "merely frivolous." Section 16, which uses identical language, was intended to apply in the same circumstances. *McMahan v. Industrial Commission*, 183 Ill. 2d 499, 515 (1998).

The purpose of sections 16, 19(k), and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297, 301 (1980). Under section 19(l) of the Act, the penalties are in the nature of a late fee, and are mandatory if the payment of benefits is late and the employer cannot show an adequate justification for the delay. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 20. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id*. The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Id*.

The record reflects Respondent terminated TTD benefits on October 2, 2019. Resp.'s Ex. 3. Respondent offers two bases for its TTD termination: 1) Petitioner failed to provide Respondent with updated treatment records, and 2) its orthopedic expert opined Petitioner had reached MMI. Although Respondent's first justification lacks merit, we find it was reasonable for Respondent to rely on Dr. Phillips' opinion. The Commission observes that under Commission Rule 9110.70(c), if a respondent is denying TTD benefits based on a lack of medical records, it is the respondent's responsibility to subpoena the needed records. Barring Petitioner refusing to provide an executed medical release, which there is no evidence of this occurring here, Respondent's failure to obtain updated medical records is not adequate justification for refusing to pay TTD benefits. However, the Commission finds Respondent reasonably relied on Dr. Phillips' expert opinion that Petitioner had reached MMI. As such, the Commission finds Respondent proved it had a good faith basis for discontinuing TTD benefits under the circumstances. This does not end our inquiry, however. Instead, we next consider Respondent's refusal to pay maintenance benefits.

Petitioner argues there was over a year that he was looking for work but Respondent failed to pay maintenance benefits. The Commission observes, though, that while Petitioner's job logs start in October 2019, the logs were not provided to Respondent until January 27, 2020. Resp.'s Ex. 7. As such, for the first three months of the claimed maintenance period, Respondent was not in possession of the records which would justify payment of benefits. Therefore, the Commission

finds Respondent reasonably withheld payment of maintenance benefits through January 27, 2020. The record reflects, however, that after Respondent received the logs, it did not institute benefits; instead, three months later, in May 2020, it retained Taussig to review and verify the job logs. T. 90, 93. In its Response to Petitioner's Petition for Penalties, Respondent claimed it based its denial on the expert vocational opinion of Julie Bose. Resp.'s Ex. 9. The Commission observes Respondent did not introduce Julie Bose's opinions into evidence. Respondent cannot prove it reasonably relied on an expert opinion when it fails to produce the expert's report for the Commission's scrutiny. To be clear, the only vocational expert opinion Respondent offered into evidence was the testimony of Karen Taussig. The Commission emphasizes, however, Respondent did not retain Taussig to perform the job log verification until May 2020 (T. 93); as such, the record reflects Respondent refused to pay maintenance benefits for over three months despite having no contrary vocational opinion evidence. The Commission finds Respondent's failure to pay maintenance benefits from January 28, 2020 through May 31, 2020 was unreasonable and vexatious and implicates the Act's penalties provisions.

Section 19(l) imposes a penalty of $30 for each day payment is delayed or withheld. The Commission has concluded Respondent withheld maintenance benefits from January 28, 2020 through May 31, 2020, a period of 125 days. The Commission orders Respondent to pay §19(l) penalties in the amount of $3,750.00 ($30 x 125 = $3,750.00).

The Commission finds Respondent vexatiously delayed payment of 17 6/7 weeks of maintenance benefits totaling $15,271.61 (17 6/7 x $855.21 = $15,271.61). Therefore, the Commission finds Petitioner entitled to §19(k) penalties of $7,635.81 ($15,271.61 x 50% = $7,635.81) and §16 fees of $3,054.32 ($15,271.61 x 20% = $3,054.32).

VI. Award Disbursement Order

The Decision ordered Respondent to pay 50% of Petitioner's award directly to a third party – Bernardina Nava. The Commission emphasizes such an order violates the plain language of Section 21, and we hereby vacate it.

VII. Permanent Disability

Given our order for formal vocational rehabilitation, the Commission finds Petitioner's permanent disability is not ripe for adjudication. The Commission vacates the award of 40% loss of use of the person as a whole and remands this matter to the Arbitrator for further proceedings consistent with this Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the July 8, 2022 Decision of the Arbitrator is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $855.21 per week for a period of 69 1/7 weeks, representing July 2, 2018 through October 28, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall have a credit of $56,443.86 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $855.21 per week for a period of 80 3/7 weeks, representing October 29, 2019 through May 13, 2021, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for vocational rehabilitation services with Kathleen Mueller, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred through October 28, 2019, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(l) penalties in the amount of $3,750.00.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §19(k) penalties in the amount of $7,635.81.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner §16 attorney's fees in the amount of $3,054.32.

IT IS FURTHER ORDERED BY THE COMMISSION that the order directing Respondent to pay 50% of the award to Bernadina Nava via the law firm of Lucas & Apostolopoulos is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of 40% loss of use of the person as a whole is vacated.

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.

July 21, 2023

/s/ *Deborah J. Baker*

DJB/mck

O: 5/10/23

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029539
Case Name	Antonio D'Alesio v. Walsh Construction
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	***Corrected*** Decision
Commission Decision Number	23IWCC0302
Number of Pages of Decision	21
Decision Issued By	Carolyn Doherty, Commissioner, Marc Parker, Commissioner

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Peter Carlson, Lauren Kus

DATE FILED: 7/27/2023

/s/Carolyn Doherty, Commissioner

Signature

DISSENT: /s/Marc Parker, Commissioner

Signature

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: Average weekly wage, benefit rates, TTD, TPD, maintenance, and PPD awards.	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTONIO D'ALESIO,

Petitioner,

vs. NO: 19 WC 029539

WALSH CONSTRUCTION CO. OF ILLINOIS,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent, Walsh Construction Company of Illinois, herein and notice given to all parties, the Commission, after considering the issues of average weekly wage, benefit rates, causal connection, medical expenses, temporary total disability, temporary partial disability, maintenance benefits, permanent partial disability and vocational rehabilitation expenses and being advised of the facts of 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 thereof.

I. Overtime and Average Weekly Wage

The Arbitrator concluded that Petitioner's earnings preceding the accident, including overtime wages were $8,047.49, with a corresponding average weekly wage (AWW) of $2,917.31 using the "weeks and parts thereof" method. While Petitioner was never explicitly told that overtime was mandatory, the Arbitrator found overtime was "implicitly mandatory" and included overtime in the average weekly wage calculation. The Commission sees the evidence differently and finds the inclusion of overtime in the average weekly wage calculation was unsupported by the record. The Commission finds that the proper average weekly wage, excluding overtime, is $1,992.31 using the weeks and parts thereof method.

Section 10 of the Act explicitly states that overtime is to be excluded in calculating the average weekly wage. 820 ILCS 305/10 (West 2022). However, "overtime includes those hours

in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." Airborne Express, Inc. v. Illinois Workers' Compensation, 372 III. App. 3d 549, 554-555 (1st Dist. 2007); *see also* Tower Automotive v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 427, 436 (2011). The *Airborne* Court did not include overtime hours in the AWW because it found Petitioner was not required to work overtime as a condition of his employment and although the claimant consistently worked overtime, he did not work a set number of overtime hours each week. *Id.* at 555; (*see also* Freesen, Inc. v. Industrial Commission, 348 Ill.App.3d 1035 (2004)(finding the Commission erred in including overtime hours in its AWW calculation because there was no evidence overtime was a condition of employment claimant's employment, no evidence claimant consistently worked a set number of hours per week or that overtime hours were part of claimant's regular hours).

Here, as was the case in *Airborne*, Petitioner did not work a set number of overtime hours each week. *See* PX 9; T. 1519-1522. Further, as conceded to by Petitioner in their brief, there is no testimony from Petitioner, Mr. Golf, Mr. Duncan nor language in the union contract which states overtime was mandatory or a condition of his employment. In addition, there is no evidence to support a finding that Petitioner would be subject to discipline or termination if he refused to work overtime. *(compare to* Tower Automotive v. IWCC, 407 Ill.App.3d 427 (1st Dist. 2011)(the Court including overtime because the claimant testified that an employee was subject to discipline if he refused to work overtime). Rather, Mr. Golf, the business agent for the union testified on cross-examination that if a cement finisher did not want to work overtime, he would send that finisher to a job they can get done in 8.5 hours or less. (T. 64-66). Mr. Duncan, the superintendent for Respondent also testified that if a worker did not want to work overtime, they could leave the job site and it would be up to that worker if they want to return to work for Walsh. (T. 408-09). Therefore, the Commission finds that overtime was not mandatory in this case.

Lastly, the Commission observes that nothing in the case law discusses nor defines mandatory overtime as "implicit" or "constructive." As such, the Commission rejects the conclusion that overtime was implicitly mandatory in this case because Petitioner felt obligated to stay and /or that Petitioner could not readily leave the job site before the work was completed.

Having found that overtime was not mandatory, the Commission concludes that overtime wages should not have been included in the average weekly wage. It follows that the Commission modifies the AWW using the "weeks and parts thereof" method. The Commission observes that the pay stubs for Petitioner's employment with Respondent provide a time period of August 19, 2019 through September 15, 2019. (PX 9/T. 1519). Of note, Petitioner worked two Saturdays (August 31st and September 7th), totaling 24 hours, and was paid for those hours at a rate of time and half. Those two Saturdays should be included at a straight time rate because Mr. Duncan testified that project ran Monday through Saturday. (T. 79-80). Petitioner testified he was paid for Saturday, September 14, 2019 the day after his accident, but he did not actually work. As such the earnings from that specific day should be excluded. Petitioner received "show up" pay on September 3rd, which is properly excluded because he did not actually work that day. After excluding the earnings on September 3rd and September 14th, Petitioner worked a total of 112 regular hours over a period of 13 days (or 2.6 weeks). As such the calculation is as follows: 112 hours x $46.25/hour amounts to $5,180.00 in total earnings and $5,180.00 divided by 2.6 "weeks

and parts thereof" provides an average weekly wage of $1,992.31. The Commission concludes the correct AWW for this claim is $1,992.31.

II. Temporary Total Disability and Maintenance Benefits

The Arbitrator ordered Respondent to pay Petitioner temporary total disability (TTD) benefits totaling $130,036.40, representing $1,529.84 per week for 85 weeks for the time periods of October 11, 2019 through March 9, 2021 and April 26, 2021 through July 14, 2021, but excluding June 16, 2021. The Arbitrator also awarded maintenance benefits at a rate of $1,529.84 per week for the period of July 15, 2021 through September 17, 2021, totaling 9-2/7ths weeks.

The Commission's modification of Petitioner's average weekly wage requires a modification of the TTD and maintenance rates and benefits awarded. Using the modified average weekly wage of $1,992.31, the Commission adjusts the TTD and maintenance rates to $1,328.21 per week. As such, the Commission modifies the total TTD award to $112,897.85, representing the 85 weeks of TTD benefits awarded for the period of October 11, 2019 through March 9, 2021, and April 26, 2021 through July 14, 2021, excluding June 16, 2021. The Commission also modifies the maintenance award to $12,333.36, representing 9-2/7ths weeks for the time of July 15, 2021 through September 17, 2021.

III. Temporary Partial Disability

The Arbitrator ordered Respondent to pay Petitioner temporary partial disability (TPD) benefits totaling $4,678.96 representing 3-5/7 weeks for the time periods of September 16, 2019 through October 10, 2019 and June 16, 2021. As with the TTD award, the Commission's modification of Petitioner's average weekly wage requires a modification of the TPD award. The pay stubs indicate that Petitioner's gross wages exceeded the correct AWW of $1,992.31 for the pay period of September 16, 2019 through September 22, 2019. As such, the Commission also corrects the period of time in which TPD benefits are owed to reflect the pay periods of September 23, 2019 through October 13, 2019 and June 16, 2021 pursuant to the paystubs in evidence, as well as Petitioner's testimony. (See PX 10; PX 19 and T. 181).

The Commission provides the following updated calculations using the correct AWW of $1,992.31:

DATE	PAY PERIOD	WKS	WAGE	GROSS	DIFF	TPD
9/25/19	9/16/19 - 9/22/19	1	1,992.31	4,590.32	N/A	N/A
10/2/19	9/23/19 - 9/29/19	1	1,992.31	832.50	1,159.81	773.21
10/9/19	9/30/19 -10/6/19	1	1,992.31	832.50	1,159.81	773.21
10/16/19	10/7/19 - 10/13/19	1	1,992.31	415.25	1,577.06	1,051.37
N/A	6/16/21	1/7	284.62	80.00	204.62	136.41
					TOTAL	$2,743.20

As such, the Commission modifies the TPD award to $2,743.20, representing 3 -1/7 weeks.

IV. Permanent Partial Disability

The Arbitrator concluded Petitioner's injuries resulted in a loss of earnings pursuant to Section 8(d)1 of the Act and awarded Petitioner permanent partial disability (PPD) benefits in the amount of a maximum weekly benefit of $1,147.38 commencing on September 18, 2021 until the Petitioner reaches the age of 67 years old or five years from the date of the final award, whichever is later. The Commission affirms the award of PPD benefits pursuant to Section 8(d)1 but modifies the benefit rate. According to the union contract, if Petitioner was currently working as cement mason, he would make $49.75 per hour, which amounts to an AWW of $1,990.00 based on a 40-hour week. (*See* PX 16/T. 1777.) The Arbitrator correctly found that after his work injury, Petitioner is capable of earning $800.00 per week ($20.00 per hour x 40 hours per week) as a result of his employment as a groundskeeper. Therefore, the wage differential is correctly calculated as $1,990.00 – $800.00 = $1,190.00 multiplied by 66-2/3% which amounts to $793.33. Therefore, Petitioner is entitled to weekly payments in the amount of $793.33 beginning September 18, 2021, until he reaches the age of 67 years old or five years after the final award, whichever is later.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated November 17, 2022, is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's average weekly wage for this claim is $1,992.31.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,328.21 per week commencing from October 11, 2019 through March 9, 2021, a period of 85 weeks of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary partial disability benefits in the amount of $2,743.20 for the period of September 23, 2019 through October 13, 2019 and June 16, 2021 as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,328.21 per week commencing from July 15, 2021 through September 17, 2021, a period of 9-2/7 weeks for maintenance benefits under Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $793.33/week beginning September 18, 2021 until he reaches the age of 67 years old or five years after the final award, whichever is later as provided in Section 8(d)(1) of the Act.

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.

Bond for the removal of this cause to the Circuit Court 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.

July 27, 2023

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

o: 06/15/23
CMD/jjm
045

/s/ *Christopher A. Harris*
Christopher A. Harris

CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's decision to affirm the Arbitrator's award of benefits to the Petitioner. However, I believe Petitioner's overtime wages should be included in his average weekly wage. Therefore, I dissent from that portion of the majority's decision. Business agent, Mr. Golf, testified that overtime was mandatory because concrete is a perishable product. He stated the work must be finished and that he would not send a worker to the worksite if he would not agree to work overtime. It is clear to me that Petitioner would not be given the opportunity to work an eight-hour shift if he did not agree to work overtime. Petitioner testified that overtime was mandatory because they didn't "stop the concrete." Respondent was in charge of the project and responsible for the concrete continually arriving at the worksite. I find Respondent's superintendent's testimony that Petitioner, or any worker, was free to leave the job site before the pour was completed not credible. Therefore, I dissent from the portion of the majority's decision excluding Petitioner's overtime wages from the average weekly wage calculation.

July 27, 2023

/s/ *Marc Parker*
Marc Parker

o: 06/15/23
MP/xxx
045

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC029539
Case Name	Antonio D'Alesio v. Walsh Construction
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	15
Decision Issued By	

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Peter Carlson

DATE FILED: 11/17/2022

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 15, 2022 4.44%

/s/ Rachael Sinnen, Arbitrator

Signature

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

Antonio D'Alesio
Employee/Petitioner

v.

Walsh Construction
Employer/Respondent

Case # **19** WC **29539**

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 **Rachael Sinnen**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **8/23/2022 and 9/21/2022**. 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 **Cost of vocational rehabilitation services pursaunt to Section 8(a)**

FINDINGS

On **9/13/2019**, 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 $**8,047.49**; the average weekly wage was $**2,917.31**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **2** 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 $**55,554.92** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**4,183.45** for other benefits, for a total credit of $**59,738.37**.

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 $1,529.84/week for 85 weeks, commencing 10/11/2019 through 3/9/2021, and 4/26/2021 through 7/14/2021, but excluding 6/16/2021 as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $1,529.84/week for 9-2/7 weeks, commencing 7/15/2021 through 9/17/2021, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits totaling of $4,678.96 reflecting 3-5/7 weeks (9/16/2019 through 10/10/2019, and 6/16/2021) as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 9/18/2021, of $1,147.38/week, which is the maximum benefits, until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay Petitioner directly for the outstanding medical services outlined in Petitioner's Exhibit 11 (with the exception of the Cement Masons Local 502 lien), pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner vocational rehabilitation expenses in the amount of $1,919.92, as provided in Section 8(a) 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.

NOVEMBER 17, 2022

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Antonio D'Alesio,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19WC29539
Walsh Construction Co. of Illinois	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on August 23, 2022 and September 21, 2022 in Chicago, Illinois before Arbitrator Rachael Sinnen on Petitioner's Request for Hearing. Issues in dispute include causal connection, average weekly wage "AWW," unpaid medical bills, temporary total disability "TTD," temporary partial disability "TPD," maintenance, Respondent's credit of TTD, penalties/attorneys' fees under Sections 19(k), 19(l), and 16 of the Illinois Workers' Compensation Act "Act." Arbitrator's Exhibit "Ax" 1.

Petitioner's Job Duties

The Petitioner is a member of the Cement Masons labor union Local 502. (TA 1 of 2 at 76). He has been a member of Local 502 since 1995, over 25 years. (TA 1 of 2 at 76). The Respondent hired the Petitioner to work on a project pouring a runway at O'Hare Airport. (TA 1 of 2 at 78). Access to the runway was restricted so Petitioner would meet the crew at a nearby office, load into company vehicles that were driven by "badged" employees who were cleared to drive on the runway, and then stop at airport security before arriving to the pour site. (TA 1 of 2 at 79-87). The foreman, Zenon Heldak (a.k.a. "Ziggy") was badged. (TA 1 of 2 at 105). At the end of the workday, Ziggy would return with his vehicle, the crew would load back into the vehicles, follow Ziggy out of the airport, go out through security, and drive back to the Respondent's office. (TA 1 of 2 at 107-9).

Petitioner worked on an 8-person crew (6 cement finishers and two operating engineers). Finishers use a variety of hand tools to "finish" concrete while following a paver machine. (TA 1 of 2 at 87). The Petitioner described in detail how the crew works as an assembly line as well as the importance of not falling too far behind the paver machine as the concrete will start to harden. (TA 1 of 2 at 96-99). Petitioner explained that a finisher could not simply step away from his work without disrupting the choreography of the rest of the crew and there were not extra finishers

standing by. (TA 1 of 2 at 101-2). The Petitioner's work with the Respondent required him to lift a variety of items some of which could be over 50 pounds. (TA 1 of 2 at 112-17).

The Petitioner testified that he was paid weekly, and a normal work week would be 8 hours a day and 5 days a week for a total of 40 hours. (TA 1 of 2 at 117). In the event of rain, the crew would wait it out until the superintendent or foreman called off the work. (TA 1 of 2 at 109-10). He testified that he worked overtime because it was mandatory, and paystubs reflected overtime on all his workdays with the exception of an 8-hour day on September 14, 2019 and a day where he was given 2 hours "show-up time," because he is entitled to a minimum of 2 hours if he appears for work, but no work is performed. (TA 1 of 2 at 126-31).

Mr. Thomas Golf, a retired business agent for Cement Finishers labor union Local 502, testified on behalf of the Petitioner and explained the hours and rate of pay of Respondent per the area wide agreement admitted as Petitioner's Exhibit 12. (TA 1 of 2 at 18-19, PX 12). Mr. Golf also testified that while there was nothing in the agreement that indicated overtime was mandatory for cement finishers, if the nature of the project requires the finisher to work (deadlines, concrete hardening, etc.), that finisher cannot go home. (TA 1 of 2 at 42).

Mr. Mark Duncan (the project superintendent) testified on behalf of the Respondent. (TA 2 of 2 at 74). Petitioner testified that he had never seen Mr. Duncan prior to the day he first appeared in court. (TA 2 of 2 at 171-72). Mr. Duncan testified that no one on the project was required to work overtime and he never received a request from the Petitioner to not work beyond 8 hours even though Mr. Duncan was at the project every day. (TA 2 of 2 at 79). He further indicated that a cement finisher could leave the job site at any time as there were always badged co-workers and vehicles available. (TA 2 of 2 at 83-86).

Petitioner's Prior Medical History

The Petitioner testified that prior to his September 13, 2019 work accident, he had never sought medical treatment related to his right shoulder. (TA 1 of 2 at 151). He had previously injured his left shoulder, which required surgery, but never the right. (TA 1 of 2 at 152). He testified that he returned to work after the left shoulder surgery about three years before his work accident. (TA 1 of 2 at 153). Prior to his work accident, he had never been recommended surgery on his right shoulder. (TA 1 of 2 at 153-54). Before his accident, he had never experienced any pain or significant issues in his right shoulder, nor had he ever missed time from work due to his right shoulder. (TA 1 of 2 at 154). While the Petitioner previously owned a couple of landscaping businesses with his family called ASK Landscaping and Grass Monkey, he did not do any work for those businesses between September 13, 2019 and the present. (TA 1 of 2 at 231, TA 2 of 2 at 50).

Work Accident of September 13, 2019

On September 13, 2019, the Petitioner was pulling a bull float while he was walking backwards. (TA 1 of 2 at 145). He tripped over a false board and fell on his right shoulder. (TA 1 of 2 at 146). He noticed an immediate onset of pain; his other crew members contacted the safety manager, Mr. Tom Moran, as well as the foreman Ziggy, who were not present at the time. (TA 1 of 2 at 147).

Mr. Moran arrived at the job site and transported the Petitioner back to the Respondent's office. (TA 1 of 2 at 148). He completed an accident report at that time, but he did not seek medical treatment. (TA 1 of 2 at 148). The Petitioner and Mr. Moran agreed to wait to see how the shoulder felt over the weekend. (TA 1 of 2 at 148). He was paid for the following day (a Saturday) but did not actually work. (TA 1 of 2 at 149). The following Monday, September 16, 2019, he returned to the office and met with Mr. Moran. (TA 1 of 2 at 150). Mr. Moran drove him to Physicians Immediate Care (PIC) for initial treatment. (TA 1 of 2 at 150).

Petitioner's Medical Treatment

The Petitioner initially treated at PIC who ordered an MRI of the right shoulder, that was performed on September 30, 2019 at A&E Diagnostics. (TA 1 of 2 at 155-56, PX 1 at 37, PX 2 at 3-4). PIC recommended a course of physical therapy, which the Petitioner began on October 9, 2019 at Athletico. (TA 1 of 2 at 156, PX 1 at 79, PX 4 at 95).

The Petitioner elected to seek out his own choice of provider in Dr. Steven Chudik, an orthopedic surgeon who he first saw on October 11, 2019. (TA 1 of 2 at 157, PX 3 at 22). Dr. Chudik reviewed the MRI, diagnosed the Petitioner with a right shoulder rotator cuff tear, and recommended surgery. (TA 1 of 2 at 157, PX 3 at 22-29).

Respondent's IME with Dr. Aribindi

The Respondent requested a Section 12 examination with Dr. Ram Aribindi that was performed on March 9, 2020. (TA 1 of 2 at 158, RX 2). Dr. Aribindi opined that there was no need for a rotator cuff repair as he felt the pathology was in the labrum. He opined that the Petitioner's right shoulder exam was "suggestive of labral pathology," recommended a steroid injection shoulder, an MR arthrogram, and possible surgery if no improvement from the injection. (RX 2 at 6).

Dr. Chudik performed the injection on May 1, 2020 and reiterated his recommendation for surgery when the Petitioner returned and continued to have shoulder complaints. (TA 1 of 2 at 158-9, PX 3 at 33-7).

Dr. Aribindi was provided with surveillance footage of the Petitioner taken on June 13, 2020 while in his garage at home. (RX 3, 7). Dr. Aribindi opined that the video showed, among other things, the Petitioner "elevating the right arm to the overhead position without difficulty." (RX 3 at 1). As a result, Dr. Aribindi opined that the Petitioner had no right shoulder pathology; he did not require any further treatment and could return to work without restrictions. (RX 3 at 2). In reliance on this report, the Respondent terminated TTD benefits on or about July 15, 2020, and denied Dr. Chudik's recommended surgery. (TA 1 of 2 at 139, RX 12). Dr. Aribindi's testimony at his evidence deposition on January 15, 2021 was consistent with his prior reports. (RX 1).

At trial, the Petitioner was asked to review three surveillance videos the Respondent submitted as Respondent's Exhibit 7 and Exhibit 10. In one video, Petitioner is seen attempting to reach overhead to grab bean bag boards that weigh 11 pounds each but used a step stool to avoid reaching overhead to lift the boards. (TA 1 of 2 at 193-98, RX 7, PX 7).

Petitioner's Surgery with Dr. Chudik

On July 28, 2020, Dr. Chudik proceeded with arthroscopic surgery. (TA 1 of 2 at 159). Dr. Chudik intraoperatively visualized a "right rotator cuff tear" of the "subscapularis" as well as "torn superior labral tissue." (PX 3 at 41, 43). After visualizing the two tears, he performed repairs of both among other procedures. (PX 3 at 41-45). Dr. Chudik took intraoperative photographs during the surgery. (PX 6 at 47-48).

Dr. Chudik testified on behalf of the Petitioner by way of an evidence deposition on December 16th and 28th, 2020. (PX 6). Dr. Chudik explained that both he and Dr. Aribindi turned out to be right; Dr. Aribindi suspected a labral tear, whereas Dr. Chudik suspected a rotator cuff tear. (PX 6 at 46). Dr. Chudik discovered the presence of both when he performed surgery on the Petitioner which are seen on the intraoperative photographs taken during the surgery. (PX 6 at 47-48). Based on the mechanism of injury, the immediate onset of pain after the accident, the positive findings on the MRI, as well as the intraoperative visualization of the tears during surgery, Dr. Chudik opined that the Petitioner's September 13, 2019 work accident caused the present condition of ill-being in his right shoulder. He further opined that the surgery and physical therapy were reasonable and necessary medical treatment for that diagnosis. (PX 6 at 54-55). Dr. Chudik reviewed the surveillance footage from June 13, 2020 but explained that Petitioner's injuries would not necessarily prohibit him from lifting his arm above shoulder height; it would prevent him from being able to vigorously work with the shoulder. (PX 6 at 61-62).

Following post-operative physical therapy, the Petitioner saw Dr. Chudik on March 9, 2021. (TA 1 of 2 at 160, PX 3 at 75). Dr. Chudik recommended a course of work conditioning, but the Petitioner declined and requested to be released back to work instead. (TA 1 of 2 at 160, PX 3 at 76). The Petitioner explained that he needed to return to work because he had not seen any income in around 8 months at that stage. (TA 1 of 2 at 160). Dr. Chudik released him to full-duty work on a trial basis. (TA 1 of 2 at 160, PX 3 at 76).

Petitioner's Work with Lampignano & Sons

Petitioner attempted to return to full-duty work as a cement finisher and his union's business agent found him work at two cement contractors: Lampignano & Sons and Abbey Paving & Sealcoating. (TA 1 of 2 at 160-61). The Petitioner testified that this work was similar to that which he was doing for the Respondent, but he was unable to tolerate the pain long term and was unable to keep those jobs. (TA 1 of 2 at 162-164).

Mr. Mike Lampignano, the owner of Lampignano & Son Construction (a concrete company) testified on behalf of the Respondent by way of an evidence deposition on August 22, 2022. (RX 21). Mr. Lampignano observed the Petitioner performing curb and sidewalk work, which required framing in the morning and pouring concrete a few hours later. (RX 21 at 8). He testified that the Petitioner did not perform any overhead lifting. (RX 21 at 10). Mr. Lampignano denied that the Petitioner complained of any pain. (RX 21 at 9). He testified that he asked the Petitioner to return the following day, but Petitioner declined because he would not work full-time. (RX 21 at 11).

The Petitioner subsequently returned to Dr. Chudik on April 6, 2021 who documented the Petitioner's desire but struggle to return to work as a cement finisher. (TA 1 of 2 at 165, PX 3 at 78-9). Untimely Dr. Chudik recommended an FCE and removed him from work again. (TA 1 of 2 at 166, PX 3 at 82-83). The FCE was completed on April 30, 2021, the Petitioner returned to Dr. Chudik on May 7, 2021 who reviewed the FCE results and released him to work pursuant to the restrictions outlined in the FCE. (TA 1 of 2 at 166, PX 3 at 87). The FCE revealed deficiencies in the right arm versus the left. The Petitioner could bilaterally lift up to 47.8 pounds, and that he could lift bilaterally overhead 19.2 pounds. (PX 5 at 411).

The Petitioner next returned to Dr. Chudik on June 22, 2016 and requested a course of work conditioning, which he began at ATI on June 28, 2021. (TA 1 of 2 at 166-67, PX 3 at 97, PX 5 at 380). However, by July 2, 2021, work conditioning was discontinued due to difficulty with range of motion of the right shoulder and the therapist recommended using the April 30, 2021 FCE to determine the Petitioner's functional capabilities. (PX 5 at 365, 367). On July 14, 2021 Dr. Chudik discharged him from care and imposed permanent restrictions based on the FCE. (TA 1 of 2 at 167-68, PX 3 at 94).

Petitioner's Work with GCA

In May of 2021, the Petitioner began looking for a new job, keeping job logs that show contact for over 150 prospective employers between May 3, 2021 and August 9, 2021. (TA 1 of 2 at 179, PX 17). On September 19, 2021, Petitioner started work for GCA Education Services, which is a groundskeeping and custodial contractor for high schools. (TA 1 of 2 at 182-4, RX 22 at 8). The Petitioner's job duties include emptying garbage cans, collecting trash and yard waste around the school grounds, as well cutting grass, and trimming foliage with weed whackers, edgers, backpack blowers and lawn mowers. (TA 1 of 2 at 185). He started earning $17 per hour; by January of 2022 he received a merit-based raise to $20 per hour. (TA 1 of 2 at 186, PX 17 at 2, 9).

Mr. Trevor Garcia (a facility operations manager for AMB Industries[1]) testified on behalf of the Respondent by way of an evidence deposition on September 16, 2022. (RX 22). He testified to the job description contained in Respondent's Exhibit 13. Mr. Garcia stated that the requirements of the groundskeeper role were within the Petitioner's restrictions. (RX 22 at 45-46). He testified that the Petitioner never complained about physical difficulty doing the job, or any pain in his right shoulder. (RX 22 at 30, 35-37).

The surveillance videos admitted as Respondent's Exhibit 10 depict the Petitioner working for GCA on September 27, 2021 and September 29, 2021. (TA 1 of 2 at 203, RX 10). The Petitioner is seen riding a lawnmower, lifting garbage out of garbage cans with the primary use of his left hand, carrying a hedge trimmer with his left hand, using a grabber device with his right hand to pick up litter from the ground to place it into a bucket he is holding with his left hand, and attempting to use a pull-cord to start the gas-powered hedge trimmer first with his right arm unsuccessfully and then switching to his left arm. (TA 1 of 2 at 216-20, RX 10).

In March of 2022, the Petitioner went off of work for an unrelated heart condition and was laid off when he was released back to work in July of 2022. (TA 1 of 2 at 188). At trial, the Petitioner

[1] ABM Industries is a facilities contractor that owns GCA. (RX 22 at 5, 7).

had resumed his job search and was waiting for a response following an interview for another landscaping position at Loyola University in Chicago that pays $20.00 an hour. (TA 1 of 2 at 188).

Evidence Deposition of Ms. Kathleen Mueller

Ms. Kathleen Mueller, a vocational counselor for 10 years, testified on behalf of the Petitioner by way of an evidence deposition on August 31, 2021. (PX 14). She described the Petitioner as a 45-year-old man who emigrated from Italy in 1979. (PX 14 at 18-19). The Petitioner reported that he did not attend high school, nor did he have a GED. (PX 14 at 22). Ms. Mueller opined that the Petitioner had a "singular work history" as a cement finisher. (PX 14 at 25). Ms. Mueller testified that based on the dictionary of occupational titles, it was her understanding that cement finishing was "heavy" work that could require lifting up to 100 pounds. (PX 14 at 70). Ms. Mueller opined that the Petitioner has lost access to his prior occupation as a cement finisher due to his restrictions, and as a result, he sustained a reduction of his earning capacity. (PX 14 at 40-41). Ms. Mueller performed vocational testing and a transferable skills analysis, which led her to identify several appropriate jobs for the Petitioner including cage maker, stone splitter, and mold maker, which are light jobs related to the concrete and machinery industries. (PX 14 at 34-35). In the medium category, she identified drywall applicator, trimmer, steel post installer and a boiler reliner. (PX 14 at 35). After researching wages for these jobs, Ms. Mueller concluded that the Petitioner could likely earn between $11.80 per hour and $19.00 per hour. (PX 14 at 37-38).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The Petitioner provided unrebutted testimony that, prior to his work accident, he never sought medical treatment or had been recommended surgery for his right shoulder. (TA 1 of 2 at 151, 153-54). Prior to his work accident, he never experienced significant pain in the right shoulder, nor did his right shoulder ever affect his ability to work. (TA 1 of 2 at 154). The Petitioner testified

that he had a *left* shoulder surgery in 2016 but had been working without restrictions since then. (TA 1 of 2 at 76, 153). As a result, the Petitioner established that his right shoulder was in a "previous condition of good health."

The Petitioner also established that he suffered a traumatic injury involving his right shoulder insofar as he fell directly on his right shoulder in the undisputed work accident. (AX 1, TA 1 of 2 at 146). He explained that he immediately felt pain in his right shoulder following the accident. (TA 1 of 2 at 146). This is further corroborated by the Petitioner's treating medical records. (PX 1 at 12). Both Dr. Chudik and Dr. Aribindi testified that the mechanism of injury is consistent with rotator cuff and labral tears. (AX 1, PX 6 at 55-56, RX 1 at 26, 109).

The Arbitrator finds the opinions of Dr. Chudik to be more credible than the opinions of Dr. Aribindi. The Petitioner experienced temporary relief after undergoing an extraarticular injection that addressed both the rotator cuff and labral pathologies. When Dr. Chudik performed arthroscopic surgery on July 28, 2020, he visualized both the supraspinatus tear that he suspected, as well as the labral tear that Dr. Aribindi suspected. (PX 6 at 46). Additionally, Dr. Aribindi initially opined that the Petitioner required work restrictions and possible surgical intervention to address his labral pathology. After watching surveillance footage that Dr. Aribindi described as depicting overhead lifting, he opined that the Petitioner required no further treatment and could return to work without restrictions. The Arbitrator does not find Dr. Aribindi's final opinions to be persuasive as Petitioner was often obscured in the surveillance footage, was not lifting overhead, and was lifting below the weight restrictions initially recommended by Dr. Aribindi. (RX 1 at 122, 131-32, 138).

Based on the above, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

Issue G, Petitioner's earnings, the Arbitrator finds as follows:

Section 10 of the Act "provides four different methods for calculating average weekly wage. (1) By default, average weekly wage is 'actual earnings' during the 52-week period preceding the date of injury, illness or disablement, divided by 52. (2) If the employee lost five or more calendar days during that 52-week period, 'whether or not in the same week,' then the employee's earnings are divided not by 52, but by 'the number of weeks and parts thereof remaining after the time so lost has been deducted.' (3) If the employee's employment began during the 52-week period, the earnings during employment are divided by 'the number of weeks and parts thereof during which the employee actually earned wages.' (4) Finally, if the employment has been of such short duration or the terms of the employment of such casual nature that it is 'impractical' to use one of the three above methods to calculate average weekly wage, 'regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer.'" *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 230-31 (2001).

The Arbitrator relies on the credible testimony from the Petitioner and a representative from his union, Mr. Golf. The Petitioner could not easily leave before the work was completed due to the

nature of the job as pouring concrete is a time sensitive matter. (TA 1 of 2 at 34-35, 88-96). This was consistent with the testimony of Mr. Duncan, the Respondent's concrete superintendent on the project. (TA 2 of 2 at 75). Additionally, the Petitioner could not leave the job site on his own accord even if he wanted to because Petitioner was pouring concrete on a runway at O'Hare Airport which had restricted access. (TA 1 of 2 at 78). The Arbitrator considers the testimony of Mr. Duncan, Respondent's witness, but does not find his testimony credible regarding the accessibility of the job site.

Not only does the Arbitrator find that overtime was mandatory but further finds that the Petitioner's overtime hours were consistent. The Petitioner's credible testimony is consistent with his paystubs, which reveal he worked overtime 13 out of the 13 days he worked. (TA 1 of 2 at 130-31; PX 9). The Petitioner, Mr. Golf and Mr. Duncan all testified that a regular workday was 8 hours long, and a regular work week was 5 days long, for a total of 40 hours per week. (TA 1 of 2 at 25-26, 28, 117, TA 2 of 2 at 78, 80). The Petitioner provided unrebutted testimony that he missed a total of 6 days for reasons outside of his control, like inclement weather. (TA 1 of 2 at 120-30).

As a result, the Arbitrator finds that the Petitioner's average weekly wage should be calculated by dividing his total earnings, at straight-time, by the weeks and parts thereof he actually worked. The record shows that he actually worked a total of 13 days prior to his work accident (or 2.6 weeks) of which he worked a total of 164 hours[2]. His pay records reveal an hourly rate of $46.25 per hour at all relevant times. (PX 9). As a result, the Petitioner's average weekly wage is based on $46.25 per hour multiplied by 164 hours, or $7,585.00. $7,585.00 divided by the 2.6 "weeks and parts thereof" the Petitioner worked provides an average weekly wage of $2,917.31.

As a result, the Arbitrator finds that the AWW calculated pursuant to Section 10 of the Act was $2,917.31.

Issue J, whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The "two-doctor rule" refers to Petitioner's choice of providers as described in Section 8(a) of the Act. Section 8(a) of the Act states a Respondent is responsible for "(1) all first aid and emergency treatment; plus (2) all medical, surgical and hospital services provided by the physician, surgeon or hospital initially chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical services in the chain of referrals from said initial service provider; plus (3) all medical, surgical and hospital services provided by any second physician, surgeon or hospital subsequently chosen by the employee or by any other physician, consultant, expert, institution or other provider of services recommended by said second service provider or any subsequent provider of medical services in the chain of referrals from said second service provider…" 820 ILCS 305/8.

[2] The Arbitrator excludes the 2 hours of "show up time" he received on September 3, 2019, as well as the 8 hours of pay he received on the day after his accident, September 14, 2019. (PX 9).

Throughout his treatment, the Petitioner always maintained a chain of referrals within the Respondent's choice of provider, and his own two choices of providers. He first sought treatment with Physicians Immediate Care at the direction of the Respondent. (TA 1 of 2 at 150, PX 1). The doctors are Physicians Immediate Care referred him to A&E Diagnostics for an MRI of the right shoulder. (TA 1 of 2 at 155, PX 1 at 37, PX 2). After several weeks, the Petitioner elected to seek out his own choice of physician in Dr. Steven Chudik. (TA 1 of 2 at 157, PX 3). Dr. Chudik referred him for physical therapy at both Athletico and ATI Physical Therapy. (PX 3, PX 4, PX 5). Dr. Chudik performed surgery at Salt Creek Surgery Center. (PX 6 at 142). Anesthesia services for that surgery were provided by Midwest Anesthesia Partners. (PX 11 at 26). Dr. Chudik credibly testified that all the Petitioner's treatment, including the surgery, was reasonable and necessary. (PX 6 at 54). Dr. Aribindi did not agree Dr. Chudik as to the necessity of the surgery; however, the Arbitrator having found Dr. Aribindi unpersuasive on the issue of causation extends that finding to his opinion to the reasonableness and necessity of the surgery.

The Arbitrator finds that the lien from the Petitioner's health insurance through the Cement Masons Local 502 is unrelated to the September 13, 2019 work accident. A review of the lien reveals that the dates of service for the charges do not correspond with any of the treatment contained in the record. (PX 11). The Arbitrator finds that it appears the majority of these charges are related to the Petitioner's unrelated heart condition in the Spring and Summer of 2022. (TA 1 of 2 at 186-88, PX 11).

As the Arbitrator finds that the Petitioner's current condition of ill-being in his right shoulder is causally related to his work accident, the Arbitrator further finds that the medical treatment provided to the Petitioner has been both reasonable, necessary and within the two-doctor rule.

The Arbitrator orders Respondent to pay Petitioner directly for the outstanding medical services outlined in Petitioner's Exhibit 11 (with the exception of the Cement Masons Local 502 lien), pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act.

Issue K, whether Petitioner is entitled to temporary total disability, temporary partial disability, and maintenance benefits, the Arbitrator finds as follows:

The Arbitrator, having found that the Petitioner's current condition of ill-being in his right shoulder is causally related to his work accident, further finds that all of the lost time the Petitioner incurred was likewise related to the work accident.

The Petitioner credibly testified that he was restricted to light-duty work from September 16, 2019 through October 10, 2019. (TA 1 of 2 at 154-55, PX 1 at 15-16, PX 3 at 21). He was then removed from work entirely by Dr. Chudik from October 11, 2019 through March 9, 2021. (TA 1 of 2 at 157, 160, PX 3 at 21, 22, 76). The Petitioner was released to full-duty work thereafter until Dr. Chudik again removed him from work beginning April 26, 2021. (TA 1 of 2 at 166, PX 3 at 84). Other than one day of work at Royal Pools for $80.00 on June 16, 2021, the Petitioner remained off of work until July 14, 2021 at which time Dr. Chudik released him back to work with permanent restrictions based on the FCE. (TA 1 of 2 at 1607-68, 180-81, PX 3 at 96, 19). The Petitioner subsequently conducted a diligent self-directed job search from approximately May 3, 2021 through August 9, 2021. (PX 15 at 56, PX 17). In August 2021, he secured an interview with his

new employer, GCA, and started working on September 18, 2021. (TA 1 of 2 at 182-84, RX 22 at 8, 20, RX 13 at 42, PX 18 at 1-2). For calculating temporary partial disability benefits, the Arbitrator turns to Petitioner's Exhibit 10, which contains the light-duty pay records, as well as Petitioner Exhibit 19 which documents the pay rate and first day of work at Royal Pools. (TA 1 of 2 at 180-81, PX 10, PX 19).

Based on the above, the Arbitrator finds Respondent liable for 85 weeks of TTD benefits (October 11, 2019 through March 9, 2021 and excluding June 16, 2021) at a weekly rate of $1,529.84; TPD benefits totaling $4,678.96 (reflecting 3 5/7 weeks from September 16, 2021 through October 10, 2019 and June 16, 2021); and maintenance benefits of $1,529.84 per week for 9 2/7 weeks, commencing July 15, 2021 through September 17, 2021 as provided in Section 8(a) of the Act.

Issue L, the nature and extent of the injury, the Arbitrator finds as follows:

Section 8(d) of the Act details two types of compensation for employees who are permanently and partially disabled. Section 8(d)(1) provides for a wage differential award; alternatively, section 8(d)(2) provides for a percentage-of-the-person-as-a-whole award. See Jackson Park Hospital v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 142431WC, ¶ 2, 47 N.E.3d 1167

Section 8(d)(1) of the Act sets out the two requirements for a wage differential award. Under section 8(d)(1), an impaired worker is entitled to a wage differential award when (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1)

The Petitioner suffered a severe injury to his right shoulder resulting in tears to both the supraspinatus in his rotator cuff and his superior labrum, which required surgery to correct. (TA 1 of 2 at 159, PX 3 at 41-45). The Petitioner attempted to return to work as a cement finisher but credibly testified that he did not feel he could continue doing that kind of work long-term. (TA 1 of 2 at 162-64; TA 2 of 2 at 53; PX 21 at 23-24). The Arbitrator relies on the testimony of the Petitioner, his union representative Mr. Golf, his supervisor Mr. Garcia, and his vocational counselor Ms. Mueller credible on this issue. The Petitioner's right shoulder injury resulted in permanent restrictions removing him from his prior occupation. Specifically, his overhead lifting, and other lifting restrictions fall below the demands of his prior occupation as a union cement finisher. These limitations prevent him from being able to use the tools of his trade, as well as lift and move the necessary materials needed to perform the work.

The Arbitrator finds that "the average amount which [the Petitioner] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident" is equal to his average weekly wage in this case: $2,917.31. 820 ILCS 305/8(d)(1). For the "average amount which he . . . is able to earn in some suitable employment or business after the accident," the Arbitrator finds the Petitioner is capable of earning $20.00 per hour, for an

average of 40 hours per week. 820 ILCS 305/8(d)(1). This results in a current average earning capacity of $800.00 per week. Deducting the current earning capacity from his full performance wage results in a difference of $2,117.31; 66-2/3% of this difference is $1,411.54. As this amount is larger than the maximum 8(d)(1) benefit of $1,147.38, the Arbitrator finds that his wage differential benefit is the maximum of $1,147.38. The Arbitrator finds that the Petitioner's current earning capacity could have been reasonably determined at the time he started working for GCA: September 18, 2019.

As a result, the Arbitrator finds that the Petitioner shall receive a wage differential benefit of $1,114.38 per week beginning September 18, 2019 and ending when the Petitioner reaches age 67.

Issue M, whether penalties or fees should be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator declines to impose penalties or fees upon Respondent finding that its reliance on Dr. Aribindi's opinions was not unreasonable or vexatious.

Issue N, whether Respondent is due any credit, the Arbitrator finds as follows:

The Arbitrator finds that the Respondent is due a total credit of $59,738.37, which is the sum of $55,554.92 in previously paid TTD benefits, and an additional $4,183.45 paid as an advance against permanency. The Arbitrator notes that Respondent's Exhibit 12 reveals $55,554.92 in TTD payments, and an additional $4,183.45 in PPD payments. (RX 12).

Accordingly, the Arbitrator finds that the Respondent is due a total credit of $59,738.37.

Issue O, whether Respondent has paid all appropriate charges for vocational rehabilitation services per Section 8(a), the Arbitrator finds as follows:

Section 8(a) of the Act provides for vocational rehabilitation and mandates that the employer pay all maintenance costs and expenses "incidental" to a program of "rehabilitation." 820 ILCS 305/8(a) (West 2006). "A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019 (2005). The Supreme Court, in *National Tea v. Industrial Comm'n*, 97 Ill.2d 424, 433 (1983), held that determining whether a claimant is entitled to vocational rehabilitation to restore him to his pre-injury earning capacity depends upon the particular circumstances of each case. *Id.* Such a standard, however, should not be inflexibly applied. *Id.*

Ms. Mueller provided unrebutted testimony that the Petitioner was removed from his prior occupation as a cement finisher for Walsh Construction. (PX 14 at 40). This resulted in a reduction in his earning capacity, which could be increased with the implementation of vocational rehabilitation services. (PX 8 at 40-41). Ms. Mueller credibly testified that her invoice for the initial assessment and vocational testing totaled $1,919.92. (PX 14 at 51-52, PX 15 at 12). The Arbitrator further finds that the Petitioner did have a genuine intention to return to work and that

he made a good faith attempt to look for work given his limitations. As a result, the Arbitrator finds that it was reasonable to undergo an initial assessment and vocational testing with Ms. Mueller.

Based on the above, the Arbitrator orders Respondent to pay Petitioner directly for unpaid vocational rehabilitation services in the amount of $1,919.92 per Section 8(a) of the Act.

It is so ordered:

Arbitrator Rachael Sinnen

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019437
Case Name	INSURANCE COMPLIANCE v. CLEVE ELLIS d/b/a CLEVZ TREE SERVICE
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	***Corrected Decision***
Commission Decision Number	23IWCC0305 [19INC00035]
Number of Pages of Decision	6
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Nicole Werner,
Respondent Attorney	

DATE FILED: 7/19/2023

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

- [x] 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

Illinois Workers' Compensation Commission,
Insurance Compliance Division,
Petitioner,

vs.

No. 23 IWCC 0305, 19 INC 00035,
20 WC 19437

Cleve Ellis, individually and d/b/a
Clevz Tree Service,
Respondent.

CORRECTED DECISION AND OPINION RE: INSURANCE NON-COMPLIANCE

Petitioner, Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action by and through the Office of the Illinois Attorney General, against the above-captioned Respondent. Petitioner alleges a violation of Section 4(a) of the Illinois Workers' Compensation Act (the Act), for Respondent's failure to procure mandatory worker's compensation insurance. Proper and timely notice was given to all parties.

Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance for a total of 1080 days between January 1, 2015 and November 30, 2018. A hearing was held before Commissioner Marc Parker in Collinsville, Illinois, on June 20, 2023. Petitioner appeared and presented the testimony of Investigator Michael Cummins. Respondent did not appear.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondent knowingly and willingly violated Section 4(a) of the Act during the period in question. As a result, Respondent shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with Section 4(d) of the Act. The Commission hereby assesses the penalty of $500.00 per day for 1,080 days ($540,000.00).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Investigator Cummins testified he began an investigation of Clevz Tree Service as a result of a workers' compensation claim filed against that company. Clevz Tree Service came under the mandatory insurance clause of the Act, but upon investigation, Mr. Cummins found that it did not have workers' compensation insurance.

2. Investigator Cummins sent a notice of non-compliance to Cleve Ellis, owner of Clevz Tree Service, during the time in question. Mr. Ellis acknowledged that Clevz Tree Service did not have a workers' compensation policy; he implied that he would get one, but never did.

3. On May 16, 2023, Mr. Ellis verbally agreed to pay, within 30 days, a fine to settle this matter. He acknowledged that if he did not pay the fine within that time, there would be a hearing in this matter on June 20, 2023, whether or not he appeared. Mr. Ellis did not pay the agreed upon settlement within 30 days of May 16, 2023, and the hearing proceeded on June 20, 2023.

4. At the June 20, 2023 hearing, Investigator Cummins testified about the steps he conducted in his investigation of Clevz Tree Service. He searched several databases that indicate employers' revenue and insurance history. Records from the Illinois Department of Revenue indicated that Clevz Tree Service wasn't reporting payroll taxes. He searched the National Council on Compensation Insurance database which indicated that Clevz Tree Service was without workers' compensation insurance. He checked with the Office of Self-Insurance and learned that Clevz Tree Service was not self-insured.

5. Investigator Cummins testified he is aware of at least one workers' compensation claim filed against Clevz Tree Service. The Commission's records show that the Clevz Tree Service was named a Respondent in claim number 19 WC 554, filed by injured worker, Mark Milligan, though that claim was dismissed.

6. Petitioner's Exhibit 3 is a certified statement from the National Council on Compensation Insurance showing that at no time during the period in question did Clevz Tree Service have a workers' compensation policy. The Commission notes that the NCCI certification in this case is prima facie proof that Respondent did not have the required workers' compensation insurance for the period in question. (Rule 9100.90(d)3(D) of the Rules Governing Practice before the Illinois Workers' Compensation Commission.)

7. Petitioner's Exhibit 5 is a certified record from the Illinois Secretary of State, showing that Clevz Tree Service was never incorporated with the Secretary of State.

8. Petitioner's Exhibit 7 is a certified statement from the Commission's Office of Self-Insurance stating that at no time during the period in question was Clevz Tree Service self-insured.

9. Petitioner's Exhibit 8 is a certified record from the Illinois Department of Employment Security, showing that during the period in question, Clevz Tree Service reported making payroll for 3 to 10 employees.

10. The Illinois Department of Revenue provided certified records showing Clevz Tree Service was reporting revenue during the period of non-compliance while it was in operation. This indicates that Respondent was in fact operating and generating revenue during the period of non-compliance.

11. Prior to the June 20, 2023 hearing, Respondent's owner, Cleve Ellis, admitted Clevz Tree Service did not have workers' compensation insurance during the period in question. He did not appear at the scheduled June 20, 2023 hearing, or offer any testimony or exhibits or testimony into evidence.

Pursuant to Section 3 of the Act, certain employers and their employees are automatically subject to the provisions of the Act if they engage in specific businesses including: "the erection, maintaining, removing, remodeling, altering or demolishing of any structure," *820 ILCS 305/3(1)*; "construction, excavating or electrical work," *820 ILCS305/3(2)*; and, "any business or enterprise in which electric, gasoline or other power driven equipment is used in the operation thereof." *820 ILCS 305/3(15)*.

The Commission finds, based on the work performed by Clevz Tree Service as disclosed in the testimony of Investigator Cummins, that pursuant to Section 3, Respondent was automatically subject to the provisions of the Illinois Workers' Compensation Act and was required to carry workers' compensation insurance.

Regarding the issue of penalties, Section 4(d) of the Act states in part:

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) if this section or the failure or refusal to comply with any order of the Illinois Workers' Compensation Commission pursuant to paragraph (c) of this Section disqualifying him or her to operate as a self-insurer and requiring him or her to insure his or her liability, the Commission may assess a civil penalty of up to $500.00 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000.00. Each day of such failure or refusal shall constitute a separate offense." *(820 ILCS 305/4(d).*

Here, Mr. Ellis was the owner of Clevz Tree Service for the entire time at issue, and he acknowledged that during the period in question, he failed to secure and maintain any workers' compensation insurance coverage for Clevz Tree Service. The certification from NCCI shows that Clevz Tree Service was without workers' compensation insurance from July 20, 2005 through March 20, 2019.

In the instant case, the Commission finds that the length of time in which the Respondent had been violating the Act by failing to obtain workers' compensation insurance was significant. Respondent failed to have insurance for 1,080 days. Respondent's failure to pay any workers' compensation insurance for over two years is a flagrant and willful violation of the law.

The Commission finds that Petitioner has met its burden of proving that Respondent: operated a business in Illinois; was properly served with notice, and was legally required to maintain Workers' Compensation insurance but conducted business for 1,080 days without workers' compensation insurance. The Commission also finds that Petitioner proved that such violation was knowing and willful because Mr. Ellis, individually and d/b/a Clevz Tree Service, was aware and understood that he was required to obtain workers' compensation insurance for the employees of Clevz Tree Service. Accordingly, the Commission finds that Respondent is liable for a penalty for failure to comply with Section 4(a) of the Act. The Commission hereby assesses against Respondent a fine totaling $540,000.00, for the period of 1,080 days that Respondent was without workers' compensation insurance coverage.

IT IS THEREFORE ORDERED BY THE COMMISSION that Cleve Ellis, individually and d/b/a Clevz Tree Service, pay to the Illinois Workers' Compensation Commission the sum of $540,000.00, as provided in Section 4(d) of the Act.

Pursuant to Commission Rule 9100.90, once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure:

1) payment of the penalty shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission;

2) payment shall be mailed or presented within 30 days after the final Order of the Commission or the order of the court on review after final adjudication to:

Department of Insurance
Attn: Insurance Compliance
122 S. Michigan Ave, 19th Floor,
Chicago, IL 60603; or

3) as otherwise directed by www.iwcc.il.gov.

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 the Circuit Court.

July 19, 2023

MP/mcp
r-06-20-23
068

/s/ *Marc Parker*
Marc Parker

/s/ *Christopher A. Harris*
Christopher A. Harris

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty