STATE OF ILLINOIS)
) SS.
COUNTY OF)
ROCK ISLAND

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Crump,

Petitioner,

15IWCC0241

vs.

NO: 10 WC 42677

State of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 12, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

15IWCC0241

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

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

DATED: APR 2 - 2015

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 3/25/15
45

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

CRUMP, RICHARD
Employee/Petitioner

Case# **10WC042677**

15IWCC0241

STATE OF ILLINOIS
Employer/Respondent

On 5/12/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0225 GOLDFINE & BOWLES PC
ATTN: WORK COMP DEPT
124 S W ADAMS ST SUITE 200
PEORIA, IL 61602

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

5116 ASSISTANT ATTORNEY GENERAL
GABRIEL CASEY
500 S SECOND ST
SPRINGFIELD, IL 62706

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

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

MAY 12 2014

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

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Richard Crump
Employee/Petitioner

v.

State of Illinois
Employer/Respondent

Case # 10 WC 42677

15IWCC0241

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rock Island**, on **March 10, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 8, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,361.00**; the average weekly wage was **$1,064.63**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$709.75**/week for **25 1/7** weeks, commencing **June 3, 2011** through **August 15, 2011**, and from **November 28, 2013** through **March 10, 2014**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **June 3, 2011** through **March 10, 2014**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of **$92,363.99**, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Arbitrator Anthony C. Erbacci

May 5, 2014
Date

10 WC 42677
ICArbDec19(b)

MAY 12 2014

15IWCC0241

FACTS:

The Petitioner testified that on April 8, 2010 he was employed by the State of Illinois as a correctional officer. The Petitioner testified that on that date his foot caught on a fatigue floor mat which caused his right knee to twist and bang into a control panel. The Petitioner testified that he immediately felt pain and discomfort in his right knee but did not immediately seek medical attention hoping that it would not be necessary. The Petitioner testified that he continued to experience pain and swelling in his knee and that he ultimately sought medical attention with Dr. Daniel Brune on April 21, 2010. The Petitioner testified that, prior to seeing Dr. Brune that morning; he filled out an incident report regarding the accident which took place on April 8, 2010. A review of this document indicates that the Petitioner filled out that incident report on April 21, 2010 consistent with his testimony at Arbitration. Dr. Brune's records do not reflect the history to which the Petitioner testified to, stating that there was no injury. Dr. Brune referred the Petitioner for an MRI, which was performed on April 30, 2010, and Dr. Brune referred the Petitioner to Dr. Donald Mitzelfelt. After conservative treatment consisting of physical therapy, injections, and a knee brace failed to alleviate the Petitioner's pain and discomfort, Dr. Mitzelfelt recommended surgical intervention. The Petitioner's first surgery under Dr. Mitzelfelt took place on June 3, 2011. Dr. Mitzelfelt's postoperative diagnosis was that the Petitioner was suffering from a posterior medial meniscal tear, synovitis, and chondromalacia.

The Petitioner continued to treat with Dr. Mitzelfelt post-operatively and he underwent a series of injections in his right knee with no improvement. At the request of the Respondent, the Petitioner was examined by Dr. Luis Redondo on May 21, 2012. It was Dr. Redondo's opinion that the Petitioner was suffering from osteoarthritis of the knee mostly in the patellofemoral joint and the medial aspect of the knee. In his report, Dr. Redondo opined that the Petitioner's condition was causally related to the work injury of April 8, 2010. Dr. Redondo noted that the Petitioner denied any symptoms prior to the injury when striking the anterior portion of the knee joint with persistent pain in that knee and had undergone a long trial of conservative management without relief. Dr. Redondo indicated that the Petitioner developed degenerative changes within the knee joint and he opined that there was a causal relationship between the Petitioner's condition and the work injury of April 8, 2010.

On March 4, 2013, Dr. Mitzelfelt indicated that the only course of treatment available to the Petitioner was a right knee replacement. Dr. Mitzelfelt placed the Petitioner on light duty restrictions on July 10, 2013, and the Respondent accommodated those restrictions until November 27, 2013. The Petitioner eventually underwent the right knee replacement on February 11, 2014. The Petitioner testified that he continues to remain off of work as of the date of the Arbitration. The Petitioner testified that prior to the accident of April 8, 2010 he had never had any right knee problems. The Petitioner further testified he has not suffered any other accidents or injuries to his right knee since April 8, 2010.

Testimony was also heard from correctional officer Dennis Howell. Officer Howell testified that he was working third shift with the Petitioner on April 8, 2010. Officer Howell testified that while he did not see the accident in question, he did hear the Petitioner bang his

knee into the control panel and then exclaim that "that's going to hurt tomorrow". Officer Howell testified that he is not friends with the Petitioner outside of work and was testifying pursuant to a subpoena that he had received.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner testified that on April 8, 2010 his foot caught on a fatigue floor mat which caused his right knee to twist and bang into a control panel. The Petitioner testified that he immediately felt pain and discomfort in his right knee but did not immediately seek medical attention hoping that it would not be necessary. Due to continued pain and discomfort the Petitioner eventually sought medical attention on April 21, 2010 with Dr. Daniel Brune. Prior to seeing Dr. Brune the Petitioner filled out an incident report regarding the accident which took place on April 8, 2010 which was consistent with his testimony at Arbitration. Dennis Howell, one of the Petitioner's co-workers, testified that he was working third shift with the Petitioner on April 8, 2010 and that, while he did not see the accident in question, he did hear the Petitioner bang his knee into the control panel and then exclaim that "that's going to hurt tomorrow".

Both the Petitioner and Officer Howell testified that the accident in question took place on April 8, 2010. Their testimony with regard to the accident was unrebutted. Additionally, the Petitioner testified that he filled out his incident report on April 21st, prior to seeing Dr. Brune. The only evidence in the record contrary to this testimony is the office note from Dr. Brune which states "no injury but must have happened at work because didn't do anything to cause it". Given the credible testimony of the Petitioner and the credible testimony of Officer Howell, the Arbitrator hereby finds and concludes that the Petitioner did sustain an accident which arose out of and in the course of his employment on April 8, 2010.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner testified at Arbitration that on April 8, 2010 he caught his foot on a fatigue floor mat which caused his right knee to twist and bang into a control panel. The Petitioner eventually came under the treatment of Dr. Donald Mitzelfelt, an orthopedic surgeon in Pekin, Illinois. After failing conservative treatment, the Petitioner underwent his first surgery with Dr. Mitzelfelt on June 3, 2011. Dr. Mitzelfelt's post-operative diagnsosis was posterior medial meniscal tear, synovitis, and chondromalacia. In his first evidence deposition, Dr. Mitzelfelt testified that it was his opinion that these conditions were causally related to the injury of April 8, 2010. Dr. Mitzelfelt's testimony on causation is unrebutted. The Petitioner testified that he continued to have problems post-operatively and he continued to

treat for those problems with Dr. Mitzelfelt, receiving multiple injections in his right knee. At the request of the Respondent, the Petitioner was seen by Dr. Luis Redondo who indicated that the Petitioner was suffering from osteoarthritis of the right knee. Dr Redondo opined that, since the Petitioner was asymptomatic prior to the injury and the injury was directly to his patellofemoral joint, there was a causal relationship between the accident in question and the Petitioner's continued right knee symptoms.

Eventually Dr. Mitzelfelt recommended that the Petitioner undergo a right knee replacement. In his second evidence deposition, Dr. Mitzelfelt opined that the Petitioner's work accident exacerbated and accelerated the Petitioner's underlying degenerative process to the point where he required the knee replacement. No medical opinions contrary to those of either Dr. Mitzelfelt or Dr. Redondo were offered into the record. Having already found that the Petitioner sustained accidental injuries which arose out of and in the course of his employment, the Arbitrator further finds that the Petitioner's current condition of ill-being is causally related to the accident of April 8, 2010.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Respondent acknowledged at Arbitration that the only dispute with regards to the medical bills in question is causation. Having already found that the Petitioner sustained accidental injuries which arose out of and in the course of his employment with the Respondent, and having further found that the Petitioner's current condition of ill-being is causally related to said accident, the Arbitrator therefore further finds and concludes that the medical care given to the Petitioner was reasonable, necessary, and causally related to the Petitioner's work injury of April 8, 2010. The Arbitrator orders the Respondent to pay the outstanding medical expenses listed in Petitioner's Exhibit number 7, pursuant to the applicable fee schedule. The Arbitrator further orders the Respondent to reimburse to the Petitioner the out of pocket expenses listed in Petitioner's Exhibit number 8.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner testified that he was off of work following the surgery of June 3, 2011 from the date of the surgery through August 15, 2011. Dr. Mitzelfelt testified that was the period during which he removed the Petitioner from work. The Petitioner continued to treat with Dr. Mitzelfelt post-operatively and was eventually placed on light duty restrictions on July 10, 2013. The Petitioner testified that the Respondent accommodated these restrictions through November 27, 2013. The Petitioner testified that he has been off of work since November 28, 2013 through the present.

15IWCC0241

Having previously found that the Petitioner sustained accidental injuries which arose out of and in the course of his employment, and that the Petitioner's current condition of ill-being is causally related to said accident, the Arbitrator further finds that the Petitioner was temporarily and totally disabled for the period of June 3, 2011 through August 15, 2011, as well as for the period of November 28, 2013 through March 10, 2014, the date of Arbitration.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Sedlacek,

Petitioner,

15IWCC0242

vs.

NO: 12 WC 7375

Bond County Health Dept.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 11, 2014 is hereby affirmed and adopted.

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

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

15IWCC0242

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 - 2015

DLG/gaf
O: 3/25/15
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0242

SEDLACEK, JENNIFER Case# **12WC007375**

Employee/Petitioner

BOND COUNTY HEALTH DEPT

Employer/Respondent

On 8/11/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4888 LAW OFFICE OF KEITH SHORT
1801 N MAIN ST
EDWARDSVILLE, IL 62025

0810 BECKER PAULSON & HOERNER PC
RODNEY W THOMPSON
5111 W MAIN ST
BELLEVILLE, IL 62226

STATE OF ILLINOIS)
)SS.
COUNTY OF ST. CLAIR)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION **15IWCC0242**

JENNIFER SEDLACEK
Employee/Petitioner
v.
BOND COUNTY HEALTH DEPT.
Employer/Respondent

Case # 12 WC 7375

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti,** Arbitrator of the Commission, in the city of **Belleville,** on **May 30, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0242

FINDINGS

On **January 30, 2012,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$31,570.24**; the average weekly wage was **$607.12**.

On the date of accident, Petitioner was **26** years of age, ***married*** with **1** dependent child.

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

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

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

Respondent is entitled to a credit for all medical expenses paid pursuant to Section 8(j) of the Act.

ORDER

The medical treatment at issue is found to be reasonable and necessary, and Respondent is hereby ordered to pay the medical expenses set forth in Petitioner's Exhibits 5 through 11, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $404.75/week for 2 weeks, commencing January 31, 2012 through February 13, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $364.27/week for 4.3 weeks, because the injuries sustained caused the 2% loss of use to the right leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

07/29/2014
Date

AUG 11 2014

STATE OF ILLINOIS)
) SS
COUNTY OF ST. CLAIR)

15IWCC0242

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JENNIFER SEDLACEK
Employee/Petitioner

v. Case # 12 WC 7375

BOND COUNTY HEALTH DEPT.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Jennifer Sedlacek, alleges she developed Methicillin-resistant Staphylococcus aureus (MRSA) in her right thigh as a result of treating a patient who suffered from MRSA. Petitioner was a nurse employed by Respondent, the Bond County Health Department, on January 30, 2012. She provided in-home nursing care for disabled individuals. Petitioner had been employed by Respondent for several months before the onset of the alleged injury which occurred on or about January 30, 2012. During those months preceding the onset of her MRSA infection, Petitioner did not suffer any illnesses or injury, including MRSA.

Petitioner testified that none of her family members were ill or suffered active infections in the timeframe when she contracted MRSA. None of her friends, extended family, or associates was ill or receiving treatment for infection. Petitioner did not have any other employment which could have reasonably been expected to expose her to an active MRSA infection.

The evidence reveals that Petitioner was regularly caring for a patient who suffered MRSA, a contagious, transferrable staph infection. (See Petitioner's Exhibit (PX) 13). Due to HIIPA concerns, the parties submitted the redacted medical records of one of the patients for whom Petitioner was providing said care. The parties stipulated to at least one MRSA patient involved, though acknowledged that Petitioner might have cared for others in the course of her employment. There is no dispute that Petitioner was frequently exposed to active MRSA during the course of her employment.

Petitioner testified that she would have to change the wound dressings of the patients who suffered from MRSA. This would include having to clean active infection, debride diseased tissue, and replace infection-soiled bandages with clean ones. Petitioner testified that she had performed these activities as part of her regular job duties with Respondent. Respondent offered no contrary testimony or evidence.

Petitioner testified that in January 2012, she scratched her right leg. The leg became infected with MRSA. There is no dispute regarding the diagnosis or the reasonableness and necessity of the treatment she received for the MRSA infection. While being treated for MRSA, Petitioner was temporarily and totally disabled from her employment from January 31, 2012 through February 13, 2012. Respondent disputed the issue of temporary total

disability (TTD) on the basis of liability only. (See Arbitrator's Exhibit 1). Petitioner testified that the only place she could have contracted the MRSA was from one of her patients.

Petitioner testified that she was first seen at Highland Priority Care on January 31, 2012. She had a fever and painful, draining red area on her right thigh. Her fever was 102 degrees. (PX 2). She was immediately sent to St. Joseph's Hospital Emergency Room, where she remained for five days. She underwent at least two surgical excisions and a draining of the infection. (PX 1).

Upon discharge, Petitioner was referred to Gateway Regional Medical Center for wound care follow-up. (PX 3). She was later told to continue treatment with her family physician.

Petitioner testified that her leg functions reasonably well, but that she has a disfiguring indentation where necrotic skin was removed. She remains susceptible to MRSA infection. She is able to perform all of the essential functions of here employment and is not under any work restrictions.

CONCLUSIONS OF LAW

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

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

A primary issue in all workers' compensation claims is the determination of whether the employment places the claimant at a greater risk of injury than activities of daily living. In the instant case there is no dispute that Petitioner was directly and regularly exposed to MRSA during her employment with Respondent. This was not a casual exposure akin to being near someone with a cold. Rather, Petitioner was required to repeatedly engage in direct physical contact with wounds known to harbor MRSA. She cleaned the bacteria from the wound, removed dead and decayed tissue, and handled infected bandages.

In resolving questions of fact, "it is the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and *draw reasonable inferences from the evidence*." *Stapleton v. Industrial Comm'n*, 282 Ill. App. 3d 12, 15, 668 N.E.2d 15, 19 (5th Dist. 1996). (emphasis added). The reasonable inference to be drawn from the facts presented is that Petitioner contracted MRSA as a consequence of her employment and that her employment placed her at a significantly increased risk of MRSA than that to which the general population is exposed.

A causal connection between an accident and a claimant's condition may be established by a chain of events including the claimant's ability to perform manual duties before an accident, a decreased ability to so perform immediately after an accident, and other circumstantial evidence. *Union Starch & Refining Co. v. Industrial Comm'n*, 37 Ill.2d 139, 143, 224 N.E.2d 856, 858 (1967). It is not necessary to establish a causal connection by medical testimony. *Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill.2d 244, 250, 356 N.E.2d 28, 31 (1976).

There is no evidence that Petitioner was exposed to MRSA in any environment other than at her employment. As such, it is the determination of the Arbitrator that Petitioner has sustained her burden of proof regarding the issues of accident and causal connection. Respondent offered no medical opinion refuting the allegations of Petitioner. Respondent acknowledged that Petitioner was exposed as she asserted. Respondent offered no alternative explanation for her injury.

Issue (G): What were Petitioner's earnings?

15IWCC0242

The parties disputed Petitioner's wages, and both parties submitted wage documentation. (PX 12; RX 1). However, subsequent to the closing of proofs, Petitioner stipulated to Respondent's wage calculation. Petitioner's earnings in the year preceding injury are therefore $31,570.24, and her average weekly wage is $607.12.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The medical services provided to Petitioner were reasonable and necessary, and the Arbitrator hereby awards Petitioner the medical expenses contained in Petitioner's Exhibits 5 through 11, subject to the medical fee schedule, Section 8.2 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). Per agreement of the parties, Respondent is entitled to a credit for benefits paid under Section 8(j) of the Act.

Issue (K): What temporary benefits are in dispute? (TTD)

Respondent disputed TTD on the basis of liability only. Having found that Petitioner sustained her burden of proof regarding accident and causal connection, the Arbitrator finds that Petitioner is entitled to TTD benefits for the period of January 31, 2012 through February 13, 2012.

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

Petitioner's date of accident falls after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning the permanent partial disability (PPD) award being issued. No PPD impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

Concerning Section 8.1b(b)(ii) of the Act (Petitioner's occupation), Petitioner is a nurse. She must treat patients that suffer from MRSA. Due to the injury at issue, Petitioner is more susceptible to future MRSA infection. The Arbitrator therefore places great weight on this factor when determining the PPD award.

Regarding Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of the injury), Petitioner was 26 years old on the date of accident. The Arbitrator considers Petitioner a very young individual who likely has many more years ahead of her than that of an older individual, and thus a higher PPD than an older person. The Arbitrator places significant weight on this factor when assessing the permanency award.

Concerning Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), there is no alleged future earning capacity in question, and no weight is therefore given in this regard.

With regard to Section 8.1b(b)(v) of the Act (evidence of disability corroborated by Petitioner's treating medical records), Petitioner suffered a MRSA infection that resulted in five days of hospitalization, and follow-up treatment. She is more susceptible to further MRSA infection. The Arbitrator gives ample weight to this factor when determining the PPD award.

The determination of PPD is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of PPD, consideration is not given to any single enumerated factor as the sole determinant. Therefore, applying Section 8.1b of the Act, Petitioner has sustained accidental injuries that caused the 2% loss of use to the right leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Craig Briley,

Petitioner,

15IWCC0243

vs.

NO: 11 WC 19003

Pinckneyville Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 17, 2014 is hereby affirmed and adopted.

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

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

DATED: APR 2 - 2015

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 3/25/15
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRILEY, CRAIG
Employee/Petitioner

Case# **11WC019003**

15IWCC0243

PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

On 3/17/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1580 BECKER SCHROADER & CHAPMAN
MATTHEW CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

MAR 17 2014

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

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

15IWCC0243

CRAIG BRILEY
Employee/Petitioner

Case # 11 WC 19003

v.

PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard ***on remand*** by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **January 16, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0243

FINDINGS

On **March 11, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$54,859.00**; the average weekly wage was **$1,054.98**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$9,746.25** for TTD (note: all TTD benefits were paid), **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$9,746.25**.

Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 9 (and as discussed in the Memorandum of Decision of Arbitrator), as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for amounts paid and Respondent shall hold Petitioner harmless from any claims by any providers of services for which Respondent is receiving this credit.

Respondent shall pay Petitioner the sum of $632.99/week for a period of 137.4 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to the extent of 15% of his right hand, 15% of his left hand, 15% of his right arm, and 15% of his left arm.

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

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

Signature of Arbitrator

03/12/2014
Date

MAR 17 2014

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

15IWCC0243

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CRAIG BRILEY
Employee/Petitioner

v. Case # 11 WC 19003

PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Procedural Background

This matter was previously heard on April 17, 2012, and a decision was issued. The arbitrator that heard the matter found that Petitioner, Craig Briley, failed to prove he sustained an accident that arose out of and in the course of his employment with Respondent, the Pinckneyville Correctional Center, and further that Petitioner's current condition of ill-being was not causally related to his work duties with Respondent. That decision was reversed by the Illinois Workers' Compensation Commission (hereafter the "Commission") as to the issues of accident and causal connection, and remanded for a determination on the issues of notice, liability for medical expenses and the nature and extent of the injury. (Arbitrator's Exhibit (AX) 1). The parties appeared before the present Arbitrator on January 16, 2014, and submitted the Transcript of Proceedings from the prior trial, including the exhibits entered into evidence from that trial. (AX 2).

Notice

On March 11, 2010, Petitioner was working as a correctional officer for Respondent. (Transcript (Tr.), p. 12). At the time of the original hearing, Petitioner had worked at Respondent's Pinckneyville prison for approximately twelve and half years. (Tr., p. 12). As found by the Commission, during the course and scope of his duties, Petitioner developed repetitive trauma injuries to both hands and arms. (AX 1). Petitioner first started feeling numbness in 2007 or 2008. (Tr., p. 68). At that time, the symptoms would "come and go." (Tr., p. 68). Petitioner believed at that time he was experiencing difficulty performing his tasks because he was getting older. (Tr., p. 95). Petitioner saw Dr. Mohammad Azam on February 25, 2010. (PX 1). Petitioner explained that by February 2010, the numbness and pain had started to keep him up at night. (Tr., p. 57). He could not sleep well and he would wake up in pain. (Tr., p. 57). Petitioner did not relate these symptoms to a job-related injury until Major Malcolm, his supervisor, told Petitioner that the Major was having carpal tunnel surgery. (Tr., p. 69). Petitioner did not know what carpal tunnel surgery even was at that time. (Tr., p. 69). Maj. Malcolm told Petitioner that the surgery was to correct the numbness in his hands. (Tr., p. 69). This conversation occurred in 2010, after Petitioner had already seen Dr. Azam, his family doctor. (Tr., pp. 69-70).

Dr. Azam recommended an EMG/NCV, which was performed on March 11, 2010. The EMG/NCV revealed moderately severe bilateral carpal tunnel syndrome, mild to moderate bilateral ulnar neuropathy at the elbows, and that there was no evidence of cervical radiculopathy on either side. (PX 3).

On March 11, 2010, after receiving a diagnosis and having the conversation with Maj. Malcolm, Petitioner reported his diagnosis to Respondent by contacting his shift commander, reporting to a nurse at the infirmary, and contacting the employee responsible for workers' compensation claims. (RX 11). Petitioner also prepared a Notice of Injury form dated March 11, 2010. (RX 7; Tr., p. 108). Finally, Respondent supplied to Dr. James Williams, who testified in this matter on behalf of Respondent, an Illinois Form 45, which notes a date of report being March 18, 2010. This document is within Respondent's Group Exhibit 3 for Dr. Williams' deposition.

Medical Treatment

Dr. Azam referred Petitioner to Dr. Robert Golz. Based on the duration and severity of Petitioner's complaints, Dr. Golz recommended surgery. (PX 2). On May 10, 2010, Dr. Golz performed a right subcutaneous ulnar nerve transposition and carpal tunnel release. (PX 4). On June 21, 2010, Dr. Golz performed a left carpal tunnel release and left cubital tunnel release. (PX 5). It is stipulated that Respondent paid temporary total disability (TTD) benefits while Petitioner recovered from these surgeries.

During his post-surgical recovery, Petitioner had difficulty with his surgical wound and with the strength in his arms. (PX 2). Dr. Golz recommended occupational therapy and also prescribed anti-vibration gloves. (PX 2; PX 6). Petitioner was eventually returned to work on August 20, 2010, and released at maximum medical improvement on November 12, 2010. (PX 2).

Dr. Golz testified on behalf of Petitioner. Dr. Golz is a board certified orthopedic surgeon. He explained that the NCV confirmed that Petitioner's pain, numbness, and tingling were emanating from his elbows and wrists. Petitioner reported to Dr. Golz that his symptoms worsened with activity, especially turning keys at work. Dr. Golz testified that, at the time of surgery on the right hand and elbow, Petitioner's ulnar nerve was quite tightly constricted in the cubital tunnel. There was also a large amount of adherent scar tissue and very limited excursion of the nerve. He had little movement of the nerve. Similarly, Petitioner's transverse carpal ligament was very thickened and fibrotic. Dr. Golz held Petitioner off work from May 10, 2010 through August 20, 2010. (PX 7).

Dr. Golz opined that the treatment of Petitioner, including surgery, was reasonable and necessary to treat Petitioner's conditions. (PX 7). Dr. Golz opined the charges for services rendered, including the surgeries, were reasonably and customary in amount. (PX 8). Dr. Golz further explained that in cases like Petitioner's, with a workers' compensation claim pending, surgery is not performed without prior approval from the workers' compensation carrier. (PX 7). Dr. Williams, who testified on behalf of Respondent, agreed that Petitioner's surgeries and treatment plan were reasonable. (RX 1).

Disability

Petitioner testified that he still experiences aching in his thumbs and wrists, but that the numbness and pain have abated. He also testified that occasionally he will "feel something" in his elbows, but that he no longer experiences any elbow pain. (Tr., p. 64).

CONCLUSIONS OF LAW

Issue (E): Was timely notice of the accident given to Respondent?

Respondent was given notice within the time limits stated in the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). The date of an accidental injury in a repetitive trauma case is the date on which the injury manifests itself, *i.e.*, the date on which both the fact of the injury and the causal relationship of the injury to the worker's employment would become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). Petitioner did not have a definitive diagnosis of his injuries until completion of the EMG/NCV test on March 11, 2010. Petitioner reported his diagnosis later that day on March 11, 2010. There is no competent testimony to rebut Petitioner's account of when his symptoms worsened to the point of requiring medical treatment, when he first learned that his symptoms could be caused by work activities, and when he knew that he had carpal and cubital tunnel syndromes. Moreover, in this case, it would be difficult to place the manifestation date at any point where notice would not be sufficient, since there is no evidence that Petitioner sought any treatment for the symptoms described at trial prior to seeing Dr. Azam on February 25, 2010. Finally, it should be noted that Respondent accepted Petitioner's case from the outset, approved his treatment, and paid TTD benefits while he was recovering from surgery.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent, who approved all of Petitioner's treatment and lost time from work, shall pay the following reasonable, necessary, and related medical bills, as set forth in Petitioner's Exhibit 9, pursuant to the medical fee schedule, Section 8.2 of the Act:

SI Neurology & Sleep Medicine	$ 2,984.00
Dr. Mohammad Azam	$ 109.00
Southern IL Orthopedic Center	$18,117.00
Southern Orthopedic Assoc.	$12,741.00
Brigham Anesthesia:	$ 855.00
	$ 760.00
	$ 855.00
	$36,421.00

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

As a result of his work duties, Petitioner underwent bilateral carpal and cubital tunnel surgeries. Petitioner testified that he still experiences aching in his thumbs and wrists, but that the numbness and pain have abated. He also testified that occasionally he will "feel something" in his elbows, but that he no longer experiences elbow pain. Based on the foregoing, the Arbitrator finds that Petitioner's injuries sustained in this matter have caused the permanent partial disability to the extent of 15% of his right hand, 15% of his left hand, 15% of his right arm, and 15% of his left arm, as provided in Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Grace Pichal,
Petitioner,

vs.

NO: 12 WC 37241

15IWCC0244

Extra Help Inc.,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective medical, causal connection, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 18, 2014 is hereby affirmed and adopted.

No bond required for removal of this cause. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 3 - 2015

MB/mam
o:3/25/15
43

Mario Basurto

David L. Gore

Stephen Mathis

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

PICHAL, GRACE
Employee/Petitioner

Case# **12WC037241**

12WC037222

15IWCC0244

EXTRA HELP INC
Employer/Respondent

On 9/18/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0487 SMITH ALLEN MENDENHALL ET AL
STEVE SELBY
PO BOX 8248
ALTON, IL 62002

1433 McANNY VAN CLEVE & PHILLIPS PC
SHELLEY A WILSON
505 N 7TH ST SUITE 2100
ST LOUIS, MO 63101

15IWCC0244

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Grace Pichal
Employee/Petitioner

v.

Extra Help, Inc.
Employer/Respondent

Case # **12** WC **37241**

Consolidated cases: **12 WC 37222**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Belleville**, on **July 31, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 11, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned **$22,880.00**; the average weekly wage was **$440.00**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **3** dependent children.

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

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

Respondent is entitled to a credit of **$0.00** in medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on May 11, 2012 that arose out and in the course of her employment with Respondent or that her current condition of ill-being in her hands is causally connected to her employment duties with Respondent or her accident of May 11, 2012. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Nancy Lindsay
Signature of Arbitrator

September 15, 2014
Date

ICArbDec19(b)

SEP 18 2014

Grace Pichal v. Extra Help, Inc., 12 WC 37241 (19(b))

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is one of two cases which were consolidated solely for the purposes of conducting the hearing. Separate decisions were to be issued. In this case Petitioner alleges repetitive trauma injuries to her hands and wrists with a manifestation date of May 11, 2012. Respondent disputes liability for Petitioner's accident as well as Petitioner's entitlement to prospective medical care and an award of medical bills. Petitioner was the only witness testifying at the arbitration hearing.

The Arbitrator finds:

According to the medical records, on November 1, 2011, Petitioner sought treatment from Dr. Robinson, her primary care physician, complaining of pain in her left hand. (Pet. Ex. 3). She returned to Dr. Robinson on December 2, 2011 complaining of a cough. Id. At that time, there was no mention of hand or wrist complaints or pain. Id. However, on a subsequent visit on February 16, 2012, there was mention of "hand pain". Id.

Petitioner was next seen by Dr. Sadiq Mohyuddin on September 7, 2012, complaining of hand tingling and pain. (Pet. Ex. 5). Dr. Mohyuddin diagnosed Petitioner with "hand poly arthritis," among others. Id.

On October 17, 2012 x-rays of Petitioner's bilateral hands and wrists were obtained. (Pet. Ex. 2). It was noted that Petitioner had "chronic carpal tunnel symptoms;" and had fallen in July of 2012. The radiographic studies were all normal. Id.

Petitioner was terminated by Respondent on October 12, 2012. (RX 2)

Dr. Beatty examined Petitioner on December 3, 2012, upon referral of her attorney, for possible carpal tunnel syndrome. Petitioner gave a history of having fallen on the job in June of 2012 and a left wrist problem "earlier" due to bakery work. Petitioner was to provide/describe her work for the doctor. he also prescribed a right wrist/thumb wrap on December 3, 2012. (RX 2)

Petitioner returned to Dr. Beatty on March 20, 2013. (Pet. Ex. 1, p. 10). (Res. Ex. 2). Dr. Beatty noted Petitioner has carpal tunnel syndrome in her left wrist and a mass in her right wrist. (Res. Ex. 2). He recommended surgery for both conditions. Id.

On July 30, 2013, Petitioner appeared at Midwest Occupational Medicine for a "Pre-Placement Physical Examination." (Pet. Ex. 4). According to the record, Petitioner denied ever having a "work related injury or illness," and also denied ever having "joint pain." Id.

Following a non-work-related altercation, Petitioner was seen at Alton Memorial Hospital on September 12, 2013. (Pet. Ex. 6). X-rays were performed and she was diagnosed

with a dislocation of her left fifth digit. Id. There was no mention of any previous hand complaints or carpal tunnel diagnosis.

Dr. Beatty was deposed on October 23, 2013. (PX 1)Petitioner first saw Dr. Beatty on December 3, 2012. (Pet. Ex. 1, p. 6). (Res. Ex. 2). At that time, Petitioner complained of bilateral hand and wrist pain, with tingling. (Pet. Ex. 1, p. 7). (Res. Ex. 2). Petitioner also reported a right wrist injury to Dr. Beatty which occurred in June of 2012. Id. Dr. Beatty testified Petitioner had a nerve injury at the level of the wrist in both the right and left hands, as well as, de Quervian's tenosynovitis. (Pet. Ex. 1, p. 8).

During Petitioner's first visit with Dr. Beatty, she described her history of complaints, treatment and job duties in a written statement. (Res. Ex. 2)[1]. Petitioner noted she first visited Dr. Robinson on November 1, 2011 "to complain about [her] hands aching." Id. She stated he diagnosed her with carpal tunnel syndrome. Id. Further, Petitioner noted that she has had hand tingling and "aching" since she started at Landshire in July of 2011. Id. Moreover, while working for Respondent, Petitioner indicated she had on-going hand complaints, but "kept [her] pain from her co-workers and supervisors." Id. Petitioner stated she finally told her supervisor about her pain and hand complaints on September 17, 2012, after months of keeping her pain and complaints a secret. Id.

Petitioner's history also indicated that she began working for Respondent at Landshire Sandwich Company in early May of 2012. She placed frozen meat patties on a conveyor belt twelve hours per shift, constantly grabbing frozen meat at the pace of 115/minute. Petitioner occasionally used an electric knife to cut bread. The working environment was 48 degrees and wet. Petitioner also worked as a line operator, hand wrapping sandwiches coming down a conveyor belt at the rate of 1 sandwich every 15 seconds. Petitioner would twist, grab, push and pull plastic with bread all day long. Petitioner also mentioned that she had fallen in the clean room using her right hand to break her fall. Petitioner also described climbing up and down a ladder carrying 30 lbs of chicken or tuna salad 10 - 15 times. Finally, Petitioner noticed pain, tingling and numbness (especially in her right hand) and knots. When she couldn't take it anymore she reported it to Respondent (September of 2012). Id.

At the request of Respondent, Petitioner underwent an examination with Dr. Brown on April 22, 2014. (Res. Ex. 1). Dr. Brown noted Petitioner had symptoms and findings suggestive of carpal tunnel syndrome. Id. However, he stated Petitioner's work for Respondent did not factor into the cause, development, progression, or need for treatment for a diagnosis of carpal tunnel syndrome. Id. Dr. Brown based this conclusion on the fact that Petitioner had hand complaints beginning in 2011, several months before she started work at Respondent, and that she continued to have on-going and worsening complaints, even after she ceased working for Respondent. Id.

At the arbitration hearing Petitioner testified that she is 40 years old and came to the United States from the Philippines in 1993. She stated that she is divorced and has three children.

[1] Highlighted portions of Petitioner's statement were not done by the Arbitrator. The exhibit was submitted that way.

Petitioner testified that she worked for Hire Quest from 2004 to 2007 and again from July of 2011 to April of 2012. She testified she began working for Hire Quest at Landshire's bakery in July of 2011. She described her job duties at Landshire's bakery to include packaging bread, mixing dough, stacking and moving bread to the dock for shipment, and taking bread out of the oven. She stated that she would work a minimum of four hours a week and a maximum of eleven a week while employed in the bakery. Petitioner testified that she quit working for Hire Quest in April of 2012. Petitioner stated that she quit working for Hire Quest due to poor treatment and not because of the alleged hand pain.

Petitioner testified that she began employment with Respondent herein as a line operator on Landshire's "cold side" on May 11, 2012. She stated that her job duties required her to assemble four sandwiches per minute on the conveyor belt and hand wrap sandwiches. She further stated that her job included preparing salads, slicing meat, and labeling sandwiches in the "hand wrap" line. She testified that after she was terminated from Landshire's "cold side" on October 12, 2012, she worked at Elite Staffing, "The Rem Group", CVS, and Senior Services Plus.

Petitioner testified that she is currently employed by Elite Staffing and has been since May 2012. She stated that she was employed with "The Rem Group" from May of 2012 to December 17, 2013. She testified that she was employed with Senior Services Plus between August 2013 and November 2013. Finally, Petitioner testified that she was employed by CVS from February 11, 2014 to May 6, 2014. She admitted that her job duties at Elite Staffing and "The Rem Group" required her to use both hands to assemble and label items on a factory line.

Petitioner testified that she began employment with Senior Services Plus in July 2013 but was terminated in November 2013 for failing to give sufficient notice of absences. She described her job duties to include lifting up to 15 pounds and doing chores around homes. Petitioner admitted that she was given a pre-employment physical during which she failed to notify the doctor of her hand problems despite his examination of her upper extremity. She also acknowledged that she underwent a Functional Capacity Evaluation prior to her employment with Senior Services Plus where she performed all of the required activities but again failed to mention or demonstrate any issues with her hands.

Petitioner stated she only worked for CVS from February of 2014 to May of 2014 because she was terminated after filing sexual harassment charges. She testified that during her tenure at CVS she was a case picker. She described her job duties at CVS to include driving a forklift, picking up palettes, moving boxes, and using a radio frequency gun to scan and type package numbers. She testified that her job at CVS required her to manipulate items with both hands. Petitioner admitted that on her CVS job application she failed to divulge the issues with her hands and instead noted she had no problems that would interfere with her ability to do her job.

Petitioner stated that she first noticed tingling and loss of grip when she worked for Hire Quest. She stated she believes the pain was linked to grabbing and stacking bread pans weighing 25 to 30 pounds. She admitted that her job with Hire Quest was more hand intensive that her job with Respondent.

Petitioner admitted that on her application for adjustment against Hire Quest she listed an accident date of November 1, 2011 because that was when her primary care physician, Dr. Robinson, notified her that she had carpal tunnel syndrome. Petitioner stated it was her belief that she had carpal tunnel syndrome on November 1, 2011.

Petitioner stated that despite medical records suggesting otherwise, at her November 1, 2011 appointment with Dr. Robinson, she told him that she was having problems with both of her hands and not just her left hand. Petitioner testified she told him about her work activities on the bread bakery side. Petitioner conceded that she was seen again by Dr. Robinson on December 2, 2011 but failed to mention any hand pain. Petitioner admitted that she underwent a school physical on January 8, 2013 and failed to mention hand pain. Additionally, she stated that despite being seen by Dr. Robinson throughout 2013 and 2014 she did not mention hand pain to him at all.

Petitioner testified that her last visit to Dr. Beatty, who had recommended surgery, occurred in March 2013 and she has not seen any doctor to treat her hand pain since then. Petitioner admitted that in September 2013 when she visited the emergency room for a left hand fracture she failed to mention anything regarding carpal tunnel syndrome or hand pain. Petitioner stated that she did not tell her other employers about her hand pain because she was simply trying to get a job and she did not have any restrictions from any treating physician.

Noticeably, at the hearing, Petitioner was not wearing a wrist splint on either hand. She testified that Dr. Beatty had provided her with one but she does not wear it and instead occasionally wears one that she recently purchased.

On cross-examination, Petitioner indicated although she received treatment to her hand or hands on November 1, 2011, she did not report any symptoms or hand complaints to Respondent until September of 2012. Petitioner was terminated by Respondent in October of 2012.

Petitioner admitted that she lied on job applications about her hand pain. Petitioner was presented with a job application where she indicated that she had no previous injuries. She admitted that the application was accurate. Petitioner also testified that she didn't discuss her hand pain with other employees because it was personal and she was trying to get a job.

The Arbitrator concludes:

As an initial matter, the Arbitrator addresses Petitioner's credibility. While Dr. Beatty testified to some difficulty communicating with Petitioner, Petitioner testified at the beginning of the hearing that she could read, write, and speak English well. This Arbitrator had no difficulty understanding Petitioner's testimony. The Arbitrator was, however, troubled by some aspects of Petitioner's testimony. While she can understand why Petitioner might deny any hand problems to prospective employers, she did not explain why she didn't pursue further medical care if she was having problems. Additionally, she testified that she told Dr. Robinson that both of her hands hurt when she was initially seen by him. However, that representation isn't reflected in Dr.

Robinson's notes. Furthermore, Dr. Beatty's testimony as to the history Petitioner provided to him contradicts her testimony (PX 1, p. 7) Accordingly, Petitioner's credibility is troublesome.

1. Issues (C) Accident and (F) Causal Connection.

Petitioner did not sustain her burden of proving she sustained accidental injuries arising out of and in the course of her employment nor did she establish a causal connection between her employment and her present condition of ill-being in her hands/wrists.

Under the Illinois Workers' Compensation Act, an employee's injury is compensable only if it arises out of and in the course of her employment. 820 ILCS 305/2. "In the course of employment" refers to "the time, place, and circumstances surrounding the injury." Sisbro, Inc. v. Industrial Commission, 797 N.E.2d 665, 671 (Ill. 2003). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. Id.

The "arising out of" element refers to the causal connection between the accident and the Petitioner's injury. *Id.* For an injury to "arise out of" the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. City of Springfield v. Illinois Workers' Compensation Commission, 388 Ill.App.3d 297, 313 (Ill. App. Ct. 2009). Petitioner bears the burden of proving that a causal relationship exists between her present condition of ill-being and the work-related injury. Peabody Coal Co. v. Industrial Commission, 596 N.E.2d 1297 (Ill. App. Ct. 1992).

Petitioner failed to sustain her burden proving that her injury arose out of and in the course of her employment. Petitioner admitted, she was diagnosed with carpal tunnel syndrome long before she began with Respondent. Petitioner testified she started working for Respondent in May of 2012. However, she testified she first sought treatment for bilateral hand and wrist complaints on November 1, 2011.

Petitioner's treatment records corroborate Petitioner's testimony that she had hand and wrist complaints prior to being employed with Respondent. On November 1, 2011, Petitioner sought treatment from Dr. Robinson, complaining of pain in her left hand. (Pet. Ex. 3). According to Petitioner, Dr. Robinson diagnosed her with carpal tunnel syndrome at that time. Thereafter, Petitioner returned to Dr. Robinson on February 16, 2012, complaining of "hand pain." (Pet. Ex. 3). Further, pursuant to Dr. Beatty's records, Petitioner has had hand tingling and "aching" since she started at Landshire in July of 2011. (Res. Ex. 2). Additionally, those records also indicate Petitioner was previously diagnosed with carpal tunnel syndrome prior to beginning work at Respondent. (Res. Ex. 2).

Dr. Beatty testified he diagnosed Petitioner with bilateral carpal tunnel syndrome. (Pet. Ex. 1, p. 13). He also testified that Petitioner presented with a history of having injured her right wrist in a fall at work in June of 2012 and that she had a left wrist problem prior to that injury. (PX 1, p. 7) However, Dr. Beatty never attributed Petitioner's work with Respondent as causing, aggravating or contributing to her alleged bilateral carpal tunnel syndrome. In fact, Dr. Beatty

testified Petitioner had bilateral hand complaints prior to commencing her employment with Respondent. (Pet. Ex. 1, pp. 35-36).

It is important to note that no other physician has ever attributed Petitioner's work duties for Respondent as causing, aggravating or contributing to her alleged bilateral carpal tunnel syndrome.

Dr. Brown evaluated Petitioner and noted she had symptoms and findings suggestive of carpal tunnel syndrome. (Res. Ex. 1, p. 7). However, Dr. Brown stated Petitioner's employment with Respondent would not be considered a factor in the cause, development, progression or need for treatment for a diagnosis of carpal tunnel syndrome. (Res. Ex. 1, Ex. 2). Dr. Brown noted Petitioner had complaints and hand pain prior to beginning work with Respondent, and that she sought treatment for those complaints starting in 2011, before working for Respondent. Id.

There is some mention of an alleged work-place fall in Dr. Beatty's deposition and Dr. Beatty did diagnose Petitioner with de Quervian's tenosynovitis as a result of that fall. However, no testimony was elicited in regard to the diagnosis of de Quervian's tenosynovitis.

Based on the foregoing, Petitioner failed to prove a causal connection between her employment at Respondent and her alleged work related injury. Although Dr. Beatty and Dr. Brown both note Petitioner has symptoms and findings suggestive carpal tunnel syndrome, neither doctor indicates Petitioner's job duties for Respondent caused or aggravated that condition. Dr. Brown specifically denied that Petitioner's job duties caused her condition. Dr. Beatty's opinions were not based upon a thorough and complete understanding of Petitioner's job history and medical history. As such, Petitioner has not met her burden of proving that she sustained an injury that arose out of her employment with Respondent.

2. Issue (E). Notice.

Petitioner did not provide Respondent with notice of the accident within the time limits stated in the Act.

Under the Act, notice of an accident, either oral or written, must be provided to the employer within 45 days of the employee's accident. 820 ILCS 305/6(c). This notice must include the approximate date and place of the accident. Id.

The statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place. See White v. Workers' Comp. Comm'n, 374 Ill.App.3d 907 (Ill. App. Ct. 2007) (citing Fenix-Scisson Construction Co. v. Industrial Comm'n, 27 Ill.2d 354, 357 (Ill. 1963)). The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. Seiber v. Industrial Comm'n, 82 Ill.2d 87, 95 (Ill. 1980).

This notice requirement applies to employees who suffer repetitive trauma injuries. White, 374 Ill.App.3d at 910. In a repetitive trauma case, the employee must allege and prove a

single, definable accident. Id. The date of such an accident, from which notice must be given, is the date when the injury "manifests itself." Id. The phrase "manifests itself" signifies "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." Id.

Petitioner alleges a date of injury of May 11, 2012. (Arbitrator's Ex. 1). This was the first day of Petitioner's employment at Respondent. Petitioner readily admitted she did not report any symptoms or hand complaints to Respondent until September of 2012. Id. Corroborating her admission, according to Dr. Beatty's records, Petitioner hid her alleged hand and wrist complaints from co-workers and supervisors. (Res. Ex. 2).

Accordingly, and as Petitioner alleged a date of injury of May 11, 2012, she would have had until June 25, 2012 to provide notice to Respondent of her condition. However, Petitioner did not provide notice until September of 2012. Therefore, notice was not provided in accordance with the Act.

3. Issues (J) Medical Expenses and (K) Prospective Medical Care.

In light of her decision on accident, causal connection, and notice as set forth above, the remaining issues are rendered moot.

Petitioner's claim for compensation is denied and no benefits are awarded.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Grace Pichal,
Petitioner,

vs.

NO: 12 WC 37222

Hire Quest,
Respondent,

15IWCC0245

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, prospective medical, causal connection, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 18, 2014 is hereby affirmed and adopted.

No bond required for removal of this cause. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 3 - 2015

MB/mam
o:3/25/15
43

Mario Basurto

David L. Gore

Stephen Mathis

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

PICHAL, GRACE
Employee/Petitioner

Case# **12WC037222**

12WC037241

HIRE QUEST
Employer/Respondent

15IWCC0245

On 9/18/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0487 SMITH ALLEN MENDENHALL ET AL
STEVE SELBY
PO BOX 8248
ALTON, IL 62002

2396 KNAPP OHL & GREEN
L DAVID GREEN
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

15IWCC0245

STATE OF ILLINOIS)
)SS.
COUNTY OF ST. CLAIR)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

GRACE PICHAL
Employee/Petitioner

v.

HIRE QUEST
Employer/Respondent

Case # **12** WC **37222**

Consolidated cases: **12 WC 37241**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **NANCY LINDSAY**, Arbitrator of the Commission, in the city of **Belleville**, on **July 31, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Admissibility of alleged hearsay statement found in Petitioner's written job description found in Dr. Beatty's deposition -- PX 1, dep. ex. 2**

FINDINGS

On the date of accident, **November 1, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned **$11,803.19**; the average weekly wage was **$268.25**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **3** dependent children.

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

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

Respondent is entitled to a credit of **$0** for any medical bills paid by its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove she sustained an accident on November 1, 2011 that arose out and in the course of her employment with Respondent or that her current condition of ill-being in her hands is causally connected to her employment duties with Respondent or her accident of November 1, 2011. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Nancy Lindsay
Signature of Arbitrator

September 15, 2014
Date

ICArbDec19(b)

SEP 18 2014

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is one of two cases that were consolidated solely for the purpose of conducting the hearing. Separate decisions were to be issued. In this case, Petitioner alleges repetitive trauma injuries to her hands resulting in bilateral carpal tunnel syndrome. She alleges a date of injury of November 1, 2011. Respondent disputes liability on the basis of accident, causal connection, and notice. Petitioner was the only witness testifying at the hearing. Diana Stout was present as representative for Respondent, Hire Quest.

The Arbitrator finds:

In June of 2004 Petitioner began working for Respondent[1] as a laborer. Petitioner's job duties included warehouse work, working as a baker, mail processing, "greenery" worker, and housekeeping in a hospital. (RX 9, p.7)

Since early 2004 Petitioner's primary care physician has been Dr. Robinson.

Petitioner began working for Respondent at Landshire on July 13, 2011. (PX 1, dep. ex. 2)

Prior to November 1, 2011 Petitioner never presented to Dr. Robinson's office with regard to any upper extremity complaints. On November 1, 2011 Petitioner's presenting complaint included left hand pain and a bad cough/cold. There is a notation in the doctor's note of "Caseyville, Landshire, Bread." Petitioner returned to see Dr. Robinson on December 2, 2011. There is no mention of any hand complaints. However, Petitioner returned again on February 16, 2012 with hand complaints and difficulty sleeping. (PX 3)

A bill was incurred at St. Anthony's Health Center on January 22, 2012 (PX 7). No record of any visit is found in evidence.

Petitioner stopped working for Respondent in April of 2012, due to "personal reasons." (RX 9, p. 7; RX 12, p. 4) In April of 2012 Petitioner began working for "The Rem Group" as a laborer assembling products in a warehouse setting, using pallet jacks, and labeling product. (RX 9, p. 7)

In early May of 2012 Petitioner began working for Extra Help at Landshire. (PX 1, dep. ex. 2)

[1] a/k/a Hire Quest and Acrux Staffing

Petitioner began working for Elite Staffing as a laborer in May of 2012. She assembled products (including display pods), moved pallets, labeled, and made/broke down corrugated boxes. (RX 9, p. 7)

Petitioner fell at work in June of 2012. (PX 3)

On September 7, 2012 Petitioner was seen by Dr. Mohyudden (an associate of Dr. Robinson's) for the chief complaint of pain in her hands and tingling. (PX 5)

Petitioner signed her Application for Adjustment of Claim against Respondent herein on October 15, 2012. (RX 1, p. 3) On that same day, Petitioner signed her Application for Adjustment of Claim against Extra Help, Inc. (case # 12 WC 37241) (RX 11) Both claims allege repetitive trauma to Petitioner's hands and wrists.

Per Dr. Robinson, on October 17, 2012 Petitioner underwent x-rays of her left hand, left wrist, right hand, and right wrist -- and all were normal or negative. According to the histories, Petitioner had fallen in June of 2012. (PX 2)

On October 22, 2012 Petitioner underwent a nerve conduction study and EMG study. The history is silent as to any complaints associated with Petitioner's work. The study revealed electrophysiological evidence consistent with left median sensory entrapment neuropathy but the need EMG study did not show any ongoing denervation. (PX 1, dep. ex. 2)

Respondent completed a First Report of Injury on October 22, 2012. (RX1, p.5)

On December 3, 2012 Petitioner presented to Dr. Beatty who diagnosed her with left carpal tunnel syndrome and right de Quervain's tenosynovitis with a first compartment cyst. (PX 1)

Petitioner returned to see Dr. Robinson on January 8, 2013 for a school physical. (PX 3)

In February of 2013 Petitioner underwent surgery for a non-work-related medical condition at Alton Memorial Hospital. (PX 5)

Petitioner returned to see Dr. Beatty on March 20, 2013 at which time Dr. Beatty recommended surgery in the form of a right first compartment release and bilateral carpal tunnel releases. (PX 1, p. 10)

Petitioner stopped working for "The Rem Group" in May of 2013 citing "change of employer and hours no longer worked for her." (RX 9, p. 7)

In early July of 2013 Petitioner applied for employment with Senior Services Plus (SSP). (RX 9) Petitioner was still working for Elite Staffing at that time. (RX 9, p. 7) That same month Petitioner underwent a pre-placement physical exam for SSP. Petitioner was deemed medically qualified for the job she applied for. According to her medical history she had never had a work-related injury or illness and she denied any physical impairment which would keep her from performing the job she had applied for. (PX 4; RX 6; RX7)

On September 12, 2013 Petitioner was seen at Alton Memorial Hospital's emergency room for a broken finger on her left hand allegedly stemming from a domestic situation. (PX 5; RX 5)

The deposition of Dr. Beatty was taken on October 23, 2013. (PX 1) Dr. Michael Beatty testified that he first saw Petitioner on December 3, 2012 on referral by her attorney. Dr. Beatty also added that he thought that the family physician, Dr. Robinson, had referred her to him.

Dr. Beatty took a history of Petitioner falling in June of 2012 injuring her right wrist. The history also revealed that Petitioner's left wrist was painful before this injury (although he did not testify as to when the left wrist became symptomatic). She also had numbness and tingling in both hands and fingers. Dr. Beatty had a copy of the EMG/NCS study obtained on October 22, 2012 which revealed left carpal tunnel syndrome.

Dr. Beatty testified that on physical examination, Petitioner had positive Tinel's sign on the left wrist and a positive Phalen's test on both the right wrist as well as the left wrist. She also had inflammation over the tendon next to her right thumb consistent with deQuervain's syndrome.

Dr. Beatty testified that the Petitioner's thumb activity could cause a problem with the space in which the tendon is located just behind the thumb resulting in an inflammation of that area and resulting in deQuervain's tenosynovitis.

Dr. Beatty recommended Petitioner use a thumb/wrist support for the right wrist and she was to return in a few weeks.

According to Dr. Beatty, he last saw Petitioner on March 20, 2013. At that time, her history was that her right wrist complaints had persisted. He again found a soft tissue mass consistent with deQuervain's tenosynovitis. She also had positive Tinel's at the left wrist.

Dr. Beatty was asked a hypothetical question, assuming Petitioner had been working since July of 2011 and the work activities were consistent with the hand-written

notes[2] which Petitioner had given Dr. Beatty describing her work, and that she fell on the right wrist, whether the "work activities or the fall" would be related to the conditions which he diagnosed. Dr. Beatty's answer was somewhat confusing. He testified that, regarding the fall, and as it pertains to the deQuervain's tenosynovitis, that the fall in which she landed on her right wrist could directly or indirectly lead to the deQuervain's tenosynovitis and the ganglion cyst which he found during his examination. The left wrist issue based on the fall "is not well defined." The right wrist complaint is "not well defined" in that the history is not clear on the injury to the right wrist. The information that the employee gave regarding her work history "would be relative" to the "carpal tunnel issues." (PX 1)

Dr. Beatty admitted that the only written documentation he had of a referral was from Petitioner's attorney and that he had no record of a referral from the family physician or any medical provider, for that matter. His belief that the family physician, Dr. Robinson, may have referred Petitioner to him was based on a phone note. However, upon questioning of that note, he admitted that there is nothing in the note which specifically states that Dr. Robinson referred Petitioner to him. (PX 1)

Dr. Beatty also admitted that his opinion on the relationship between Petitioner's work activities and carpal tunnel syndrome is not based on any particular number of repetitive motions and that he has no threshold level of repetitive activity sufficient to cause carpal tunnel syndrome. He further admitted that being female is a risk factor recognized in the medical community for the development of carpal tunnel syndrome although he himself does not subscribe to it. He claimed on cross-examination that he has never had a case where he diagnosed deQuervain's syndrome or carpal tunnel syndrome without being able to pinpoint the cause for the condition. However, he did admit that he has had patients with those conditions which he could not attribute to repetitive work. (PX 1)

Finally, Dr. Beatty admitted that he would not provide any treatment to Petitioner without first seeing her again since he has not seen her since March 20, 2013. He admitted that both the deQuervain's tenosynovitis, as well as the carpal tunnel syndromes, could have resolved since March 20, 2013. (PX 1)

Petitioner returned to see Dr. Robinson on November 15, 2013 due to chest pain and general body aches. (PX 3; RX 2)

On December 7, 2013 Petitioner applied at Customer Distribution Services (CDS) for work in a warehouse. (RX 13) Petitioner began working there on February 12, 2014. (RX 13)

[2] Petitioner authored a summary outlining her jobs with Respondent and Extra Help. Dr. Beatty testified that, due to language difficulties, he asked Petitioner to write out a description of her symptoms and work history. (PX 1, p. 9)

On March 16, 2014 Petitioner was examined by Dr. Robinson for bronchitis and sinusitis. (RX 2, p. 5)

At the arbitration hearing Petitioner testified that she is 40 years old and was born in Manila, Philippines. She has been in the United States since June 11, 1993. Petitioner testified that she reads, writes, and speaks English with no difficulty.

Petitioner testified that she began working for Respondent, a staffing agency, in 2004. From 2004 to 2011 she worked in a variety of different employment opportunities. She then left Respondent's employment in 2007 but returned in 2010. Petitioner began working for Respondent at the Landshire Sandwich Company in Caseyville, Illinois as a bakery worker in July of 2011. Petitioner testified that she removed bread from the oven, packaged it, and occasionally mixed flour. A more detailed description of her job duties is found in PX 1. She worked 4 to 11 hours per day with 2 fifteen minute breaks and a 30 minute lunch period. Petitioner worked for Respondent through April 10, 2012. (R.Ex.12, p.4). Petitioner left her employment with Respondent as of April 10, 2012 for personal reasons, including finding a job that paid better.

In early May of 2012, Petitioner began working for another staffing company, Extra Help, at Landshire as a line operator "on the cold side." (See also PX 1, dep. ex. 2) Petitioner worked for Extra Help until October 12, 2012. Petitioner also alleges repetitive trauma injuries to her hands resulting in bilateral carpal tunnel syndrome against Extra Help. (R.Ex.11). Petitioner admitted the work for Extra Help was assembly line work and fast paced.

Petitioner testified on direct examination that she began having problems with both hands after May 11, 2012 while working for Extra Help. She further testified that she reported it to Pat Carlton, the supervisor for the "cold side." Petitioner also testified that she was packing in the bakery side when she first noticed her symptoms. In particular she would grab the bread pans, which varied in sizes and weighed 25 - 30#, and she would feel a shooting pain in the palm of her hand. These trays would be stacked "eleven high." Petitioner explained that she only worked with trays one day per week. Petitioner acknowledged she had no required quotas or number of trays to stack per minute.

Petitioner also testified that she next moved to the sandwich area ("cold side") where she was required to hand wrap and label four sandwiches per minute which involved hand wrapping a previously made sandwich in plastic. Petitioner also mentioned working with frozen patties on the cold side -- 120/minute.

Petitioner also described her job duties on the "V-Mag." Petitioner would spend one day (usually Wednesdays) solely on this job which required her to climb and ladder to the top of the "V-Mag" with salad and fill the "V-Mag" with the salad. The bags weighed about 30 lbs. and she might go through 10 - 20 bags to fill the "V-Mag."

Petitioner also carried 30# meat logs to the floor to be sliced with the meat slicer.

Petitioner testified her job with Respondent was hotter than the job with Extra Help, Inc. because she worked around bread and a furnace. Her job with Extra Help was cooler because of the frozen sandwiches. While working for Respondent Petitioner mainly used her hands to stack the finished trays of bread after they had been packed.

Petitioner testified that she believed she had a work-related problem with her hands as of November 1, 2011. Upon further questioning, Petitioner also testified that she believed she had work-related carpal tunnel syndrome as of November 1, 2011.

Petitioner testified that her supervisor on the bakery side was Dale Flenoy. Furthermore, Petitioner admitted she was given and signed for Respondent's employee handbook in late 2010 when she returned to work there. It outlined the accident procedure that said no later than 48 hours post injury she must assist Respondent's personnel in the completion of the First Report of Injury and provide a statement of the accident. (RX 12, pp.1-3) Petitioner not only admitted she failed to follow this accident procedure, she admitted she knew Diana Stout was with Respondent, but she never told Diana about any work-related condition she believed she had. Petitioner also admitted that she spoke with Diana on April 11, 2012, to tell her it was her last day of work and she didn't tell Diana about any problems with her hands.

Petitioner testified that after she left Landshire she worked for Elite Staffing periodically from May of 2012 to October of 2012 but worked substantially for it from October of 2012 to July of 2013. Elite Staffing did assembly work in which Petitioner used both hands. Petitioner also testified that she used both hands in her job with Elite Staffing and continues to be employed by Elite Staffing. Petitioner worked for "The Rem Group" periodically from April of 2012 to October of 2012 but worked substantially for it from October of 2012 to at least May of 2013. This job also involved assembly work with different tasks and moving around. On cross-examination, Petitioner admitted she stopped working for "The Rem Group" on December 17, 2013.

Petitioner testified that she worked for Senior Services Plus from July of 2013 through November of 2013. Petitioner admitted she completed a job application for Senior Services Plus on July 8, 2013 where she stated she had the ability to lift a minimum of 50 pounds. (R.Ex.9, p.8). Also, Petitioner acknowledged she underwent a post-offer employment physical for Senior Services Plus on July 30, 2013. (R.Ex.6). Petitioner admitted she completed the health questionnaire on July 30, 2013 indicating she did not have a work-related injury or illness and she did not have any physical or mental impairments which would prevent her from performing the job for which she was applying. (RX 6, p.3) Petitioner also admitted a doctor performed an examination the same day she completed the health questionnaire and that doctor cleared her to work for Senior Services Plus. (RX 6, p.5-6) Petitioner confirmed she did not tell the doctor her

hands and wrists hurt at this examination. Petitioner then underwent a functional capacity evaluation at St. Anthony's Health Center and she confirmed she did not tell the assessment specialist that her hands hurt or the evaluation hurt her hands (RX.7)

Petitioner worked at CDS from February of 2014 to May 6, 2014 as a dock worker/case picker and driving a forklift. Petitioner explained that she drove a forklift and would use an "RF gun" to pick product of various sizes and weight using her hands. The product would then be placed on a pallet and taken to another employee for wrapping and distribution. Petitioner testified that she would use the keyboard on the RF gun to type product information/bar codes and she would use the trigger on the gun to "shoot" the product barcodes. Petitioner used both her hands interchangeably in this job; however, Petitioner acknowledged she is right hand dominant and normally typed with her right hand. Petitioner admitted her employment with CDS was hand intensive. She admitted she did not tell CDS she was having problems with her hands as she wasn't asked about them. When she started there she did not feel that she had any problem that interfered with her ability to perform the job. Petitioner was terminated from this job for inappropriately discussing personal business.

Petitioner testified that she recently (June of 2014) went to work for Elite Staffing once again.

Petitioner testified that she went to see Dr. Beatty in December of 2012 and then again in March of 2013. She testified she hasn't seen any doctor for her hands since then; however, her hands still hurt and she would like to have the surgery recommended by Dr. Beatty.

Petitioner was asked about her conversations with Dr. Robinson, especially when she first presented to him. Petitioner testified on cross-examination that she did not discuss whether she had carpal tunnel syndrome or not with him. However, as of November 1, 2011 she believed she had carpal tunnel syndrome. Petitioner also testified that she told him both hands hurt. She acknowledged that when she was examined by Dr. Robinson in January of 2013 for a physical, she didn't tell him about her hands hurting.

Petitioner did not wear any wrist splints at her hearing. Petitioner admitted she was given a wrist splint from Dr. Beatty but she has not worn that splint in any of her jobs since September of 2013. Petitioner testified that she has worn a wrist splint she obtained from Walgreens since September of 2013 but it was unclear from her testimony as to when she wears it because she said she "stopped wearing them this year."

Petitioner testified that she didn't tell any other employers about her hands because it was a personal matter. She was trying to get employment and denied any problems or injuries on her applications in order to get a job.

Petitioner alleges she has $11,080.29 in outstanding medical bills. (PX 7)

The Arbitrator concludes:

As an initial matter, the Arbitrator addresses Petitioner's credibility. While Dr. Beatty testified to some difficulty communicating with Petitioner, Petitioner testified at the beginning of the hearing that she could read, write, and speak English well. This Arbitrator had no difficulty understanding Petitioner's testimony. The Arbitrator was, however, troubled by some aspects of Petitioner's testimony. While she can understand why Petitioner might deny any hand problems to prospective employers, she did not explain why she didn't pursue further medical care if she was having problems. Additionally, she testified that she told Dr. Robinson that both of her hands hurt when she was initially seen by him. However, that representation isn't reflected in Dr. Robinson's notes. Furthermore, Dr. Beatty's testimony as to the history Petitioner provided to him contradicts her testimony (PX 1, p. 7) Accordingly, Petitioner's credibility is troublesome.

1. With respect to disputed issue (C) regarding accident and disputed issue (F) regarding causal connection.

Petitioner failed to prove she sustained a work accident on November 1, 2011 which arose out of and in the course of her employment with Respondent and failed to prove a causal connection between the alleged work accident and her current condition of ill-being in her hands. In so concluding, the Arbitrator notes the following.

Petitioner did not begin working for Respondent at the Landshire facility until July of 2011 according to her trial testimony. Therefore, if Petitioner developed the alleged carpal tunnel syndrome from this employment, it developed over a course of four months or less. Petitioner's description of her job duties suggests that she performed different tasks for Respondent and would perform one particular task for an entire day and then another task on the next day. She moved from stacking bread on trays, filling the "V-Mag," carrying meat logs, and mopping. Thus, her duties varied.

Petitioner relies on the deposition testimony of Dr. Michael Beatty in establishing causation. However, Dr. Beatty testified simply that the "work history would be relative to the carpal tunnel issues" in discussing causation. This testimony is insufficient to establish causation for the repetitive trauma claim which Petitioner alleges. Nunn v. Industrial Commission, 157 Ill.App.3d 470, 510 N.E.2d 502 (4th Dist. 1987). While Dr. Beatty was provided with a statement prepared by Petitioner and Dr. Beatty relied upon it, in part, regarding his causation opinion, that statement was self-serving and not fully accurate as to Petitioner's jobs, employment, and treatment prior to seeing Dr. Beatty.

Additionally, except for two office visits to her family physician on November 1, 2011 and February 16, 2012, there are no medical records indicating Petitioner

complained of any upper extremity complaints while she worked for Respondent. Of the medical records reflecting upper extremity complaints, there is one reference to the left hand on November 1, 2011 and a second reference to a hand (which is not specified whether it is the right or the left) on February 16, 2012. However, Petitioner had visits between those two dates and after those dates where she presented with no upper extremity complaints.

Finally, Dr. Beatty admitted in his deposition that Petitioner's upper extremity complaints could have resolved since his last visit of March 20, 2013. Based on Petitioner's own history form which she completed for Senior Services Plus, as well as the physical examination which did not indicate any upper extremity complaints on July 30, 2013, it appears that this may very well have been the case. Again, Petitioner underwent a post-offer employment physical and a functional capacity evaluation on July 30, 2013 with no upper extremity complaints. On September 12, 2013 Petitioner presented to Alton Memorial Hospital for an injury to the fourth finger on her left hand but made no hand or wrist complaints of either hand or wrist (R.Ex.5). On November 15, 2013 the employee presented to Dr. Robinson and made no upper extremity complaints (R.Ex.2, p.4). On March 6, 2014, the employee presented to Dr. Robinson and made no upper extremity complaints (R.Ex.2, p.5). In addition, Petitioner has worked and continues to work hand intensive jobs for different employers since she left her employment with Respondent in April of 2012.

While Petitioner alleges injuries to both hands, no medical records show any right hand or right wrist complaints during her employment with Respondent.

Also, Petitioner sustained a fall while working on the job with Extra Help in June of 2012 in which injured her right wrist according to the medical records, although no testimony was given regarding this accident.

Petitioner testified that her hands still hurt. However, after October 12, 2012, Petitioner worked for Elite Staffing, the "Rem Group", Senior Services Plus, and CDS doing hand intensive work. Petitioner has made no complaints of either hand or wrist to any medical provider since March 20, 2013, the last date she was seen by Dr. Michael Beatty, even though she has seen several medical providers since that date. Petitioner had no explanation for why.

Additionally, while Petitioner acknowledged she was not candid with potential employers about her hand she testified she did so in an effort to get employed. While this reasoning is somewhat understandable, it doesn't explain why she didn't continue seeking medical treatment or try to obtain medical treatment earlier.

In sum, the Arbitrator concludes there is insufficient evidence to prove Petitioner suffered a repetitive trauma work accident with Respondent.

2. With respect to disputed issue (E) regarding timely notice.

The Arbitrator makes no decision on this issue because it is rendered moot by her conclusions regarding issues (C) and (F).

3. With respect to disputed issue (J) regarding whether the medical services provided to Petitioner were reasonable and necessary.

The Arbitrator makes no decision on this issue because it is rendered moot by the Arbitrator's conclusions regarding issues (C) and (F).

4. With respect to disputed issue (K) regarding prospective medical care.

The Arbitrator makes no decision on this issue because it is rendered moot by the Arbitrator's conclusions regarding disputed issues (C) and (F).

5. With respect to disputed issue (O) regarding the admissibility of certain statements found in Petitioner's job description contained in PX 1.

Having reviewed Petitioner's written job description/history contained in Dr. Beatty's records (PX 1, dep. ex. 2) the Arbitrator acknowledges that it does contain some references to what other employees might have said. To that extent Respondent's objection is sustained.

Petitioner's claim for compensation is denied and no benefits are awarded.

****

15IWCC0246

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas McAuliff,

Petitioner,

vs. NO: 12 WC 15855

Illinois Bell Telephone d/b/a AT&T,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary disability, penalties and fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 8, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

15IWCC0246

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 6 - 2015
o4/1/15
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

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

15IWCC0246

McAULIFF, THOMAS Case# **12WC015855**
Employee/Petitioner

ILLINOIS BELL TELEPHONE COMPANY
D/B/A AT&T
Employer/Respondent

On 8/8/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0391 HEALY SCANLON LAW FIRM
DAVID HUBER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
KRISTIN THOMAS
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

THOMAS MCAULIFF
Employee/Petitioner

v.

ILLINOIS BELL TELEPHONE COMPANY d/b/a AT&T
Employer/Respondent

Case # **12** WC **15855**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Ketki Steffen**, Arbitrator of the Commission, in the city of **Chicago**, on **05/07/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☒ Is Respondent due any credit?

O. ☒ Other **Is Petitioner entitled to reimbursement for out-of-pocket expenses for $35.02**

FINDINGS

On the date of accident, **03/13/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being relating to her cervical spine *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$70,266.04**; the average weekly wage was **$1,351.27**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services related to the right shoulder.

Respondent shall be given a credit of $ 47,231.00 for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

ORDER

The Arbitrator found that Petitioner did not sustain a cervical spine injury which was causally related to his alleged date of accident; benefits are denied.

Respondent has paid all TTD benefits relating to the shoulder and low back injury.

Respondent shall be given a credit of **$47,231.00** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

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

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

Ketki Steffen
Signature of Arbitrator

8/7/14
Date

PROCEDURAL HISTORY

This matter was presented for a hearing pursuant to Sec. 19(b) of the act before Arbitrator Ketki Steffen on May 7, 2014 and June 2, 2014. Both parties were represented by counsel and have entered into several stipulations that are contained as Arbitrator's Exhibit No. 1 ("AX1") for the trial record. On June 2, 2014 Petitioner amended the application for adjustment of Cliam to indicate the effected body parts as "MAW, neck and right arm".

FACTUAL HISTORY

Petitioner, Thomas McAuliff, was 48 years old at the time of the accident of March 13, 2012. He was employed by AT&T (Respondent) as a telephone lineman. Part of of job duties included being a cable Splicer. His would install cable, along with installing poles and boxes to accommodate the cable. His work required daily use of equipment that included boone equipment to set poles and jackhammers to break concrete. His job was heavy duty and physical and included use of power tools such as jack hammers and hand tools. He had worked as a lineman for 10 years and was paid $34.27/hour for full time (40hr/week) duty.

The day of the accident was a cold day and the Petitioner was pulling cable off a reel with a co-worker on his two-man crew at work, when he felt a pop in his right shoulder. Petitioner testified that at the time of accident he felt pain in his right shoulder, tingling and numbness in his arms and hands. He stopped working for a little bit; however, he finished work that day, went home and then his pain became progressively worse. Petitioner did not testify that he felt neck or cervical spine pain at the time of the accident.

Petitioner did not seek immediate medical attention but on March 16, 2012 he had a chiropractic appointment with Christine Rosenkrant, at Wrigleyville Chiropractic and Massage. There is no mention or diagnosis of neck pain by Dr. Rosenkrant. (RX 7)

On March 21, 2012 Petitioner went to the emergency room at Resurrection Medical Center and saw Dr. Shu Chan. The petitioner complained of back pain, right shoulder pain/strain of for the past eight days. Petitioner reported he felt this pain after putting cable down at work. He denied prior back or shoulder pain. He advised that he had pain across his low back that radiated downwards and he also complained of chest tightness. Petitioner was diagnosed with acute low back strain. The records are silent as to neck complaints. (PX 7)

On March 27, 2012 Petitioner presented to Dr. Peter Calabrese. He complained of pain in his right shoulder and lower back. There is no mention of neck complains. An MRI of the right shoulder as well as right shoulder x-rays were ordered. (PX 6)

On June 11, 2012, Petitioner complains of right neck pain along with back spasms to his physical therapist at NovaCare Rehabilitation. The therapist notes Petitioner had pain, weakness in muscle spasm in his right cervical/scapular area, decreased right grip strength as well as numbness and weakness in his bilateral upper extremities. (PX 4)

Petitioner then underwent a right shoulder arthroscopy with subacromial decompression and labral debridement with Dr. Bresch on September 7, 2012. The postoperative diagnosis was right shoulder impingement with impingement syndrome, and leading edge tear of the glenoid labrum. (PX 5)

Post-operative physical therapy was initiated on September 21, 2012 at Physical Therapy Institute of Illinois for his right shoulder. The therapist noted that Petitioner had

a herniated nucleus palposus in his cervical spine at C5-6 two years prior which required surgery, but not a fusion. (PX 5)

On September 27, 2012, the petitioner returned to Dr. Bresch, who opined the petitioner was healing well and making normal progress with respect to his shoulder. During a follow up visit on October 17, 2012, Dr. Bresch renewed his request for a cervical spine MRI scan. (PX 5)

Dr. Bresch examined Petitioner on November 14, 2012, and he complained of continued pain along the neck area that radiated from the neck down along the trapezius musculature, as well as some tingling into his hand that worsened throughout the day. It was noted his right neck pain had worsened with cervical compression tests and with lateral flexed on the right. The doctor indicated that Petitioner had ongoing paresthesias into the right-hand and neck pain. (PX 5)

An MRI of the cervical spine was obtained on December 14, 2012, which revealed diffuse cervical spondylosis with multilevel annular disc bulging and hypertrophy of posterior elements, most prominent at C5-6; there was 3.5 mm diffuse disc/osteophyte complex with focal protrusion and hypertrophy posterior elements causing moderate right and moderate/severe left neural foraminal stenosis; there were spondylitic changes including asymmetric soft tissue in the oropharynx. (PX 1, 8)

On January 7, 2013, Dr. Bresch diagnosed Petitioner with cervical radiculopathy and recommended an epidural injection at C4. (PX 5)

IME, Dr. Christos Giannoulias

January 15, 2013 Petitioner presented to Dr. Christos Giannoulias for an independent medical evaluation. Petitioner reported that on March 13, 2012 he was pulling cable, and suffered a hyperextension injury to his right shoulder. Petitioner

complained of neck pain. He reported he suffered a disk herniation and underwent surgery three years ago. He did not recall any recent specific injury to his neck. Dr. Giannoulias diagnosed Petitioner with resolved right shoulder impingement as well as cervical spine degenerative disc disease and disc bulging. The doctor opined that Petitioner's right shoulder complaints were related to the work incident as he had no prior pain or problems with his right shoulder. With regard to his neck complaints and neck degeneration, the doctor opined they were pre-existing. He advised that Petitioner had surgery three years ago to his neck and therefore his trapazial pain, crepitation and pain in his neck were pre-existing and unrelated to his work injury. The doctor opined that Petitioner's neck prognosis was fair and that he had degenerative changes, which deteriorate with time. Further, Dr. Giannoulias advised that any restrictions with regard to the petitioner's cervical spine were not related to his work accident. (RX 2)

Dr. Igor Rechitsky

The petitioner underwent an NCV test with Dr. Igor Rechitsky on April 9, 2013. The doctor took a history from Petitioner. It was noted that Petitioner had left-sided cervical brachial pain that was successfully treated with a microdiscectomy four years prior at C5-6 multilevel spondylosis. The clinical and electrodiagnostic findings confirmed the clinical impression of bilateral carpal tunnel syndrome. The left and right median neuropathies at the wrists were mild and demyelinating, without evidence of axonal loss. (PX 8)

An EMG was also obtained which suggested the presence of chronic C6 radiculopathy on the left, which the doctor expected with a history of C5-6 degenerative disc disease that required surgical treatment in the past. The doctor went on to indicate that a recent MRI study demonstrated left C5-6 foraminal narrowing; however, the left

C6 radiculopathy did not seem to be symptomatic at that time. Dr. Rechitsky could not demonstrate the presence of cervical meylopathy, peripheral polyneuropathy that could alternatively explain sensory symptoms in the hands. The doctor noted that the MRI study in December 2012 also detected no evidence of myelopathy. Dr. Rechitsky advised in the future if the petitioner developed exacerbation of left cervical – brachial radicular pain, selective C6 nerve root blocks could be considered. (PX 8)

Petitioner treated with Dr. Bresch on April 10, 2013. The doctor reviewed the EMG report and opined that the petitioner had bilateral carpal tunnel syndrome and chronic C6 radiculopathy on the left. The doctor's impression was that Petitioner was status post right shoulder arthroscopy, had bilateral carpal tunnel syndrome and neck pain. Dr. Bresch recommended the petitioner undergo treatment with Dr. Bernstein for his neck. He had reached MMI with respect to his right shoulder; however, Dr. Bresch indicated he was to refrain from work activities until Petitioner was cleared by his spine specialists. (PX 5)

Dr. Avi Bernstein

Petitioner presented to Dr. Avi Bernstein at the Spine Center on April 15, 2013, based on a referral from Dr. Bresch. The petitioner reported a consistent history of injury. The Arbitrator notes that this is the first time in the medical records Petitioner reported that he had pain into his right shoulder, right shoulder blade and his neck from the day of the accident. Petitioner currently complained of neck and scapular pain, along with numbness radiating down his right upper extremity into his forearm. It was noted that Petitioner underwent a left posterior cervical microdiscectomy at C5-6 approximately 4 years ago, which provided good relief of left sided radicular pain and return to work six months later. Dr. Bernstein reviewed Petitioner's MRI and opined at

C5-6 there was a residual disc osteophyte complex that was likely related to his prior surgery. He had advanced degenerative changes at C5-6 and had bilateral neuroforaminal stenosis, at C4-5 Petitioner had a disc osteophyte complex treating to spinal stenosis and impinging the spinal cord. He also had a disc bulge at C6-7. Dr. Bernstein advised that he had chronic neck pain and referred pain into his right scapula, which was most likely due to the C5-6 level. He also had degenerative changes at C4-5, which could be contributing it to his pain complaint. The doctor opined that Petitioner's neck problems were causally related to his work injury, and the doctor recommended a multilevel cervical discogram. (PX 8)

A cervical discogram was obtained on May 17, 2013, which revealed C3-4 through C6-7 levels contributed to the petitioner's pain complex. There was graphic evidence of diffuse disc degeneration and annular disruption at those levels. The C3-4 level appeared relatively intact morphologically. (PX 8)

A CT of the cervical spine was obtained post-discogram on May 17, 2013, which revealed evidence of multilevel disc degeneration and spondylosis with disc bulging from the level of C4-5 through C6-7. There was also a small left paracentral disc protrusion at C5-6. The C3-4 level appeared morphologically intact. When Dr. Bernstein reviewed these results on May 23, 2013, he opined that Petitioner had spinal cord impingement and lateral disc herniation, as well as degenerative changes. The doctor recommended Petitioner undergo a three-level interior cervical decompression and fusion. It was also noted Petitioner smoked a pack and a half of cigarettes per day, and he was advised to quit. (PX 8)

Petitioner underwent another MRI of the cervical spine on July 27, 2013, which revealed multifactorial, multilevel degenerative changes of the cervical spine greatest at

C5-6, with moderate left and right spinal canal stenosis, with moderate left and mild-moderate right neural foraminal stenosis. There was also possible right thyroid nodule, which Dr. Spencer opined was similar to his prior scan, and surgery was recommended. (PX 8)

On August 14, 2013, Petitioner underwent C4-5, C5-6, C6-7 anterior cervical microdiskectomy with spinal canal nerve root decompression; C4-7 anterior cervical fusion; implantation of VG1 implants; implantation of infused bone morphogenetic protein; application of trestle titanium plate and SSEP and MEP monitoring with Dr. Bernstein. The postoperative diagnosis was C4-7 discogenic neck pain, right upper extremity radiculopathy, right C5-6 neural foraminal stenosis and left C4-5 herniated disk. (PX 8)

Petitioner followed up with Dr. Bernstein on August 19, 2013 and was doing well. X-rays were obtained and the doctor opined they looked good. The petitioner had some typical post-operative neck discomfort, and was wearing a bone stimulator. It was noted he had discontinued smoking for the time being. (PX 8)

Dr. Bernstein examined Petitioner on September 16, 2013 and October 21, 2013. At both visits Petitioner reported he was doing well and was pleased with his result of to that point. He is still had some nodding in the interscapular region but was instructed to gradually progressed to work conditioning. (PX 8) From October 2, 2013 through January 22, 2014, Petitioner attended 49 sessions of physical therapy at Athletico Physical Therapy. (PX 2)

Dr. Bernstein examined Petitioner on November 21, 2013 and he complained of persistent pain in his neck. The doctor advised it would take Petitioner up to six months for his fusion to heal and that he was only three months status post fusion. The next

time of the doctor examined Petitioner was January 6, 2014. Dr. Bernstein opined Petitioner looked well on examination even though he continued to complain of neck pain. Because of this the doctor ordered a CT scan and MRI to rule out other disc abnormalities. Where the petitioner was six months status post surgery, on February 6, 2014 he reported he was doing reasonably well. (PX 8) Petitioner last returned to Dr. Bernstein on March 17, 2014 and continued to have complaining in some recurrent numbness and tingling in his arms reminiscent of his preoperative status. A new CT scan of the cervical spine, which was obtained on February 27, 2014, revealed Interior cervical discectomies and fusion from C4 through C7, with evidence of progressive bone fusion at each intervertebral level. An MRI obtained the same day demonstrated no other pathology. The Dr. advised that once the petitioner completed rehab he would be at maximum medical improvement. (PX 8)

Dr. Lami

Dr. Lami performed a records review on December 1, 2013. Therein, he advised he reviewed records from Lutheran General Hospital, Dr. Jerry Bauer and Dr. Bovis. Dr. Lami noted that Petitioner's primary care physician, Dr. Calabrese, suggested neck problems dating back to 1999. Further, Petitioner's medical records from the chiropractor and primary care physician after the report of injury on March 13, 2012, do not corroborate a cervical spine injury and as a matter of fact, no cervical spine diagnosis was given. The doctor opined that Petitioner's MRI only showed degenerative changes without evidence of acute disc herniation, or even a chronic cervical stenosis. The EMG performed suggested a chronic left cervical radiculopathy, which Dr. Rechitsky advised was explained by a previous disc herniation and that the chronic radiculopathy was not symptomatic. Given the mechanism of injury reported, lack of

documentation of cervical spine diagnosis, MRI findings, EMG findings, Dr. Lami was unable to support a cervical spine injury as a result of employment activities on March 13, 2012. Petitioner's cervical spine condition was unrelated to the injury in question and was due to pre-existing personal health issues. Further, Dr. Lami advised that the cervical discography was a controversial procedure and unreliable test, and this is what Dr. Bernstein had to rely on to define the surgical pathology. It was also noted that the use of bone morphogenetic protein in the cervical spine was quite controversial, and there is an FDA warning regarding use of this in the cervical spine. Dr. Lami diagnosed the petitioner with degenerative discs at multiple levels and opined that the medical records failed to show any neurological deficit. Petitioner's cervical spine issues were unrelated to the injury in question. With respect to work restrictions, the doctor advised again that Petitioner may require work restrictions due to surgery, but this was not related to the work accident and was due to personal health. In addition, Dr. Lami advised Petitioner did not sustain any permanent disability to his spine as a result of injuries sustained on March 13, 2012. (RX 3)

Dr. David Shifman

Petitioner then began seeing another chiropractor, Dr. David Shifman on March 5, 2014 due to upper back and neck pain. Petitioner underwent ten treatment sessions with Dr. Shifman until April 16, 2014. Petitioner underwent treatment for complaints at C5-6, which is the same level he received chiropractic treatment for and ultimately underwent surgery for in 2010. (PX 14)

Pain Management

Petitioner also underwent medical treatment at Pain Care Consultants on March 18, 2014 with Dr. Henry Kurzydlowski. Petitioner reported that he was a current, every day

smoker. Petitioner was diagnosed with cervicalgia, pain in limb and cervical disc degeneration. He subsequently underwent a cervical epidural steroid injection on March 26, 2014 and April 7, 2014 due to cervical radiculopathy. (PX 15)

Prior Medical History

Petitioner advised that he had a prior neck injury that was not related to work, for which he sought treatment in January 2010 due to neck pain that radiated to his left arm, forearm as well as his second, third and fourth digits, which had been more constant over the last four months. Due to these complaints a MRI of the cervical spine was obtained January 20, 2010, which revealed a herniated disc in the foramen on the left at C6-7, there was also degenerative changes with osteophyte and some foraminal stenosis on the left at C5-6. The doctor opined that the petitioner had cervical radiculopathy due to a herniated disc on the left at C6-7. The doctor recommended epidural steroid injections and potential surgery if his symptoms continued. (RX 7)

Petitioner testified that he underwent a cervical epidural steroid injection with Dr. Bradley Strimling on or about January 29, 2010. And a second MRI of the cervical spine was obtained on February 11, 2010, which revealed degenerative changes seen at multiple levels. At C6-7 there was a diffuse disc bulge with focal herniation on the left extending to the neural foreman causing moderate left neural foraminal stenosis. (RX 8)

Petitioner underwent a left C6-7 partial hemilaminectomy, medial septectomy, and discectomy with Dr. Bovis on March 10, 2010. The postoperative diagnosis was left C6-7 herniated disc and left C7 radiculopathy. (RX 8)

On April 27, 2010, Petitioner returned to Dr. Bovis and he explained that he was doing well, but was participating in a softball game with his child, and performed an awkward move, where after he had developed increased neck and left arm pain. The

doctor opined Petitioner had muscle spasms and a mild recurrence of left C7 radiculitis. The doctor recommended physical therapy and instructed Petitioner to stop smoking due to the harmful effects it could have on his healing. (RX 8)

Dr. Bovis examined Petitioner again on June 14, 2010. Petitioner reported he felt a recurrence of neck pain that radiated mostly in his neck and shoulders. He denied any specific arm pain but had some mild numbness of his left hand. The doctor opined Petitioner had a recurrence of muscle spasms and neck pain after surgery and physical therapy, but did not believe he had a recurrence of left C7 radiculitis. Dr. Bovis recommended a repeat MRI. (RX 8)

A third cervical spine MRI was obtained on June 17, 2010, which revealed no recurrent disc herniation or significant canal compromise. (RX 8) However, Petitioner underwent 26 treatment sessions with his chiropractor, Christine Rosenkrant, from June 9, 2010 through December 13, 2010 due to continued complaints of neck, upper back and shoulder pain. (RX 7)

Petitioner was subsequently released from care with Dr. Bovis on December 22, 2010, as Petitioner reported he had complete relief of his pain, with no numbness, tingling or weakness. The doctor opined Petitioner had shown complete healing since surgery. (RX 8)

Petitioner underwent two additional treatment sessions for his neck with Chiropractor Rosenkrant, the first being on January 3, 2011, whereby the doctor noted Petitioner "saw MD who said he will have lapses for next 2 years." (RX 7) Petitioner returned on February 8, 2011 and reported that he had lapses of pain in his neck and his back would get stiff when he is in one position for too long. In addition, the Dr.

Rosenkrant reiterated that when Petitioner last saw his doctor, the doctor advised Petitioner that he would have lapses for the next two years. (RX 7)

CONCLUSIONS OF LAW

F. In support of the Arbitrator's Decision as to whether Petitioner's suffered an injury that arose out of and in the course of his employment and whether the present condition of ill-being is causally related to the injury, the Arbitrator makes the following findings:

Petitioner was a 48 years old on on the date of his accident on March 3, 2012. He was working as a telephone lineman with a partner. Petitioner testified credibly that the cable was very heavy and that since it was cold outside the cable was stiff and required a great deal of effort to unload it from the truck. Petitioner testified that while unloading the cable he heard a "pop" in his right shoulder and immediately felt pain in his right shoulder. Petitioner continued to work and notified his He line manager, Zenin Zolokowski, that he had been injured while working. Petitioner's chiropractor Dr. Cristine Rosenkrant, D.C. documents Petitioner complain of shoulder and low back pain on Friday, March 16, 2012. Subsequent medical treatment including surgery and physical therapy follow.

The Arbitrator finds that the Petitioner has proven that his shoulder injury and back pain arose out of and in the course of his employment. The Arbitrator finds that causal connection as to Petitioner's shoulder and low back. The Arbitrator finds that the Petitioner's ill-being related to his cervical spine condition and the need for fusion surgery in August 2013 is not causally related to his work accident for the following reasons:

1. The findings and opinions of Drs. Giannoulias and Lami are persuasive that Petitioner's had a pre-existing condition and chronic degenerative change in the

cervical spine. Dr. Bernstein's opinion is less persuasive as he has not given due consideration to Petitioner's prior cervical issues.

2. The MRI findings corroborate the presence of degenerative changes as well as recurrent disc herniation at the same level Petitioner previously underwent surgery in 2010

3. Petitioner had neck surgery two years prior to his work accident and the predicted outcome was two years of possible flare ups. There is dicumentation of subsequent his trapazial pain, crepitation and pain in his neck.

4. Dr. Lami's opinion that Petitioner's degenerative discs at multiple levels of the neck were neither caused nor aggravated by the work accident in question is persuasive and backed by MRI findings and CAT scan findings . (RX 3) His opinion that the chronology of the events do not support the injury and that a cervical spine injury requiring three level spinal fusion would have been pronounced long before the the three month interval is most persuasive. (RX 3)

5. Clear documentation that there is no mention of cervical pain or issues at the time of or soon after the work accident from a variety of medical sources (Chiropractor, Primary Care Physician, Resurrection Medical Center Emergency Room on March 21, 2012 and an orthopedic surgeon visit on May 23, 2012) is convincing.

6. Petitioner's first neck injury in 2010 began without a specific event. Dr. Lami highlights this point. He persuasively suggests that other people could not have missed the finding that Petitioner could not turn his head before July 20, 2012. His opinion that four months of missed cervical issues is not medically reasonable is clear. His opinion that this new issue clearly was a new onset is medically and factually reasonable. (RX 3)

7. The MRI records review by Dr. Lami support degenerative changes, and discount any new acute cervical findings.

8. The EMG performed by neurologist Dr. Rechitsky revealed chronic radiculopathy and in fact, the neurologist felt Petitioner was not symptomatic even from that.

When Petitioner initially presented to Dr. Bernstein on April 15. 2013, the doctor opined that at C5-6 there was a residual disc osteophyte complex that was likely related to Petitioner's prior surgery, and that he had advanced degenerative changes at this level. Accordingly, the doctor indicated that Petitioner had chronic neck pain and referred pain into his right scapula, which was most likely due to the C5-6 level. Similar

to Drs. Lami and Giannoulias' opinions, Dr. Bernstein opined Petitioner had degenerative changes that were contributing to his neck pain complaints. (PX 8)

Dr. Bernstein testified during his evidence deposition that he felt Petitioner's symptoms were probably due to C5-6 and possibly C4-5. The Arbitrator notes that C5-6 is the same level Petitioner had degenerative changes with osteophyte and foraminal stenosis seen on his MRI, over two years prior to the March 13, 2012 work injury. In addition, Dr. Bernstein indicated that the degeneration at C4-5 and C5-6 was at such a level that a simple act of everyday life could have caused Petitioner's symptoms. Further, the doctor opined that given Petitioner's degenerative neck complaints and his prior discectomy, Petitioner's current cervical symptoms could be due to wear and tear, and not the alleged work accident. (PX 10, RX 8)

The Arbitrator notes that Dr. Bernstein did not to review any of Petitioner's medical records from his prior C5-6 cervical surgery, performed on March 10, 2010, only two years before the date of accident. Dr. Bernstein also did not review any records from Dr. Bovis and Chiropractor Rosenkrant, nor did he review any of Petitioner's prior CT reports, MRI reports or films. (PX 10) The doctor relied heavily on Petitioner's history of injury as provided to him on April 15, 2013. In addition, Dr. Bernstein was unaware of the extensiveness of Petitioner's prior medical treatment and pathology. The Arbitrator notes Dr. Lami reviewed Petitioner's prior medical records, as well as Petitioner's records related to his cervical spine treatment after the March 13, 2012 accident. This provides a more comprehensive and balanced medical opinion and basis. The Arbitrator finds Drs. Giannoulias and Lami's opinions to be more persuasive than Dr. Bernstein's opinion. Therefore, after carefully considering the testimony

provided at trial and a review of the medical evidence the Arbitrator finds that Petitioner failed to prove his current condition of ill-being is related to the alleged work injury.

J. In support of the Arbitrator's Decision as to whether the medical services that were provided to Petitioner were reasonable and necessary, the Arbitrator makes the following findings:

The Arbitrator finds that the Petitioner suffered an injury to his right shoulder and low back. The Arbitrator finds the medical services provided to Petitioner were reasonable and necessary with respect to treatment for the right shoulder or lower back. Based on the causal connection opinion regarding the cervical spine, the Arbitrator denies the bills for treatment regarding the cervical spine.

K. In support of the Arbitrator's Decision as to whether Petitioner is entitled to any prospective medical care, the Arbitrator makes the following findings:

The Arbitrator finds that Petitioner failed to prove a causal relationship between the accident of March 12, 2013 and his cervical spine condition of ill-being. Therefore, the Arbitrator does not award prospective medical care for the cervical fusion surgery.

L. In support of the Arbitrator's Decision as to what amount of compensation is due for temporary total disability, the Arbitrator makes the following findings:

Parties have stipulated that Petitioner has received TTD benefits March 22, 2012 through March 23, 2013. Petitioner also admitted that after this period, he began receiving short-term disability benefits, paid for by Respondent which amounted to his full pay for six months, from May 1, 2013 through November 3, 2013. (RX 5) Petitioner testified that after this time, he continued to receive benefits, but they dropped to half his pay from November 4, 2013 through April 29, 2014, which is the last check issued before trial. Petitioner testified he was then placed on an AT&T long-term disability program beginning on April 30, 2014, but did not recall how much he was receiving at

the time of trial. Respondent's Exhibits 4 and 5 documents the workers' compensation TTD benefits and the short-term disability benefits paid for by AT&T provided to Petitioner.

The Arbitrator finds that Petitioner completed his work conditioning program by March 23, 2013, and was deemed to have reached MMI by Dr. Giannoulias with respect to his right shoulder at this point. (RX 1, 2) Petitioner has recieved temporary total disability benefits through March 23, 2013. (RX 4) Request for additional benefits is denied based on the finding regarding causal connection relating to cervical issues.

Respondent has made a claim for credit pursuant to Section 8(j) for the disability benefits related to cervical spine condition. The Arbitrator has found no causal connection regarding Petitioner's condition of ill being related to the cervical spine. The Arbitrator need not decide the issue of calimed credit for benefits paid relating to the cervical spine.

M. In support of the Arbitrator's Decision as to whether Respondent should be assessed any penalties or fees, the Arbitrator makes the following findings:

Section 19(l) of the Act states that "[i]n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." Section 19(k) of the Act states that "[i]f 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 of 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 Commission shall allow the employee additional compensation in the sum of $30. 00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld of refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. "

Section 16 of the Act states that "[w]henever the Commission shall find that the employer, or his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

Where no good faith basis exists for the refusal or delay in payment of benefits owed exists, the Respondent bears the burden to show that it had a reasonable belief that the delay in paying petitioner's benefits was justifiable. Gallegos v Rollex Corp. , 03 IIC 0173 (Mar. 10, 2003), City of Chicago v Industrial Comm'n, 98 Ill. 2d 407 (1983). The employer must show that the facts in its possession would lead a reasonable person to believe the employee is not entitled to prevail under the Act. Cook County v Industrial Comm'n, 160 Ill. App. 3d 825, 830 (1st Dist. 1987).

In Petitionet Thomas McAuliff's case, the evidence shows that his initial complain after the work accident related to his shoulder and low back. The first cervical issues

do not surface in the medical records for some 3-4 months after the accident. The Arbitrator, after reviewing the extensive medical history and opinions finds that Respondent had a reasonable, good faith basis based on medical records and well reasoned opinions of physician for denying Petitioner's claim for cervical fusion surgery.

Therefore, the Arbitrator denies Petitioner's petition for penalties under Section 19(k), 19 (l) and Section 16 attorneys' fees.

N. In support of the Arbitrator's Decision as to whether Respondent is due any credit, the Arbitrator makes the following findings:

The Arbitrator finds that Petitioner failed to prove a causal relationship between the March 13, 2012 accident and his cervical condition of ill-being. The shoulder and low back injury are causally related and reached MMI. The Respondent has paid all TTD and medical benefits relating to the causally connected work injuries. The Respondent is entitled to a TTD credit of $47,231.00.

Respondent had also made a claim for credit pursuant to 8(j) for the disability benefits relating to the cervical spine condition. The Arbitrator has found no causal connection on this issue and need not decide the issue of credits relating to the cervical spine condition.

O. In support of the Arbitrator's Decision as to whether Petitioner is entitled to reimbursement for out-of-pocket expenses totaling $35.02, the Arbitrator makes the following findings:

The Arbitrator finds that Petitioner's out-of-pocket expenses were for prescriptions prescribed by Dr. Calabrese from March 27, 2012 through April 19, 2012, and are related to treatment for Petitioner's accepted shoulder treatment. Respondent claims that these out-of-pocket expenses noted in Petitioner's Exhibit 10, were not previously provided to Respondent, because if they were, they would have been paid

as the right shoulder injury was accepted as compensable. Respondent is hereby ordered to reimburse the petitioner $35.02.

Kelli Steffen 8/7/14

Signature of Arbitrator Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Peeks,
Petitioner,
vs.
ITS Techologies & Logistics LLC,
Respondent,

NO: 10WC 46584
15IWCC0247

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, notice, penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 23, 2014, is hereby affirmed and adopted.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 6 - 2015
JDL/bm
o/03/24/15
068

Joshua D. Luskin

Kevin W. Lamborn

Thomas J. Tyrrell

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

PEEKS, CHRISTOPHER
Employee/Petitioner

Case# **10WC046584**

ITS TECHOLOGIES & LOGISTICS LLC
Employer/Respondent

15IWCC0247

On 7/23/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0365 BRIAN J McMANUS & ASSOC LTD
MARK CONNOLLY
30 N LASALLE ST SUITE 2126
CHICAGO, IL 60602

1295 SMITH AMUNDSEN LLC
ANITA SENISE-JOHNSON
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Christopher Peeks
Employee/Petitioner

v.

ITS Technologies & Logistics, LLC
Employer/Respondent

Case # 10 WC 46584

Consolidated cases: _____

15IWCC0247

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **9/20/2013 and 9/23/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0247

FINDINGS

On the date of accident, **August 15, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

In the year preceding the injury, Petitioner earned **$38,001.80**; the average weekly wage was **$730.80**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **1** dependent child.

ORDER

Based on his findings on the issues of accident and notice, the Arbitrator denies compensation. All other issues are moot.

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

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

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

Signature of Arbitrator

July 22, 2014
Date

JUL 23 2014

FINDINGS OF FACT

The date of accident in this matter is indicated in three Applications for Adjustment of Claim, two of which are Amended Applications, as August 24, 2008, August 16, 2008, and finally August 15, 2008. Respondent hired Petitioner as a terminal operator on September 11, 2003. Petitioner resigned from his employment with Respondent on August 15, 2008.

Respondent, ITS, is an intermodal rail yard for semi-trailers and containers. Respondent's terminal operators remove the containers or trailers from the railcars for drivers or brokers to pick up from the yard and conversely load railcars with containers or trailers that were brought to the yard (Arbitration Transcript, September 20, 2013, pages 14-15). During Petitioner's tenure with the Respondent, he was employed as a terminal operator. The job duties of such position consisted of three activities: ground crew, crane operator (also referred to as machine operator, lift operator, etc.), and hostler/driver/spotter (Arbitration Transcript, September 20, 2013, pages 12-13, Respondent's Exhibits #3, #4 and #5).

The crane operator sits in a cab 10 feet off the ground. One needs a step ladder to enter and exit the cab. The cab seat, which has padded armrests, is located behind the steering wheel. The steering wheel is used to move the entire crane/machine backward, forward or to another location. The crane has automatic transmission and power steering. The containers are stacked as much as three high or are located near the railcar that is being loaded. The crane is moved backward and forward only minimally as the containers to be loaded or unloaded are stacked and placed adjacent to each other (Respondent's Exhibit #4, Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., pages 184-188, Arbitration Transcript, September 23, 2013, Testimony of Sam Adelfio, Sr., pages 78-81, Respondent's Exhibit #5).

Located next to the steering wheel and to the crane operator's left are switches that operate the crane arms up and down, side-shift the mast (lifting device), and lock the levers into place. One uses these switches to maneuver the crane to grasp onto a container or trailer. The levers on the right side raise the

mast (lifting mechanism) up and down and stretch it out forward or bring it backward. All of these controls are operated by use of one to two fingers. Moving the hoist up and down takes only a few fingers (Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., pages 81-82 and Sam Adelfio, Sr. pages 184-188, Respondent's Exhibits #4 and #5). The right hand is kept on or near the levers on the right side. These levers raise, lower and move the crane backward and forward, as the crane itself is being moved via the steering wheel. (Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., pages 81-82 and Sam Adelfio, Sr. pages 184-188, Respondent's Exhibits #4 and #5). The levers on the left side are only operated when the crane itself is not in motion. As the crane moves forward or backward with a container attached, in order to position the container either on the railcar or on the chassis or near the hostler when there is trailer, one must use his right hand is manipulate the right side levers to extend, retract or raise and lower the mast. (Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., pages 81-82, Arbitration Transcript, September 23, 2013, pages 31-32) and Sam Adelfio, Sr. pages 184-188, Respondent's Exhibits #4 and #5).

Hostler operation involves connecting and driving a small, tractor-type truck called a hostler or spotter. This vehicle also has automatic shifting and power steering. The hostler is connected to a chassis or trailer. It may be parked for movement to the railcar to be loaded or is beside the railcar from which it has just been removed. This is done via an automatic fifth wheel mechanism that slides under the chassis or trailer, automatically lifts it via a lever on the right side of the steering wheel and locks in. This maneuver is checked via a double pull or dry pull activity whereby the hostler moves forward slightly after backing up to ensure that the locking mechanism has clicked in. Then one backs up again and moves forward once more (Arbitration Transcript, September 23, 2013, pages 64-70).

Inside the hostler and to the right of the steering wheel are two buttons. One button is for the brakes and one is pressed to supply air to the air lines. Also on the right side is the hydraulic lever, which hooks the chassis or trailer on via the fifth wheel. The Adelfios testified that not much force or pressure is needed to operate these buttons/levers. After that maneuver is completed, a door behind the driver, which is mechanical, is slid open. The driver exits the vehicle

and connects the air brake hoses, via use of a glad hand device. This can be performed with either hand (Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., pages 81-82 and Sam Adelfio, Sr. pages 64-70, Respondent's Exhibits #4 and #5).

The third phase of the job (depicted second on the video, Respondent's Exhibit #5) is that of the ground worker, who manually assists in locking and unlocking the containers and directing the crane operator from the ground. Using a crowbar-type device that he places underneath the container or trailer, he pulls it to his left or right to lock or unlock the container or trailer as needed. The ground worker will also lift blocks onto the railcar in order that they may be used to lock the container down when it is lowered. Each block weighs 20 to 50 pounds. The ground worker can use either hand, both hands and/or can stand on the top of the railcar when lifting this 20 to 50 pound block (Respondent's Exhibits #4, #5, Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., pages 83-88, Arbitration Transcript, September 23, 2013, Testimony of Sam Adelfio, Sr., pages 64-69).

Sometimes a spud device is used by the hostler operator. Such device is depicted in Respondent's Exhibit #10. It will pull up the stand on the railcar for the purpose of holding up the goose neck on a trailer. This type of equipment is only located on a small number of railcars. It props up the hitches on containers without wheels. Utilization of the spud depends on how many of these types of railcars and containers are in use on a given night. Spud use is infrequent. The spud is used for loading containers onto railcars.

The spuds are found in the equipment area. The hostler is connected to the spud the same way it is connected to a trailer or chassis with the jaws of the fifth wheel locking onto a kingpin. It is then raised up and pulled away. The only thing different with a spud is that it is not necessary to connect the air hoses with the glad hands. After it is attached, this piece of equipment is taken to the railcar and backed up to it. The driver exits the door behind him in the hostler, goes around to the part of the spud that contains a catwalk and faces the railcar. He steps up onto the catwalk and removes a hook. This can be done with either hand or both hands, as it weighs about 6 pounds. The hostler driver then steps from the catwalk onto the railcar and places it on the hitch. The hostler driver

then has to re-enter the hostler device, via the same door, and move the vehicle forward, thereby raising the hitch up (standing it up). The hook is then removed and this process is repeated on another railcar as the railcars that require this type of maneuver usually come in consecutively (Arbitration Transcript, September 23, 2013, pages 73-77). It is impossible to grasp the cage mechanism on the spud with one hand and reach forward to hook the hook on the hitch in the railcar, as the distance is too great. Similarly, when the hook is returned to the spud, it can be done with one or both hands (Arbitration Transcript, September 20, 2013, pages (82-83), Arbitration Transcript, September 23, 2013, pages 78-81).

With the exception of the spud use, these job duties, and the physical activity required to perform them, are described in Respondent's Exhibit #4 and depicted in the job video. (Respondent's Exhibit #5, Arbitration Transcript, September 20, 2013, page 194 and Arbitration Transcript, September 23, 2013, pp. 70-71)

Respondent trained Petitioner, or any new employee, via modules that consist of videos and written material on all three aspects of the job. (Respondent's Exhibit #3, Arbitration Transcript, September 23, 2013, Testimony of Sam Adelfio, Sr., pages 86-88). In addition, on-the-job training is provided by an assigned employee. In Petitioner's case, Bob Daniels trained Petitioner on the crane. (Arbitration Transcript, September 20, 2013, Testimony of Sam Adelfio, Jr., page 138, Arbitration Transcript, September 23, 2013, Testimony of Sam Adelfio, Sr., pages 86-88).

Another task not shown in the video and not contained in the job description is vehicle checking, which is to be carried out on all of the machinery. Respondent's Exhibit #11, the vehicle condition report, is the report to be filled out during vehicle checking. The employee is required to check fluids and fill up the unit before leaving the area. If a problem cannot be fixed in a hostler or crane, one is not to use it and is to take it back to the equipment shed. Three cranes are typically used per shift, although five are available (Arbitration Transcript, September 23, 2013, pages 83-84).

According to Petitioner's testimony, his right upper extremity complaints surfaced in late 2007 and "gradually increased in 2008 and right around to the time where [he] decided [he] couldn't take it anymore." (Arbitration Transcript, September 20, 2013, page 27) At that time, Petitioner was assigned 50 percent of the time to the hostler and 50 percent of the time to crane. Petitioner associated his complaints with those functions of the terminal operator job rather than the ground work that he had performed his first two years (Arbitration Transcript, September 20, 2013, page 12, 24, 69, 74). He associated his arm complaints with his operation of the crane, hostler and spud (Arbitration Transcript, September 20, 2013, page 75).

During a 12-hour shift of the supervisors, operations manager, and lead man/ramp manager, Respondent's unit processes (loads and unloads) three trains. Over the course of such shift, there could be anywhere from 275 to 325 lifts (Arbitration Transcript, September 23, 2012, pages 59-60). Five cranes are available (typically three for two trains) and are used. Two employees are assigned per crane: one to operate the crane and one to serve as ground crew. The rest of the employees (12) work as hostler operators. (Arbitration Transcript, September 20, 2013, pages 161 and 162).

The terminal operators under the two supervisors would work six 8-hour shifts, whereas the supervisor worked 12-hour shifts, with 3 days on and 3 days off (Arbitration Transcript, September 23, 2013, pages 37-38). Therefore, Christopher Peeks, as a crane operator or hostler operator, would not have as many as 275 to 325 lifts, which were estimated for a 12-hour shift. It should also be noted that his 50 per cent work as a hostler or crane operator might be 50 per cent a night in both capacities, or 50 per cent a week with an entire shift being devoted to one machine. (Arbitration Transcript, September 20, 2013, page 20)

The reporting procedure for an illness or injury, on or off the job, is reflected on forms in Petitioner's personnel file (Respondent's Exhibit #3). If the injury or illness occurred before the shift, one would call in to the office and report it to the operator. This report would be relayed to the operations manager (Sam Adelfio, Sr., if he was working the same shift as Petitioner). The operations manager would receive the numbers from the railroad and would communicate with his lead man/ramp manager (Sam Adelfio, Jr., if he was working the same

shift as Petitioner). Assignment of the various tasks to be performed by the terminal operators would be made accordingly. The operations manager, Sam Adelfio, Sr., would write up the information, and after the terminal manager (Jason Bolda) processed the information, the operations manager would designate the appropriate time off work, with or without pay. (Arbitration Transcript, September 20, 2013, pages 167-175, Arbitration Transcript, September 23, 2013, pages 41-47).

If an illness, injury or personal problem developed while on the job, whether it was related to the job or not, the injured person would inform Sam Adelfio, Sr., the operations manager, or Sam Adelfio, Jr., the lead man/ramp manager. If the report was made to Sam Adelfio, Jr., he would report it to Sam Adelfio, Sr. Sam Adelfio, Sr., who would then do his own write-up, communicate with the terminal manager and decide what action would be taken. (Arbitration Transcript, September 20, 2013, pages 167-175, Arbitration Transcript, September 23, 2013, pages 41-47). Both Mr. Adelfio, Sr. and Mr. Adelfio, Jr., kept copies of the write-ups in their attendance files and forwarded these copies up the chain. These two individuals were in radio communication, not only with the railroad, but with the entire working operation and the terminal manager at all times and would process the same via direct contact and radio. (Arbitration Transcript, September 20, 2013, pages 167-175, Arbitration Transcript, September 23, 2013, pages 41-47). All employees had radios and the equipment had radios installed in them (Arbitration Transcript, September 20, 2013, page 168).

Mr. Adelfio, Sr. has kept all of these records dating back to 1992. Mr. Adelfio, Jr. turned his attendance file over to the operations manager when he left Respondent in 2011 (Arbitration Transcript, September 23, 2013, pages 36-51; Arbitration Transcript, September 20, 2013, pages 167-173 and 169). Neither witness found any evidence of a write-up for a physical complaint by the Petitioner in the attendance file. (Respondent's Exhibit #9) Neither witness recalled Petitioner voicing any right upper extremity complaint at any time (Arbitration Transcript, September 20, 2013, pages 172-176 and Arbitration Transcript, September 23, 2013, pages 52-56). Petitioner's supervisor testified that due to the dangerous nature of the work, if someone is not "100 per cent" mentally or physically, he would not be allowed to work that day (Arbitration Transcript, September 20, 2013, pages 173-176, Arbitration Transcript, September

23, 2013, pages 41-43). Removal from the job for any reason would be radioed to the terminal manager, or in the case of the lead man, to the operations manager and from him to the terminal manager. Adjustments would then be made to the crew, which included possibly keeping other shifts over time or calling people in ahead of their shift.

The operations manager, Mr. Adelfio, Sr., would sometimes receive a communication from an employee of a personal nature while the employee was on the job. If appropriate, he would send that employee home. He would not always generate a report for a personal problem so that the write-up would not be counted against the employee. However, if an employee sustained an injury or there was a situation that would last longer than that one night, he would record it and pass it up the chain. This was to protect the operation manager and the employee. Even if an employee did not request time off for a physical problem, he would write it up so that there would be a paper trail. He would also call the terminal manager in such case. The terminal manager and the safety director would be notified and make the determination of what steps needed to be taken. There were other operations managers and ramp managers who could also record complaints voiced by or off-work time requested by the employees. (Arbitration Transcript, September 23, 2013, pages 32 and 38).

Petitioner had a conversation with Mr. Adelfio, Sr. on August 15, 2008, by the fuel pump at an unknown time when Mr. Peeks was removing his personal items. According to Sam Adelfio, Sr., although Petitioner indicated in that conversation that he had had it with some of the crap that was going on in the yard, he never mentioned a physical problem of any kind. The Petitioner had a conversation with Mr. Sam Adelfio, Jr. on that same day by the front office at about 6:00 a.m. again with the Petitioner carrying personal items. According to Sam Adelfio, Jr., Petitioner said that he quit due to overtime and being there all the time. According to Sam Adelfio, Jr., during that conversation and several conversations he had with Petitioner after he quit, Petitioner never mentioned any physical problem. (Arbitration Transcript, September 20, 2013, page 174, 181, 192-193, Arbitration Transcript, September 23, 2013, pages 26, 53-57 and 89).

Petitioner testified that in the course of each conversation he had with Sam Adelfio, Jr., and Sam Adelfio, Sr., on August 15, 2008, he complained of right arm pain.

The terminal manager, Jason Bolda, to whom Petitioner testified he made two complaints regarding his upper extremity, has not been employed by Respondent since March 9, 2010 and was not called by either party to testify. Jason Bolda's whereabouts is unknown.

Petitioner testified that he separated from his employment because of an inability to obtain time off for treatment to his right upper extremity. However, the Petitioner was able to obtain numerous days off. On none of these days did he see his personal physician of 18 years, Dr. DeLeon, for his upper extremity condition (Arbitration Transcript, September 20, 2013, pages 102-109). Petitioner testified that he was able to schedule a visit with Dr. DeLeon on February 19, 2007, for an abscessed tooth. However, Petitioner also testified that he was unable to schedule visits with this doctor due to Petitioner's work schedule and to Dr. DeLeon being booked a month in advance.

The Petitioner engaged in off-the-workplace activities to an increasing extent after he ceased his employment with Respondent. Such activities consisted of playing the guitar, performing for-profit computer work/computer graphics and fishing. This activity went on at least until his surgery of October 21, 2010 (Arbitration Transcript, September 20, 2013, Dr. Gross' Deposition Testimony, Petitioner's Exhibit #6, pages 51-53, 136, Dr. Neal's Deposition Testimony, Respondent's Exhibit #6, page 34, Deposition Exhibit #2). Petitioner described at the arbitration hearing the onset of symptoms that began in 2007 and consisted of pain that originated in the right elbow, went up to his right biceps and shoulder, then down from the shoulder back to the elbow, wrist and last three digits of his hand. He associated such symptoms with the hostler and crane operations. Petitioner specifically identified the pain-producing activities of opening and closing the hostler door, turning the steering wheel of the crane (he claimed that he used his right hand to turn the steering wheel 80 per cent of the time), disengaging the air brakes manually while in the spotter and hooking up the spud (Arbitration Transcript, September 20, 2013, pages 27, 87-88).

According to the medical records, Petitioner saw Dr. DeLeon on September 11, 2008 for complaints of chronic pain to his shoulder with complaints of numbness to the right hand. The record also indicates that Petitioner "works w/ hands a lot."

To the physiatrist who performed the EMG, he complained of right and left shoulder pain going into the right hand and numbness in both hands. Outside of working for the railroad for 5 years (with no further explanation), he cited playing guitar and "on the computer." He complained of "rests on elbow all the time."

To Dr. Labanauskas, on October 27, 2008, he complained of loading cable, working with his arms occasionally in a truck with constant repetitive use of both arms and radiating pain down his right upper extremity (Petitioner's Exhibits #1 and #2).

He testified he did not give Dr. Gross a work history but only discussed his current complaints.

He reported to Dr. Gandhi, who performed the EMG on October 28, 2008, that he was "on the computer most of the time and playing guitar; that is his hobby." Dr. Gandhi also noted that Petitioner is a machine operator with problems on the left side of his neck and left shoulder for the last few months.

He related to Dr. Neal that he partook in off-work activities, including graphic editing on a computer twice per week and 6 hours per day on the computer. He played guitar 4 to 5 times per week, 20 minutes per session (Respondent's Exhibit #6, page 36, Respondent's Exhibit #2).

Dr. Gross is a "hospitalist physician." As such, he follows up on patients after admission to the hospital. He also practices occupational medicine. Dr. Gross does not specialize in the hand or upper extremity. Dr. Gross did not consider the Petitioner's activities off the job (Petitioner's Exhibit #6, page 42). This physician rejected the notion of varied activities versus repetitive activities. He opined that the sum total of one's activities at work only that involve use of the elbow will, at the end of the day, determine if the work is repetitive. He cited

movement of Petitioner's elbow as the causative factor (Petitioner's Exhibit #6, pages 81-83).

Dr. Neal opined that with regard to varied versus repetitive motion, if one engages in a particular activity for 90 consecutive minutes, that activity would be considered repetitive. While flexion and extension must be considered, Dr. Neal opined, it is the constant flexion or hyperflexion that would be a cause or an aggravation.

Dr. Neal explained that cubital tunnel syndrome is an entrapment neuropathy where the ulnar nerve is impinged or pinched in the cubital tunnel. When the elbow is extended, there is less tension or pressure on the ulnar nerve. Where it is hyperflexed there is more tension on the nerve. The ulnar nerve at the cubital tunnel is posterior to or below the epicondyle. With extension, there is less tension and less stress on the nerve than there is with flexion.

In flexion, Dr. Neal continued, the nerve wants to move anteriorly due to vector forces. The pressure on the nerve and strain within the nerve causes neurovascular capillary blood flow compromise in flexion. Physiologically speaking, the ulnar nerve has a different stress, which is greater in flexion. The nerve can be compromised by too much flexion.

If one is considering repetitive motion, Dr. Neal continued, in order to assign cause, one needs to find continuous or near continuous activity and one has to have a significant elbow flexion beyond 90 degrees for causation. One is looking for prolonged flexion, not movement. The number of times one flexes or extends one's elbow is not a significant cause or aggravation (Respondent's Exhibit #7, pages 19-21). This is why most symptoms occur at night when the elbow is not moving and people are sleeping with the elbow flexed. Night splints are commonly used to extend the elbow to take the pressure off the ulnar nerve (Respondent's Exhibit #6, pages 39 and 43). Treatment includes use of an extension splint to be worn at night.

Applying this to Petitioner's job, Dr. Neal opined, activities such as walking around the vehicles, hooking them up and turning a steering wheel, do not put the nerve in constant or prolonged flexion. Similarly, digital (finger) motion and

wrist motion when operating the levers (as seen in the job description and video) do not require significant elbow flexion. In operating the crane or the hostler, Dr. Neal found, there is no constant positioning of flexion or constant resting of the elbow on anything. In fact, in order to rest on the cubital tunnel, internal rotation of the shoulder and relative abduction would be required in order to get the nerve between the structure you are resting on and the bone above it to compress it. Turning a steering wheel, Dr. Neal opined, has never been shown to be related to cubital tunnel syndrome because it does not involve significant elbow flexion beyond 90 degrees. Turning of the wheel in the spotter or in the crane again do not cause extended periods of flexion or rapid flexion and extension that would cause the condition to worsen or to develop (Respondent's Exhibit #6, pages 49-50). The steering wheel in the crane is, by necessity, mostly operated with the left hand as the right hand is operating and/or hovering over the levers that would raise, lower, move backward or forward, the containers onto the railcars or the ground near the hostler or chassis. Similarly, opening the vehicle door of the hostler would not involve prolonged or any hyperflexion. Dr. Neal found that there is very little motion in the video that involved significant hyperflexion of the elbow.

Dr Neal opined that the only activities Petitioner engaged in that would have consist of prolonged flexion of the elbow would be operating the computer or playing the guitar where the elbow is held in a flexed position while fingers are utilized. Such positioning is capable of compressing the ulnar nerve (Respondent's Exhibit #6, pages 45-48). These positions are flexed or hyper-flexed, depending on how close one sits to the computer or how big the guitar is. People do not work on a computer with their elbows extended. Use of a mouse requires a little less flexion than use of a keyboard (Respondent's Exhibit #7, pages 19-31).

Dr. Neal opined that Dr. Gross' theory that the initial insult occurred while he was working and continued to get worse after he ceased working is inconsistent with his understanding of what happens when one ceases an activity that is producing a musculoskeletal issue (Respondent's Exhibit #7, page 33). Nerve impingement is a reversible condition if the cause or aggravation is an activity. By removing that activity, as with using night splints, the condition should become better. In this case, Dr. Neal continued, Petitioner's condition

worsened both clinically as well as diagnostically after August 15, 2008 in that he had axonal degeneration by the time of the EMG of December 29, 2009, which would indicate that the work activities were not a causative or aggravating factor.

In this case, Dr. Neal opined, the onset of Petitioner's left arm condition was idiopathic. Dr. Neal further opined that if one were to accept the theory of repetitive trauma, either of Petitioner's off-work activities, guitar playing and computer work, could or might have aggravated his cubital tunnel syndrome (Respondent's Exhibit #6, pages 74-78).

Dr. Neal further opined that Dr. Gross' concept would only be valid in somebody who has a significant neurologic process for a significant length of time. By history, Mr. Peeks' issues were 3 to 9 months old at the time he began treatment for the same in mid September/early October of 2008. It was much later - - when he was not working - - that the diagnostic studies indicated his condition was severe (December 29, 2009). Such facts would point to either an idiopathic cause or an activity other than the work activity as the causative agent (Respondent's Exhibit #7, pages 36-39, Respondent's Exhibit #6, pages 74-78).

Dr. Labanauskas viewed repetitive, continuous flexing and extending, or motion of the elbow, as causing his condition and cited opening and closing the door to the hostler (Petitioner's Exhibit #5, pages 44-47). However, he also found that sustained flexion while operating a computer for very long periods of time could potentially be a contributing factor (Petitioner's Exhibit #5, pages 44-47). He cited bumping of the elbow, but stated that this was not seen in any of the videos, job descriptions, and that Petitioner did not complain of bumping his right elbow (Petitioner's Exhibit #5, pages 44-47). He cited the use of the crowbar in the ground work activity, which Petitioner did not associate with the onset of his symptoms (Petitioner's Exhibit #5, pages 48-50). Dr. Labanauskas had no information as to when the Petitioner ceased working for ITS (Petitioner's Exhibit #5, page 55). Dr. Labanauskas noted that extension relaxes the nerve (Petitioner's Exhibit #5, pages 77 and 37). Further he agreed that activities of daily living involve repetitive motion in brushing hair, teeth, etc. (Petitioner's Exhibit #5, pages 83-84).

With regard to his right arm condition, Petitioner did not communicate with Respondent after August 15, 2008. He did not look for work or attempt to perform work from the last day he worked for Respondent until 4 to 5 months prior to the arbitration hearing (April or May of 2013). His applied for an unknown position at McNamara Cab Company and he refused an offer of a management position at a railroad, Lanigan International, at 71st and Union. He postponed surgery from the summer of 2010 to October 21, 2010.

During the initial period of time he treated Petitioner, Dr. Labanauskas offered no opinion as to Petitioner's work restrictions. He did not know when the Petitioner stopped working for Respondent. He believed that Petitioner was doing for-profit work on July 7, 2010, that involved some type of physical activity (Petitioner's Exhibit #5, pages 65-67). Petitioner was also fishing during this time and was able to carry out activities of daily living (Petitioner's Exhibit #5, pages 67-68). After the surgery of October 21, 2010, Petitioner's strength continued to increase until February 11, 2012, at which time he reached a point of lacking only 10 degrees of extension.

Nevertheless, during his deposition, Dr. Labanauskas restricted the Petitioner from performing "physical labor or repetitive work activity" (Petitioner's Exhibit #5, pages 82-83). Through 2011, it was Dr. Labanauskas' understanding that the Petitioner continued to be active on the computer and with the guitar. In 2012, there were many cancelled visits. Dr. Labanauskas filled out paperwork on disability for the Petitioner, which limited him to lifting of 10 pounds and restricted him from finger grasping, stooping, bending, crouching or raising his hand. Dr. Labanauskas ordered Petitioner not to perform finger and grasping activities at work, but allowed him to perform activities of daily living. The reason Dr. Labanauskas gave for restricting Petitioner from stooping, bending or crouching was because his right arm would be positioned where it's not "recommended." He allowed Petitioner to lift one to two pounds.

Dr. Neal's physical examination of Petitioner on February 17, 2012 revealed he was lacking in a few degrees of full extension as compared to the left side and had less tissue mass on the right proximal to the medial epicondyle. Less tissue mass was consistent with fat atrophy and weakness of the right FDM, which are muscles that the ulnar nerve innervates. Weakness of the right, little and ring

fingers would be consistent with compression of the nerve above the wrist level. Dr. Neal's clinical evaluation disclosed findings that were inconsistent with the physiology of his problem or any known physiology. These include burning paresthesias in the forearm after the third or fourth tapping on the olecranon. Tapping over the biceps tendon in the cubital fossa area caused distal paresthesia and a wave of electricity to the shoulders and wrists, which is also non-anatomical. On Jamar grip testing, a bell-shaped pattern was not elicited, which is abnormal even for ulnar neuropathy. Rapid exchange gripping was asymmetric, which is consistent with a lack of full effort. He would squeeze on the right and generate 12 pounds, and on the left, 57 pounds. When doing a rapid exchange, his left side would pull as high as 170 pounds and the right 60 pounds. He also had a good grip in the rapid exchange.

Although the Petitioner claimed that surgery did not help him, his testimony and the medical records reveal that his numbness, strength and range of motion improved after surgery.

Therefore, Dr. Neal opined that the deficiency in his range of motion would not interfere with his ability to do all regular job requirements as described in his work at ITS. Based on objective findings, he should be able to do his hobbies and his regular work. Dr. Neal suggested wearing a little pad, such as an elbow sleeve, to remedy the fat atrophy in the elbow. He found no reason to limit lifting with an extended elbow because this would not provoke the ulnar nerve. He imposed no restrictions on finger activity or grasping (Respondent's Exhibit #6, pages 60-69). Dr. Neal found no reason for Dr. Labanauskas' restrictions of crouching and stooping due to elbow problems (Respondent's Exhibit #6, pages 69-70). Dr. Neal did not find that Petitioner's medication use reflected severe pain (Respondent's Exhibit #6, pages 72-73).

The Petitioner received six cortisone injections from November 12, 2008 to July 7, 2010. Such injections caused fat pad atrophy in his right elbow (Petitioner's Exhibit #2, pages 11-16, Respondent's Exhibit #6, pages 50-52, and 80). Petitioner has not undergone a final MRI, which Dr. Neal and Dr. Labanauskas have recommended. The MRI would be helpful in determining whether or not the ulnar nerve remained in the surgically-altered position (Petitioner's Exhibit #2, pages 74-75, Respondent's Exhibit #6, page 74).

CONCLUSIONS OF LAW

In support of his decisions with regard to issues (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?", and (E) "Was timely notice of the accident given to Respondent?", the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner filed three Applications for Adjustment of Claim ("Applications") in this matter. The original Application, filed on December 3, 2010, shows an accident date of August 24, 2008 and alleges injuries to the right elbow, right arm, neck and other parts of the body. Two amended Applications, in which Petitioner alleged injuries to the same body parts and which correspond to accident dates of August 16, 2008 and August 15, 2008, were filed on July 22, 2013 and September 20, 2013, respectively. Each alleges a different date of accident based on the theory that the manifestation date was Petitioner's last day of work.

All of the Applications were filed more than 1-1/2 years after Petitioner's last day of work for Respondent, August 15, 2008. Petitioner clearly was not certain as to the last date he worked for Respondent.

Further, in histories Petitioner provided to the examining doctors along with his testimony at trial, Petitioner varyingly placed the onset of shoulder symptoms or elbow pain radiating into the shoulder and then back down and into the forearms and hands, on a series of dates as early as 2006 (Petitioner's Exhibit #1) to the latter part of 2007 through 2008. No particular date was established on which Petitioner's elbow symptoms began. No specific date was identified on which said symptoms were associated with his employment. There are no documented complaints of right upper extremity pain on August 15, 2008. Therefore, the Arbitrator finds that Petitioner is unable to establish a date of accident (Respondent's Exhibits #1, #2 and #2a; Respondent' s Exhibit #6, page 21; Arbitration Transcript, September 20, 2013, pages 27, 72; Petitioner's Exhibits #1, #2 and #3).

The Arbitrator notes that the attendance and disciplinary records in the Human Resources' file that Respondent kept on Petitioner failed to disclose any

report of right upper extremity complaints. (Respondent's Exhibits 3a, 3b and 3c and 9) His Employee Separation Form and Termination Check-Off Form/Status Change specifically indicate that Petitioner failed to establish any reason for resigning his employment on or about August 15, 2008. (Respondent's Exhibit #3a)

Petitioner testified that the reason he left his employment with Respondent was because he was dealing with the pain, he could not take it anymore and Respondent would not schedule time off for him to visit the doctor for his alleged accidental injury. (Arbitration Transcript, September 20, 2013, pages 31, 34-37, 40-41) However, this statement is not supported by the following personnel records that document Petitioner's reported absences, paid and unpaid, personal and medical, from 2007 through the date he left Respondent:

1/23/07	"Daughter's Birthday"
1/26/07	Personal Day
2/13/07 – 2/17/07	Vacation
2/22/07	Personal Day
5/1/07	Personal Day
5/29/07 – 6/2/07	Vacation
6/7/07	"Isn't feeling good."
6/27/07	"Has family problems."
7/5/07	Personal Day
7/17/07	"C/O 3 pts. 2B "
7/31/07	Call Off

9/15/07	"If I have a safety day, I have to go a (sic) file a claim with a lawyer. I really need this day off! Thank you."
10/11/07	"He is sick."
10/30/07	"Family Issues."
12/3/07	"Car Problems (always Problems) on Mondays. Work him on Sun. per Sam."
12/15/07	Safety Day
1/16/08	Personal Day
2/5/08	Personal Day
2/13/08	"My Birthday Need the night off to Party. I'm not getting any younger. Thank you."
3/18/08 – 3/22/08	"March 18th thru the 22nd week. * the 16th thru the 24th with off days included. Thank you."
4/1/08	Personal Day
4/11/08	"Will Not Be In a (sic) 0600 PM. Daughter Sick."
4/22/08	Off Work
7/13/08	Personal Day
7/24/08 – 7/26/08	"Funeral leave 7-24-08/7-25-08/7-26-08. Must leave today for this (Grandmother). Thank you."
7/29/08	Call Off

(Respondent's Exhibit #3b)

On none of the above dates did Petitioner present to Dr. DeLeon or any other physician for his alleged complaints to his right upper extremity.

In 2006 and 2007, Respondent cited Petitioner for his excessive absences.

Petitioner reported to M. Bryan Neal, M.D., Respondent's examining physician, that he experienced symptoms in his right trapezius, right side of his neck and right arm that first developed "like a thunderbolt" around November of 2007. Such symptoms included numbness, tingling and pain. (Arbitration Transcript, September 20, 2013, pp. 26-27, Respondent's Exhibit #6, pp, 21-22)

Petitioner testified that on August 15, 2008, he was "dealing with the pain" and he "couldn't take it anymore."

The Arbitrator finds it difficult to believe that, given Petitioner's statement to Dr. Neal that his symptoms first developed "like a thunderbolt" around November of 2007 and Petitioner's testimony that on August 15, 2008, he couldn't take it anymore, Respondent would not allow him time off to seek treatment for his right arm and Petitioner was unable to obtain medical care until September 11, 2008, which was approximately 4 weeks after he left Respondent.

On September 11, 2008, Petitioner first treated with Dr. DeLeon. Petitioner testified that Dr. DeLeon has been his treating doctor for 18 years. (Transcript, p. 108)

The Arbitrator notes that Petitioner's personnel file, the Adelfio's attendance files and Dr. DeLeon's pre-9/11/2008 records do not substantiate any report by Petitioner of a right upper extremity problem. (Respondent's Exhibits #3 and #9, Petitioner's Exhibit #1)

Petitioner testified that he did not make any request for time off, either on the job or via call-in, for treatment to his upper extremity.

According to Petitioner's testimony, he only reported right upper extremity complaints on four occasions. Two of these reports took place on August 15, 2008, which is the date on which he voluntarily separated from his employment

with Respondent and the date on which he alleges to have voiced his physical complaints to both of the Adelfios.

Sam Adelfio, Jr., testified that on August 15, 2008 at approximately 6:00 A.M., he had a conversation with Petitioner. With regard to such conversation, the Arbitrator cites a portion of the direct examination of Sam Adelfio, Jr.:

Q: What did he say to you, and what did you say to him?

A: He had pretty much said that he was - - he had left, he had quit that day, and just kind of tired, tired of ITS, just tired of working the overtime and just being there all the time.

Q: Did he say anything about any type of physical problem?

A: No.

Q: Did he ever request of you that he be given time to go see a doctor?

A: No.

(Tr. 9/20/2013, pp. 177-178)

On cross-examination, Sam Adelfio, Jr., testified that he did not document this August 15, 2008 conversation that he had had with Petitioner but that he may have mentioned to Sam Adelfio, Sr., that Petitioner had left Respondent. (Tr. 9/23/2013, pp. 5-6)

With regard to the August 15, 2008 conversation that Sam Adelfio, Sr., had with Petitioner, Sam Adelfio, Sr., testified to the following on cross-examination:

> ***Question:*** *You testified that he quit saying that he is sick of all the crap going on in the yard?*
>
> ***Answer:*** *Right.*

****

Question: *As a supervisor if they told you that, wouldn't it be important to write that down and notify the other managers of that?*

Answer: *Yes, correct.*

Question: *In this instant (sic), it wasn't written down?*

Answer: *He didn't say initially that he was quitting. He just said he had enough.*

Question: *You testified that he had enough of the crap going on in the yard?*

Answer: *Right.*

Question: *As a manager wouldn't it be your duty to find out what the other crap would be?*

Answer: *I get a lot of crap every night. Sometimes I get guys that are just ticked off for any reason. You usually step back. Let them cool down. Let them go home and cool down. So I got a lot of guys that got a lot of problems. We go through a lot every day. You just learn to adapt to the way some of these guys act. Some of these guys do things in the heat of the moment. I had guys walk off that I never said anything and they are still working today, because I never made a big deal about it. Like I said, it is all the relationship that I have with these guys.* (Tr. 9/23/2013, pp. 97, 98-99)

The Adelfios specifically refuted any such report of physical complaints by Petitioner. The Adelfios testified that although Petitioner expressed to them his discontent with scheduling and his employment in general, he made no mention of any physical injury.

The Arbitrator notes that in a handwritten letter dated March 3, 2008, Petitioner complained bitterly to Jason Bolda, his terminal manager, of two instances in which co-worker Warren Gilbert "threatened [him] with violence on the job." Petitioner also wrote that he "will not tolerate the manner of behavior that has been dispelled upon me." (Respondent's Exhibit #9)

The Arbitrator finds that Petitioner did not report any problem with his right upper extremity to his operations manager, Sam Adelfio, Sr., or lead man/ramp manager, Sam Adelfio, Jr., and the Arbitrator finds their testimony in this regard to be credible. The Arbitrator notes that Sam Adelfio, Jr., is no longer employed by ITS and testified pursuant to subpoena.

In addition to the Adelfios, Petitioner testified that he reported physical complaints to Jason Bolda in July 2008 and during the first week of August 2008. With respect to the conversations that Petitioner alleged to have had with Jason Bolda, he testified on direct examination as follows:

Q: Where did this conversation occur, Mr. Peeks?

A: It occurred in the office of the office manager.

Q: At ITS?

A: Yes, at the 63rd Street Yard, the yard that I worked at.

Q: What time of day did this occur?

A: It happened at about 6:30 A.M.

Q: Did this begin shortly after you had started a shift?

A: No, it would be at the end of my shift or going into the next shift. On this particular day it was the end of my shift.

Q: And who did you speak with?

A: I spoke to Jason Bolda.

Q: And what did you say to Mr. Bolda?

A: I asked him if he would consider giving me Mondays off because my days off were Sundays and Mondays, but they had us working 6-day schedules where Sunday was my only day off. I told him that I needed this day off so that way I can start going to see a doctor in regard to my arm.

Q: And what did Mr. Bolda say to you?

A: He said that we're kind of busy right now, that it's hard for me to schedule that for you, but I'll look into it and try to help you out.

Q: Did you receive time off after having this conversation?

A: No.

Q: Did you have any conversations with him after that from that conversation you just described up until the time that you stopped working for ITS?

A: Yes, approximately - -

Q: When did that conversation occur?

A: About a month and a half after my initial request.

Q: So would that be sometime in August of 2008?

A: Yes. It was like the beginning of August, the first week of August, I would say.

Q: Where did this conversation occur?

A: It occurred in Jason Bolda's office in the yard on 63rd Street.

Q: And when did this conversation occur, what time of day?

A: At 6:30 A.M. again.

Q: At the conclusion of one of your shifts?

A: Yes.

Q: And what did you say to Mr. Bolda?

A: I asked him why he hasn't basically kept his word that he is going to look into giving me the time off that I requested, and he for the most part shunned me as if I weren't even there. And he told me to come back another time.

Q: Did you say anything to him at that point?

A: No, I bit my tongue.

Q: During either of these 2 conversations, did you indicate why you had asked for the time off?

A: Yes, I had told him that I need to go and see a doctor in regard to my right arm.

(Tr. 9/20/13, pp. 34-37)

With regard to the testimony above, and based on all of the evidence that supports Petitioner's lack of credibility, the Arbitrator draws the reasonable inference that Petitioner was merely asking to take Mondays off work. Prior to this busy period at work, Respondent gave Petitioner Sundays and Mondays off work.

The Arbitrator notes that Petitioner testified that he asked Jason Bolda for "Mondays off." He did not ask Jason Bolda for *this* Monday off or *next* Monday off so that he could see a doctor. At the time he had the two conversations with Jason Bolda, Petitioner had been working 6 days a week, 8-12 hours a day and was married with one dependent child. Moreover, on 12/3/07, Petitioner's supervisor recorded: "Car Problems (always Problems) on Mondays. Work him on Sun. per Sam."

Neither party called Jason Bolda as a witness, although Respondent attempted to serve him with a subpoena. (Respondent's Exhibit 8a) Petitioner's testimony regarding the two conversations he had with Jason Bolda stands unrebutted. Nevertheless, even if one assumes that the actual conversations Petitioner had with Jason Bolda are consistent with those described by Petitioner, the Arbitrator finds notice to be insufficient.

Section 6(c) of the Act states, in pertinent part, the following: "Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident."

Petitioner's testimony as to his two conversations with Jason Bolda indicates that he merely told Jason Bolda he needed Mondays off to see a doctor for his right arm. There was no specific notice at that time of any kind of injury, much less any notice to Respondent of an industrial injury.

With regard to the notice issue, the Arbitrator relies on the Appellate Court's holding in White v. Illinois Workers' Compensation Commission, 374 Ill. App. 3d, 907, 873 N.E.2d 388 (4th Dist. 2007)

Petitioner testified that that due to scheduling, there were times when he worked under two other managers on days when the Adelfios were off work. In Dr. Neal's February 17, 2012, report, he wrote that Petitioner indicated that he told his managers and the head boss, which included Jason Bolda, Sam Adelfio, Jr., and Sam Adelfio, Sr., as well as "[a]ll of [his] co-workers", which included Ray Harrison, Tim Steveno and Tom M., about his right arm symptoms. However, there is no evidence that Petitioner reported any kind of right arm injury to these men, much less an industrial injury.

Petitioner did not introduce any documentation to corroborate his testimony that while he worked for Respondent, he reported right arm symptoms to them.

Furthermore, upon carefully reviewing the medical bills, the Arbitrator finds that none of these bills were sent to Respondent. (Petitioner's Exhibit 4)

On November 12, 2008, Petitioner told his treating physician, Dr. Labanauskas that he quit his job at the railroad, but did not give him a reason that he quit. (Petitioner's Exhibit #2, Petitioner's Exhibit #5, pp. 54-55) On February 17, 2012, after he had filed a claim, Petitioner reported to Respondent's examining physician, Dr. Neal, that on August 24th or 25th, 2008, he quit his job with Respondent in the middle of the shift (at about 2:00 a.m.) because he was previously told he could have a day off to see a doctor, but when he went to work that day, he was told he couldn't have such day off. (Respondent's Exhibit #6, Dep. Ex. 2, p. 11) This version of his resignation is most inconsistent with his testimony at trial. Then, on May 3, 2012, Christopher Peeks reported the following to Dr. Gross, Petitioner's examining physician: "He quit work on or about 8-24-2008, because they would not give him time off to see a doctor." (Petitioner's Exhibit #6, Dep. Ex. 2, p. 6, Petitioner's Exhibit #6, p. 17)

The Arbitrator notes another example of Petitioner's lack of credibility. During the five-year period during which Petitioner claims he was temporarily totally disabled, he did not look for work until April or May of 2013. His job search consisted of two inquiries: one with McNamara Cab Company and one with Lanigan International, a railroad company. Although Petitioner was offered the manager's position with the railroad company, he voluntary turned down this offer. The reason Petitioner gave for turning down this job was that he did not know what to do. (Tr. 9/20/2013, p. 129) There is no evidence that the physical requirements of this position of manager exceeded Dr. Labanauskas' restrictions.

As it relates to his credibility, the Arbitrator finds it significant that Petitioner did not even *attempt* to perform the management job that Lanigan International offered him.

Furthermore, as it relates to Petitioner's credibility, upon examining Petitioner, Dr. Neal determined that Christopher Peeks was symptom magnifying and opined that there was no support for Dr. Labanauskas' finding that Petitioner would have right arm pain severe enough to interfere with the attention and concentration needed to perform even simple work tasks. (Respondent's Exhibit #6, pp. 59-64, 72)

The Arbitrator finds the testimony of Petitioner to lack credibility, but finds the testimony of Sam Adelfio, Sr., and Sam Adelfio, Jr., to be believable.

The Arbitrator finds Dr. Neal to be more qualified and better informed than either Dr. Labanauskas or Dr. Gross, and therefore gives greater weight to his opinions. In support of his opinion that Petitioner did not sustain a repetitive trauma injury to his right arm while working for Respondent, Dr. Neal found, *inter alia*, that Petitioner's work activities were varied and that Petitioner developed axonal degeneration *after* he quit working for Respondent. The Arbitrator finds these two findings to be persuasive.

After carefully reviewing the deposition transcript of Dr. Labanauskas, the Arbitrator finds that Dr. Labanauskas did not have a full understanding of Petitioner's work activities. Moreover, the Arbitrator finds Dr. Labanauskas' bending, stooping and crouching restrictions to be unreasonable. The Arbitrator finds Dr. Labanauskas' opinions to be unpersuasive.

The Arbitrator finds that Dr. Neal's definition of repetitive activity makes more sense than Dr. Gross' definition of repetitive activity.

In view of the foregoing, the Arbitrator finds that Petitioner failed to prove that an accident, repetitive or otherwise, arose out of and in the course of his employment by Respondent. Moreover, the Arbitrator finds that Petitioner failed to provide sufficient notice of this alleged accident to Respondent.

Therefore, compensation is hereby denied. All other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Doug Holleran,
Petitioner,

vs. NO. 11 WC 31086

15IWCC0248

ND Industries,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, medical expenses and penalties and attorneys' fees and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 27, 2014 is hereby affirmed and adopted.

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

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

15IWCC0248

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

APR 6 - 2015

o-04/01/15
jdl/wj
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

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

HOLLERAN, DOUGLAS
Employee/Petitioner

Case# **11WC031086**

ND INDUSTRIES
Employer/Respondent

15IWCC0248

On 2/27/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0391 THE HEALY LAW FIRM
MATTHEW GANNON
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

0766 HENNESSY & ROACH PC
DANIEL S WELLNER
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Douglas Holleran
Employee/Petitioner

v.

ND Industries
Employer/Respondent

Case # 11 WC 31086

Consolidated cases: ____

15IWCC0248

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on November 5, 2013 and December 4, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0248

FINDINGS

On the date of accident, **2/23/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 regarding his right hip ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$34,954.92**; the average weekly wage was **$672.21**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$33,866.58** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$33,866.58**.

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

ORDER

Petitioner has not proven, by a preponderance of the evidence, that his current condition of ill-being, regarding his right hip, arose out of and during the course of his employment by Respondent therefore, no benefits are awarded regarding the right hip.
Respondent shall pay Petitioner temporary total disability benefits of $448.14 per week for 59 & 5/7 weeks, commencing February 24, 2011 through April 24, 2012, as provided in Section 8(b) of the Act.
Respondent shall be given a credit of $33,866.58 for temporary total disability benefits that have been paid to Petitioner.
Respondent shall pay reasonable and necessary medical services of Northwest Community Hospital, as provided in Sections 8(a) and 8.2 of the Act.
Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.
No penalties or attorney's fees are awarded.

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

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

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

15IWCC0248

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) medical bills; 3) temporary total disability; 4) penalties; and 5) attorneys fees. *See,* AX1.

Petitioner testified that he was employed by the Respondent as a shipping and receiving coordinator. His job duties involved loading and unloading trucks and working with heavy machinery.

He testified that on February 23, 2011, he was picking up cases of papers weighing sixty (60) pounds, when he was hurt. He denied a prior injury to his back and hip and immediately notified his supervisor. He attempted to stay at work but left shortly after the injury. He further testified that the pain started in his back and hip down to his groin area and throughout his back and his whole right side. He later completed a "statement of facts" on March 2, 2011. In this document, he described pain in his low back, right thigh, groin and tailbone area. *See,* PX7.

He initially treated with Dr. Nancy Koch on February 23, 2011, and reported pain near the lower back. She prescribed medication and kept him off work. On February 28, 2011, Petitioner reported to Dr. Koch that he had pain in the lower back with spasms and pain radiating into the right buttock, but not the leg. He had an MRI of the thoracic and lumbar spine on February 28, 2011. Dr. Koch referred Petitioner for physical therapy and epidural steroid injections. Petitioner followed up with Dr. Koch on July 18, 2011, wherein she ordered work conditioning and referred Petitioner to Dr. Rabinowitz at Barrington Orthopedics.

On February 28, 2011, an MRI scan was performed on his lumbar spine. The impressions were 1) a slender right paramedian T12-L1 disc extension with encroachment on the thecal sac; 2) L3-L4 showed disc desiccation and disc bulge with small spurs and; 3) L5-S-1 appeared relatively preserved, without stenosis or nerve displacement.

He treated with Dr. Luz A. Feldmann, from approximately April 21, 2011 to July 7, 2011, and reported low back pain radiating to the thigh and groin, joint stiffness, right leg pain with a limp and myalgia. He was diagnosed with a herniated disc and received short-term relief from an injection. Petitioner treated with Dr. Feldman until released in July of 2011. *See,* PX2.

On April 21, 2011, Petitioner was seen by Dr. Luz Feldmann, for pain management. Petitioner gave a consistent history of his accident and denied any prior history of back pain. Dr. Feldmann performed a physical examination and diagnosed Petitioner with a herniated disc at L4-L5. He performed an epidural steroid injection and took Petitioner off work until his next visit on May 12, 2011. Per the NCH doctor, Petitioner was referred for physical therapy at Northwest Community Hospital, which he began on or about May 18, 2011. *See,* PXs 1-2.

Petitioner returned to Dr. Feldmann on May 12, 2011. He did not believe his pain was worse, just changed, following the injection. Dr. Feldmann noted he still had decreased range of motion, spasm of the lumbar spine and positive straight leg raising test. Petitioner was diagnosed with a herniated lumbar disc and low back pain. He added Valium to his list of medications and noted Petitioner would be off work until his next visit on June 2, 2011. *See,* PX2.

On July 7, 2011, Petitioner returned to Dr. Feldmann who noted that Petitioner's back was better, but not greatly improved. Dr. Feldmann recommended that Petitioner finish physical therapy and consider a work-hardening program, once therapy was completed. He would then consider Petitioner returning to work after the work-hardening program. He had no further options for him and advised Petitioner to return to his primary care physician.

Petitioner saw Dr. Richard S. Rabinowitz on August 9, 2011. He noted symptoms in the lower back lumbar region. He prescribed an additional six weeks of therapy and kept Petitioner off work. In October 2011, Petitioner obtained a TENs unit which was prescribed by Dr. Koch. Petitioner had continued low back pain, and he referred Petitioner back to Dr. Belcher at Barrington Orthopedics for pain management as Petitioner was reporting low back pain radiating to the thigh and groin areas.

On November 18, 2011, Petitioner saw Dr. Brook Belcher at Barrington Orthopedics and reported that the TENs unit was helping and that previous injections provided short-term relief. Dr. Belcher recommended continued physical therapy and additional injections.

Petitioner testified that the second injection also helped in the short term and on December 9, 2011, Dr. Belcher recommended another injection, noting ongoing right groin pain. She opined that all of Petitioner's pain was not due just to his lower back and suspected that Petitioner had a right labral hip tear. Dr. Belcher recommended an injection and possible surgery on the hip. She referred Petitioner to a hip surgeon, Dr. Domb, at Hinsdale Orthopedic and ordered an MRI scan of the right hip.

Petitioner followed up on February 27, 2012, following the MRI of the hip, which was read to show anterior, lateral and posterior impingement with a positive FABER sign. There was an anterosuperior labral tear with chondral labral separation. *See,* PX3.

On April 13, 2012, Petitioner saw Dr. Domb who performed an injection into the hip, and after petitioner's enhanced history of the accident, related the hip injury to the petitioner moving boxes at work. He recommended surgery and kept Petitioner off work, anticipating an approval of surgery.

On April 23, 2012, Respondent denied the surgery recommended by Dr. Domb and Petitioner's benefits were suspended.

On May 22, 2012, Petitioner returned to Dr. Domb who again recommended surgery and discussed various procedures with the petitioner. *See,* PX5.

Petitioner testified that he attended examinations with Drs. Ghanayem and Virkus and that he was aware that surveillance was being performed. Currently, Petitioner has pain and uses medication for it; his group insurance would not cover the cost of the medication.

On cross-examination, Petitioner testified that he received an advance of approximately $6,700.00 during the summer of 2012, after his benefits were suspended in April 2012. He testified that he has no other source of income and his relying on family for expenses.

Testimony of Anthony Filipello

Anthony Filipello is an investigator for Research Consultants Group. He had been an investigator for this company since April of 2004. He performed surveillance on Petitioner on March 5, 2012. Mr. Filipello took an eight (8) minute video of Petitioner's activities on that date and prepared a report of his findings; said report is offered into evidence as Respondent's Exhibit 3. The video was viewed at trial and Petitioner verified that he was the subject of the video. The video showed Petitioner walking and moving without any discernable problem. Mr. Filipello testified that there were other days of surveillance that were not entered into evidence. *See,* RX3.

Testimony of Dr. Ghanayem

Dr. Ghanayem is a director of Spine Surgery and a professor in the department of orthopedic surgery with a joint faculty appointment in neurologic surgery, at Loyola. Ten percent (10%) of his practice involves Section 12 examinations. He sees patients, performs operations, teaches residents and medical students; and does research on the spine. Dr. Ghanayem saw Petitioner at Respondent's request, on July 27, 2011. By way of a history of the accident, Petitioner reported to Dr. Ghanayem that he was carrying fifty (50) pound cases of paper from a cart to an office and developed back pain in the lower lumbar region. on the right side. Petitioner reported that he started physical therapy, had injections and was on medication. Dr. Ghanayem conducted a physical examination. Petitioner was neurologically normal but had tightness in his hamstrings, which was significant for a low back injury. Dr. Ghanayem reviewed the MRI of the lumbar spine and noted that Petitioner had degeneration at L3-L4 and L4-L5. He did not believe Petitioner had a disc herniation at T-12-L1 and thought that that was a degenerative finding. *See,* RX1, pgs. 4-11.

Dr. Ghanayem found that Petitioner hurt his back and aggravated the degeneration condition of his spine. He thought Petitioner should have physical therapy and injections. He opined that over the course of six weeks, Petitioner's progress would be good and that light duty would be reasonable: with the Petitioner's restrictions being, no lifting or repetitive bending or stooping.

Dr. Ghanayem saw Petitioner again on October 27, 2011. During the physical examination, Petitioner had tenderness in the mid-lower spine and stiffness with range of motion. He walked without a limp, but with a slow gait. His Waddell's signs were equivocal. The doctor took a history and found that Petitioner had stopped therapy because of a lack of progress and that his pain had remained stable. He did not have any radicular pain. Dr. Ghanayem concluded that Petitioner failed to make progress, and did not believe him to be at maximum medical improvement ("MMI"). He agreed that Petitioner could try some additional injections with physical therapy and concluded that Petitioner should continue at a light-duty status. *See,* RX1, pgs. 10-15.

Dr. Ghanayem re-evaluated Petitioner on March 5, 2012. Petitioner reported to him that he had had additional conservative treatment including injections, which did not help him. Therapy had helped however, Petitioner complained of back pain with radiation to the right buttock and thigh and some groin pain and numbness in both feet. Dr. Ghanayem conducted a physical examination and noted that Petitioner had two distinct gaits. Dr. Ghanayem found this to be significant because it indicated that there was non-organic pain behavior occurring. Dr. Ghanayem concluded that Petitioner had reached MMI and felt that he could return to work, at regular duty, with no additional care. Dr. Ghanayem drafted a report dated April 16, 2012, after reviewing surveillance of the petitioner, in which he stated that Petitioner could return to work, in a full duty capacity. *See,* RX 1, pgs. 16-20.

On cross-examination, Dr. Ghanayem testified that Petitioner's care had been appropriate. He also found that Petitioner had a back condition that caused him pain. The doctor found that when he sees patients on multiple occasions it helps him to assess an ongoing problem and was better than seeing them a single time. Dr. Ghanayem testified that he did not review the medical records of Drs. Friedman, Feldmann, Domb, Virkus, Koch or Rabinowitz and did not know Dr. Feldmann and did not have any opinions regarding Dr. Domb. Dr. Ghanayem charged fees for his reports and depositions. He also had no opinions concerning Drs. Koch, Friedman and Virkus. He was unaware whether Petitioner complained about his back prior to February 23, 2011. He noted the back condition was consistent with mechanism of injury described He opined that that the opinions of a pain management specialist or hip specialist would have no impact on his opinions. *See,* RX 1, pgs. 22-38.

Testimony of Dr. Virkus

Dr. Virkus is a board-certified surgeon, who has an active practice and is an associate professor of orthopedic surgery, at Rush. Dr. Virkus examined Petitioner on July 25, 2012 and took a history of the accident in which Petitioner reported that he had an injury while unloading boxes; and said that after a few boxes he felt like he had been shot in the low back. He was better for a while, but with episodes of coughing from asthma, he would get worse. Petitioner reported low back and right buttock pain radiating anteriorly through his buttock to his groin. He had symptoms in the lateral thigh of pins and needles. He also reported that he had had an injection in his right hip that did not give him any relief. Dr. Virkus took a medical and surgical history and performed a physical

examination. He also reviewed medical records from DH Medical Group, Drs. Feldman, Ghanayem, Rabinowitz and Domb as well as MRI scans. *See* RX 2, p. 5-13.

Dr. Virkus diagnosed Petitioner as having a labral tear with an underlying CAM deformity. The CAM deformity is a genetic deformity on the side of the hip, which predisposes one to labral tears and early arthritis. Dr. Virkus did not find that the hip condition was caused or aggravated by the February 23, 2011 injury. He felt the bending and lifting were not a typical cause of that type of injury and found that it would be exceeding remote for Petitioner to have sustained a labral tear and the low-back pathology, from the same mechanism of injury. Dr. Virkus noted that there was little mention of the right hip pain in the early medical records and the chief complaint was back pain. He also noted that the symptoms Petitioner reported far exceeded that which was typically seen in a labral tear and CAM lesion. He noted that the petitioner's description, of stabbing pain going from his back through his body into his testicle area; the severity of the symptoms and his significant pain with external and internal rotation of the hip, was atypical. It was Dr. Virkus' opinion that the fact that Petitioner's minimal response to the inter-articular injection of the hip, suggested a non-hip etiology. Based upon the movements that he saw in the office, which he found were non-organic, he did not think Petitioner could work in shipping and receiving. However, he did not believe the inability to work was related to the accident of February 2011. He found that Petitioner would benefit from arthroscopic treatment of the labral tear, with a re-shaping of the femoral head and osteochondroplasty.
See, RX 2, pgs. 14-17.

Upon cross-examination, Dr. Virkus agreed that Petitioner had received reasonable and necessary treatment for his right hip and that there was a labral tear present. He agreed that the treating physician was in a good position to opine as to what was going on with Petitioner's body. He testified that he had charged fees for his report and deposition and believed that surgical intervention was reasonable; but he did not think it was going to make Petitioner any better. He testified that he had no reason to believe that Petitioner had any complaints about the right hip prior to the February 21, 2011 injury. On re-direct examination Dr. Virkus testified that he based his opinion regarding causation on his examination, the history taken from Petitioner, as well as the medical records. On re-cross-examination, he indicated that "anything is possible" in response to a question concerning whether it was possible that the subject mechanism of injury could have caused the labral tear. *See,* RX2, pgs. 18-38.

Medical Records

A "statement of facts" was completed by Petitioner regarding this accident. He stated that his job duties were performed in shipping and receiving and he handled all materials coming into or going out of the shop. He was involved in cleaning the forklift and packaging the products, which required moving and lifting objects. Petitioner alleged pain in his groin, back and right thigh and tailbone area. He denied any history of similar problems in the past. He stated that on the morning of the date of

injury, he was lifting cases of copy paper outside of the maintenance office. After lifting approximately five cases, his lower back "exploded" in severe pain. He notified his employer immediately and called Sean Costin from the maintenance office. *See,* PX7.

Petitioner presented to Northwest Community Hospital Medical Group ("NCH") on February 23, 2011, complaining of lower back pain and pain to the groin area. He stated that he hurt himself at work while lifting sixty (60) pound boxes. After about the fifth box he experienced a pull/pain in his back and could not work. A physical examination was performed and Petitioner was diagnosed with lower back pain, a lower back strain and a lumbar strain. He was prescribed medication and told to stay off work through February 25, 2011. *See,* PX1.

On February 28, 2011, Petitioner returned to NCH, under the care of Dr. Ronnie Ghuneim, complaining of the same amount of pain. An MRI of the lumbar spine was performed and interpreted as showing a slender right para-median T-12-L1 disc herniation; a left L3-L4 foraminal disc protrusion; a small tear of the annulus fibrosis accompanying a disc bulge; and mild degenerative changes. Petitioner also had a posterior disc protrusion at L4-L5 with a disc bulge and degenerative changes. Dr. Ghuneim noted the results of the MRI and referred Petitioner to Pain Care Consultants. Petitioner was excused from work through March 7, 2011. *See,* PX1.

On March 8, 2011, Petitioner returned to NCH complaining that his pain had not improved. It was noted that management of his lower back pain was failing and that Petitioner had a lumbar herniated disc. He was told to follow-up with the pain management doctor and to continue off work for at least one week. Another work note was issued on March 15, 2011, taking Petitioner off work through March 22, 2011. *See,* PXs 1 & 5.

Petitioner had an EMG/NCV on June 21, 2011, which was read as a normal study. On the same date, Petitioner returned to NCH where he was seen by Dr. Cacioppo, who took a history and performed a physical examination. Petitioner was complaining of numbness and persistent burning in his hands and feet. Petitioner was diagnosed with a peripheral neuropathy, prescribed medication; and told to return if the problem became worse. At this time, Petitioner was continuing physical therapy at NCH. *See,* PX1.

According to a note from NCH, Petitioner was taken off work July 18, 2011 through July 21, 2011. Another note was issued on July 22, 2011, and Petitioner was taken off work until further notice based upon persistent low back pain. He was referred to an orthopedic doctor. *See,* PX1.

On July 27, 2011, by the request of Respondent, Petitioner presented to Dr. Alexander Ghanayem for an independent medical evaluation ("IME"). He issued a report of his findings on the same date. Petitioner provided a consistent history of his accident. He discussed having some progress in physical therapy. Dr. Ghanayem performed a physical examination. He also reviewed the MRI of the

lumbar spine and did not agree with the diagnosis of a disc herniation at T12-L1. He opined it was a degenerative finding. Dr. Ghanayem found that Petitioner had low back pain, which could be related to an aggravation of his underlying disc degeneration. He believed that the T12-L1 finding was incidental, as he had no pain at that area. Dr. Ghanayem recommended that Petitioner continue with physical therapy and conservative care for the next four to six (4-6) weeks. After that period, he should be able to return to his regular work activities. In the interim, he restricted him to lifting no more than fifteen (15) pounds, with no repetitive bending and stooping. *See,* RX1.

On August 9, 2011, Petitioner was referred by the doctor at NCH to Dr. Richard Rabinowitz at Barrington Orthopedic Specialists. During physical examination, it was noted that Petitioner had marked tenderness of the right S1 joint and that his movement was severely restricted in all directions. He assessed Petitioner as having low back pain and continued Petitioner's "off work" status. He referred Petitioner to a physical medicine and rehabilitation specialist for evaluation and treatment and found that no return visit was necessary. In a letter dated August 9, 2011, Dr. Rabinowitz further noted that Petitioner's MRI showed a central disc protrusion at L4-L5 and a loss of water content at L3-L4 and L4-L5. He believed Petitioner had a non-surgical problem. *See,* PX4.

On September 1, 2011, Petitioner followed up with Dr. Koch at NCH, complaining of persisting, low back pain, despite still participating in physical therapy. It was noted that he now had a lawyer because the respondent wanted him to return to work. Petitioner was continuing physical therapy. On September 21, 2010, Petitioner returned to Dr. Koch explaining that he did not have much improvement after physical therapy. He stated that sitting as well as sleeping bothered him. Petitioner was referred to Dr. Feldmann for another epidural steroid injection.

On October 7, 2011, Dr. Koch issued a note indicating that Petitioner had not improved. Petitioner was unable to return to work because he was still in pain and unable to function. He was again referred to an orthopedic doctor and to pain management for treatment and evaluation. *See,* PX5.

On October 27, 2011, Petitioner returned to Dr. Ghanayem at the request of Respondent. He noted the Petitioner had stopped going to physical therapy the preceding month because of a lack of progress. He found Petitioner had not made much progress and that he was not at maximum medical improvement ("MMI"). The doctor opined that it was reasonable for him to try a couple of additional epidural steroid injections with physical therapy. Afterward, he would be able to return to regular work activities. In the interim, light duty would be reasonable with a fifteen (15) pound lifting restriction. *See,* RX2.

On November 18, 2011, Dr. Belcher, at Barrington Orthopedic Specialists, performed a L5 epidural steroid injection. Dr. Belcher also suggested physical therapy and kept Petitioner off work. Petitioner returned to Dr. Belcher on December 9, 2011, where the petitioner reported significant improvement three days following the injection. Dr. Belcher proceeded with a second injection and indicated that if

back pain continued with residual groin and thigh pain, she would consider a workup of the hip including an MRI/arthrogram. She ordered continued therapy. *See,* PX4.

When Petitioner returned to Dr. Belcher on December 30, 2011, he reported that his pain had initially improved with injections and physical therapy. He then complained of developing a cough ten (10) days later, which seemed to aggravate his low back and right groin pain. He was given another injection by his personal care physician and his pain improved. She noted he was making progress however, she opined that the ongoing right groin pain was not related to the low back. She was concerned about a secondary pathology such as a hip labral tear. Dr. Belcher recommended continued physical therapy but determined if Petitioner's groin pain did not improve, she would consider an MR arthrogram of the right hip. She also anticipated the petitioner would need a work hardening and conditioning program following the completion of therapy; due to the physical nature of his employment. Dr. Belcher anticipated MMI to occur in two to three months. *See,* PX4.

On February 27, 2012, Petitioner presented to Dr. Belcher, who read the MRI of the right hip to show a labral tear. She recommended an injection and possible surgery and referred Petitioner to a hip surgeon, Dr. Domb. *See,* PX4.

Dr. Ghanayem performed another independent medical examination ("IME") on March 5, 2012. Petitioner reported that the injections had not helped and reported pain in the buttock, thigh, and groin. He did state that physical therapy had helped. Dr. Ghanayem took a physical examination and noted the petitioner had negative straight leg raising, and no motor or sensory deficits on his physical demand. He found that Petitioner had reached MMI as to the back injury. Dr. Ghanayem also noted that Petitioner had no hip pain with internal rotation in the groin. He did not see how Petitioner could have had a hip injury related to the work accident. He found Petitioner could return to work and issued an addendum report on April 16, 2012, following his review of surveillance video. He found that the video confirmed his opinion that Petitioner could return to regular work activities. *See,* RX1.

Petitioner was referred to Dr. Benjamin Domb at the request of Dr. Belcher. He saw Dr. Domb on April 23, 2012 and gave a history of lifting cases of paper, having his back give out; and feeling pain in his hip. The Arbitrator notes that this is the first history in which the petitioner has claimed pain in his hip. Dr. Domb performed a physical examination and reviewed x-rays as well as the MR arthrogram. An injection was also performed in the hip, which only provided partial relief of his pain. Dr. Domb diagnosed Petitioner with a right hip labral tear caused by a work-related injury. He also noted CAM and pincer morphology. He did not believe the morphologies were the cause of the current hip condition, instead related the hip condition to the work accident. Dr. Domb recommended an arthroscopic surgical procedure and continued Mr. Holleran's off work status. *See,* PX3.

CONCLUSIONS OF LAW

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

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See, Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 356 N.E.2d 28 (1976). Furthermore, a causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. *See, Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 193 (1986).

The burden is upon a claimant to establish evidence of his workers compensation claim by a preponderance of credible evidence. *Board of Education of the City of Chicago v. Industrial Commission*, 83 Ill. 2d 475, 479 (1981). A preponderance of credible evidence, in this matter, supports the conclusion that Petitioner's low back injury is related to the February 23, 2011 accident and the condition of ill-being of his hip, is not. Petitioner testified to having instant pain in the low back region immediately following the act of lifting boxes of paper. He sought immediate medical treatment and following his history of injury and physical examinations, he was diagnosed with a low back strain. Thereafter, all treating physicians, including Drs. Koch, Ghuneim, Feldmann, Rabinowitz and also Dr. Ghanayem, agreed that there was a low back injury related to the work accident. They recommended diagnostic testing for the back including an MRI scan and treatment for the low back including medications, therapy and injections. Therefore, the Arbitrator finds that Petitioner's low back injury is causally related to the February 23, 2011 accident.

On July 25, 2012, Petitioner presented to Dr. Walter Virkus for an IME, by request of Respondent. Petitioner reported that on February 23, 2011 he was unloading boxes. After a few boxes, he felt like he had been "shot in the low back". He also had a feeling that he was "kicked in the testicles". Petitioner then stated his history of medical treatment. Dr. Virkus performed a physical examination and reviewed certain medical records. Dr. Virkus concluded that based upon his review of the records and MRIs, Petitioner's diagnosis was a right hip labral tear with an underlying CAM deformity in the femoral head and neck. He opined that the Petitioner's right hip condition was not related to the February 23, 2011 accident.

Dr. Virkus noted that the bending and lifting mechanism was not typical for that type of hip injury. Dr. Virkus also noted that it was unlikely that Petitioner would get a low back sprain at the same exact time that he had a labral tear. In addition, Dr. Virkus noted that there was little mention of right hip pain in the early medical records. While Dr. Virkus agreed that Petitioner had a labral tear, he believed that Petitioner's symptoms of constant stabbing pain going from his back through his body and into his testicle area, were atypical. The severity of the symptoms and the significant pain on rotation as well as the lack of a response to an inter-articular injection of the hip, were atypical. He also believed that they would suggest a non-hip etiology for his symptoms. *See,* RX2.

He noted Petitioner's movements were non-organic, but he did not believe Petitioner could work in shipping and receiving. However, he noted that since Petitioner's hip condition was unrelated, his inability to work would not be related to the accident of February 23, 2011. Finally, Dr. Virkus opined that Petitioner would benefit from arthroscopic treatment of his right labral tear and reshaping of the femoral head with an osteochondroplasty. Again, he noted it would not be related to the February 23, 2011 accident. *See,* RX2.

The Arbitrator notes that a preponderance of credible evidence demonstrates that the low back condition has resolved. The Arbitrator notes as of the February 27, 2011 visit with Dr. Belcher, Petitioner was only treating for the hip condition. On March 5, 2012, Dr. Ghanayem found that Petitioner could return to work and was at MMI, with regards to the low back injury. This finding was consistent with Dr. Belcher's findings on December 30, 2011, that Petitioner was showing improvement and would be at maximum medical improvement within two to three months. The Arbitrator notes that after Dr. Ghanayem's opinion, Petitioner only sought treatment with Dr. Domb, who was keeping Petitioner off work, because of his hip. Petitioner did not offer evidence that he remained under treatment for the low back

The Arbitrator finds that the Petitioner's current condition of ill-being with respect to the right hip is not causally related to the February 23, 2011 accident. The Arbitrator notes the differences of opinion between Drs. Virkus, Ghanayem and Domb concerning causation of the hip injuries, but finds that a preponderance of the credible evidence supports the opinions of Drs. Virkus and Ghanayem. Dr. Virkus opined that there was no causal connection between the hip and accident, in part, because of the lack of any complaint by Petitioner, in the treating records, regarding his hip.

The Arbitrator notes that in his statement of facts, testimony, and histories to his doctors, Petitioner primarily complained of having low back pain, however he also complained of right-sided pain in the buttock and leg. The Arbitrator can find no direct mention of a hip issue until December of 2012, when Dr. Belcher suspected that Petitioner could have another issue causing his symptoms. Petitioner did not complain of a hip injury until he saw Dr. Domb, a hip specialist, in April of 2012. The Arbitrator notes that Petitioner's history to Dr. Domb that he felt hip pain immediately after the injury is not consistent with the statement of facts and initial histories given to the providers immediately following the injury.

Dr. Virkus also opined that there was no causation relationship of the hip injury to the accident, based upon what he termed an "exceedingly remote" chance that the mechanism of injury could have caused the labral tear in the hip. He also noted that the mechanism of injury described could not have caused an injury to both the low back and the hip. The Arbitrator notes again that this opinion is supported by the preponderance of the evidence.

Dr. Ghanayem also opined that the mechanism of injury could not have caused the tear. The Arbitrator also notes that the treating physicians were all provided a history of injury, were advised of Petitioner's symptoms and conducted physical examinations, yet they never suspected or diagnosed a hip injury until close to a year after the accident. In addition, the Arbitrator notes that Petitioner did not offer any expert opinions addressing the mechanism of injury.

The Arbitrator also notes that Petitioner's treating physician, Dr. Domb, and Respondent's IME doctor, Dr. Virkus agreed that Petitioner had CAM morphology of the hip. Dr. Virkus testified that

this was a genetic condition that predisposed Petitioner to have arthritis and labral tears. The Arbitrator notes that Dr. Domb opined that the CAM lesion did not cause the tear, without explanation.

Therefore, the Arbitrator finds that the Petitioner's CAM lesion was a possible factor causing his hip tear and that the condition of ill-being of Petitioner's hip is not causally related to the subject 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?

The Arbitrator finds that Respondent is liable for the payment of all reasonable and necessary charges related to the treatment of the back injury. This includes charges from Northwest Community Hospital pursuant to the medical fee schedule, with credit to Respondent for all amounts paid. The Arbitrator specifically declines to award the balance of the bill even pursuant to the fee schedule because there are charges for non-related conditions such as asthma. Based upon the finding that Petitioner hip condition is not causally related to the work accident, the Arbitrator denies Petitioner's request for the payment of the Hinsdale Orthopedics bill.

K. Is petitioner entitled to any prospective medical care?

The Arbitrator having found the condition of Petitioner's hip is not related to the subject accident, the Petitioner is not entitled to prospective medical care to his hip.

L. What temporary benefits are in dispute?

The Arbitrator finds that a preponderance of the credible evidence supports a finding that Petitioner was entitled to the payment of temporary total disability from February 24, 2011 to March 5, 2012. While the back injury is causally related to the accident, the Arbitrator finds that Petitioner could have returned to work and was at maximum medical improvement for the back by March 2012. The Arbitrator notes as of the February 27, 2011 visit with Dr. Belcher, Petitioner was solely treating the hip injury, not the back injury. On March 5, 2012, Dr. Ghanayem found that Petitioner could return to work and was at maximum medical improvement. This finding was consistent with Dr. Belcher's findings on December 30, 2011, that Petitioner was showing improvement and would be at maximum medical improvement within two to three months.

The Arbitrator notes that after Dr. Ghanayem's opinion, Petitioner only returned to Dr. Domb, who was keeping Petitioner off work because of his hip. Based upon the findings concerning causation, the Arbitrator finds that Petitioner off work status after March 5, 2012 was related to the hip and therefore not related to the February 23, 2011 injury. There was no further back treatment after this

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Larry Hill,

Petitioner,

vs. NO: 11 WC 10460

15IWCC0249

Entertainment Partners,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2014, is hereby affirmed and adopted.

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2015
TJT:yl
o 3/23/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HILL, LARRY
Employee/Petitioner

Case# **11WC010460**

ENTERTAINMENT PARTNERS
Employer/Respondent

15IWCC0249

On 11/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0226 GOLDSTEIN BENDER & ROMANOFF
RICHARD VICTOR
ONE N LASALLE ST SUITE 2600
CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
MARK P RUSIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

15IWCC0249

LARRY HILL
Employee/Petitioner

Case #11 WC 10460

v.

ENTERTAINMENT PARTNERS
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on October 20, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☐ What temporary benefits are due: ☐ TPD ☐ Maintenance ☐ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 23, 2010, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $56,638.40; the average weekly wage was $1,098.20.
- At the time of injury, the petitioner was 69 years of age, married with no children under 18.
- The parties agreed that the petitioner received temporary total disability benefits for 5-3/7 weeks, from March 13, 2011, through April 20, 2011.

ORDER:

- The petitioner's request for temporary total disability and permanent partial disability benefits is denied.
- All claims for benefits for the petitioner's shoulders are denied.

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

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

Robert E. Williams

Signature of Arbitrator

November 5, 2014
Date

NOV 5 - 2014

FINDINGS OF FACTS:

On August 23, 2010, the petitioner, a Teamsters truck driver, slipped on fuel while exiting his truck and fell. He reported injuring his left shoulder to both his supervisor Joe Vannis and the set medic, Ross Kulma. The petitioner did not seek any medical care. On December 1st, the petitioner sought care with Dr. Biafora for a left thumb laceration occurring approximately a week earlier and reported emergency care at Lutheran General Hospital. He followed up on December 8th and 22nd.

On January 12, 2011, the petitioner sought treatment for his right shoulder with Dr. Biafora and reported slipping while exiting his truck and attempting to catch himself five months earlier. Dr. Biafora noted weakness, pain and a positive impingement sign. The doctor opined on January 24th that an MRI arthrogram on January 21st appeared to reveal a full-thickness tear of the supraspinatus and a partial tear of the subscapularis. The petitioner was given an injection into his shoulder, started on physical therapy and provided work restrictions. On March 14th, Dr. Biafora recommended an arthroscopic subacromial decompression and a possible rotator cuff repair. The petitioner declined the surgery. On April 20th, the petitioner requested a release to full duty.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an accidental injury to his left shoulder on August 23, 2010, arising out of and in the course of his employment with the respondent.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The petitioner did not seek or receive any medical care for his left shoulder. The medical care rendered the petitioner for his right shoulder is not related to the August 23, 2010, accident. Therefore, the medical care rendered the petitioner for his right shoulder was not reasonable or necessary and the cost of the medical care is denied.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that his current condition of ill-being with his left or right shoulder is causally related to the work injury. The petitioner reported an injury to his left shoulder to his supervisor and the set medic on August 23, 2010. The petitioner was able to continue working after his left shoulder injury and did not seek or receive any medical care for his left shoulder. Also, prior to January 12, 2011, the petitioner did not seek any medical care for an injury to his right shoulder nor did he complain of any right shoulder symptoms even though he received urgent and emergency medical care on numerous occasions for other medical problems. The petitioner is not credible. All claims for benefits for the petitioner's right shoulder are denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove any entitlement to temporary total disability benefits while disabled due to his right shoulder condition. The petitioner's request for temporary total disability benefits is denied.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he is entitled to any permanent partial disability benefits for either his left or right shoulder.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Matthew Blakey,

Petitioner,

15IWCC0250

vs.

NO: 12 WC 33516

Springfield Public Schools - Dist. #186,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2015

DLG/gaf
O: 3/25/15
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BLAKEY, MATTHEW
Employee/Petitioner

Case# **12WC033516**

15IWCC0250

SPRINGFIELD PUBLIC SCHOOLS-DIST #186
Employer/Respondent

On 7/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1824 STRONG LAW OFFICES
ED PRILL
3100 N KNOXVILLE AVE
PEORIA, IL 61603

0265 HEYL ROYSTER VOELKER & ALLEN
BRETT SIEGEL
PO BOX 9678
SPRINGFIELD, IL 62791

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 15IWCC0250

Matthew Blakey
Employee/Petitioner

v.

Springfield Public Schools - Dist. #186
Employer/Respondent

Case # 12 WC 33516

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on May 22, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 15IWCC0250

On September 12, 2012, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, the parties stipulated that Petitioner earned $1,119.46; the parties further stipulated that the average weekly wage was $279.87.

On the date of accident, Petitioner was 43 years of age, single with 3 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 6, for medical services provided to Petitioner on September 12, 2012, as provided in Sections 8(a) and 8.2 of the Act, subject to fee schedule. All other medical bills are denied.

Based upon the Arbitrator's Conclusions of Law, all other compensation benefits are denied.

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

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

William R. Gallagher, Arbitrator

July 18, 2014
Date

JUL 24 2014

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on September 12, 2012. According to the Application, Petitioner was assaulted while breaking up a fight at school and sustained injuries to the neck, back and whole person. Respondent stipulated that Petitioner sustained a work-related accident; however, Respondent disputed liability on the basis of causal relationship.

At the time of the accident, Petitioner had worked for Respondent for a very brief period of time having just been hired in August, 2012. Petitioner testified that his job title was an In-House Advisor and that his job duties required him to deal with discipline issues of high school students.

Petitioner testified that prior to reporting to work on September 12, 2012, he had been to an eye doctor and received some drops in his eyes. For this reason, Petitioner's eyes were dilated and his vision was impaired. Petitioner stated that he reported his vision problem to his supervisor, Fred Devoe, but that he was directed to go to work even though he had some visual impairment.

At the time of the accident, Petitioner was in a room that was occupied by students that were being held for what amounted to detention. Petitioner then heard what he described as "gang talk" and then observed two bodies (he could not be certain exactly who they were because of his vision problems) pushing and shoving one another. Petitioner attempted to separate the two individuals and, when he did so, a third student got involved. At that time, Petitioner testified that he was struck in the mid-back and neck by some objects, one of which he believed was a chair. Petitioner got on a walkie-talkie and requested assistance. Shortly thereafter, security and the police arrived as well as Fred Devoe.

Fred Devoe testified on behalf of the Respondent and confirmed that he was one of Petitioner's supervisors. He stated that on the morning of September 12, 2012, Petitioner gave him a note from his doctor which indicated that Petitioner was released return to work without restrictions but that it also indicated that Petitioner was to be excused from work/school. A copy of the note from Dr. Randal Peterson dated September 12, 2012, was received into evidence at trial and it indicated that Petitioner was released to return to work without restrictions but that the patient (Petitioner) had been seen in his office that day and was to be excused from work/school (Petitioner's Exhibit 2). Devoe testified that he informed Petitioner that it was Petitioner's decision whether or not to work that day and that he did not ever advise Petitioner that he was required to work that day. Devoe also stated that after he and others entered the room he observed Petitioner and Petitioner did not inform him that he had sustained any injuries.

Justyce Goleash testified on behalf of the Respondent. At the time of the trial, Goleash was a senior at Southeast High School. In September, 2012, Goleash was a sophomore and was present on the date of accident on September 12, 2012. She confirmed that the fight started because some students started arguing about gang-related matters. Goleash testified that she had an unobstructed view of the altercation and the Petitioner's attempts to intervene; however, she stated that Petitioner was not struck by any chairs or foreign objects.

Goleash also testified that she had her cell phone and that she was able to video a substantial portion of the altercation. Her video was subsequently obtained and copied by the School District. A DVD of the video was received into evidence at trial. On cross-examination, Goleash did agree that while she was recording the altercation she may have missed some portions of the fight because she was paying more attention to what was being recorded on the phone rather than the altercation itself.

The Arbitrator watched the video which was approximately three and one-half minutes in length. The Petitioner is in portions of the video which did show him being struck in the right hand by an object; however, Petitioner was not observed being struck in the back, neck or head areas by any flying objects. Further, Petitioner was not seen or heard calling on a walkie-talkie for help (Respondent's Exhibit 1).

Petitioner prepared an Employee Report of Occupational Injuries or Illnesses form on September 12, 2012, which indicated that he was hit with a chair on the hand, back and head (Petitioner's Exhibit 2). Petitioner continued to work for the remainder of the day and went to the ER of Memorial Medical Center that evening.

At the ER, Petitioner gave a history of breaking up a fight at school and being hit in his hand, head and back with a chair. CT scans of both the head and cervical spine were obtained, both of which did not reveal any acute findings. Clinical examination of the Petitioner did not reveal any bruising or abrasions and examination of both the head and back revealed no external signs of trauma (Petitioner's Exhibit 2).

On September 15, 2012, Petitioner sought treatment at Springfield Accident and Pain Center where he was treated by Dr. John Warrington, a chiropractor. Dr. Warrington authorized Petitioner to be off work and provided chiropractic care to the head, neck, upper back and right shoulder areas. While still being treated by Dr. Warrington, Petitioner was involved in a motor vehicle accident on September 25, 2012. Petitioner testified that this caused an injury to his lower back that was separate and distinct from the anatomical areas he injured as a result of the work-related accident. Dr. Warrington also treated Petitioner for his low back symptoms and opined that the low back injury was new and that the upper back and neck pain were exacerbated by the motor vehicle accident (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Joseph Monaco, an orthopedic surgeon, on January 15, 2013. In conjunction with his examination of Petitioner, Dr. Monaco reviewed medical records, the CT scans and the video provided to him by Respondent. When seen by Dr. Monaco, Petitioner informed him that he was struck by a chair on more than one occasion in the upper back, base of the neck and right shoulder. He also stated that he was kicked several times (Respondent's Exhibit 6; p 7).

On clinical examination, Dr. Monaco initially noted that Petitioner was morbidly obese and that he weighed 430 pounds and 6' 3" tall. Dr. Monaco's findings on examination of Petitioner's shoulders, cervical, thoracic and lumbar spine were normal. Dr. Monaco concluded that Petitioner sustained a mild contusion to his right hand, upper back and back of his neck as a result of the accident of September 12, 2012, the findings on examination were normal and that

Petitioner had no current condition of ill-being causally related to the accident of September 12, 2012. Because of the absence of any radicular symptoms, Dr. Monaco also opined that electrodiagnostic studies were not necessary (Respondent's Exhibit 6; pp 11-13).

Petitioner continued to be treated by Dr. Warrington through February 6, 2013. While it is not specifically stated in Dr. Warrington's records, Petitioner testified that he was released to return to work after December 25, 2012.

On February 5, 2013, Petitioner was seen by Dr. Edward Trudeau. At that time, Petitioner had complaints of pain and parasthesias in both upper extremities, more in the right than left. Dr. Trudeau perform nerve conduction studies which he opined revealed right brachial plexopathy, but were otherwise normal.

Dr. Monaco was deposed on April 8, 2014, and his deposition testimony was received into evidence at trial. Dr. Monaco's deposition testimony was consistent with his medical report and he reaffirmed his opinions that Petitioner only sustained mild contusions, that his findings on examination were normal and that Petitioner had no current condition of ill-being causally related to the accident of September 12, 2012. He further opined that additional treatment, including electrodiagnostic studies, were not indicated because of the lack of radicular symptoms (Respondent's Exhibit 3; pp 18-25).

When deposed, Dr. Monaco also provided opinions regarding Dr. Trudeau's diagnosis of a right brachial plexopathy. He opined that the blunt force trauma described by Petitioner would not cause such an injury due, in part, to the fact that Petitioner was morbidly obese and that there were several inches of padding protecting the brachial plexus. Further, he stated that such an injury would not cause pain in the upper back or neck (Respondent's Exhibit 3; pp 33-35).

At trial, Petitioner testified that he did not return to work for Respondent because of fear for his own safety. He still has persistent complaints of neck, back and shoulder pain as well as headaches.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is not causally related to the accident of September 12, 2012.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony that he was compelled by Fred Devoe to work in spite of his vision problems is questionable. The note from Dr. Peterson is inconsistent because it indicates that Petitioner was released return to work without restriction while also indicating that Petitioner needed to be excused from work/school. Devoe testified that he informed Petitioner that it was Petitioner's decision whether or not to work that day.

Petitioner's testimony that he was struck in the middle back and neck by various objects being thrown, one of which was a chair, is contrary to the testimony of the witness, Justyce Goleash, and the video.

The Arbitrator finds Petitioner's credibility to be suspect.

When Dr. Monaco examined Petitioner on January 15, 2013, he opined that the findings on examination were normal, that Petitioner had no conditions of ill-being causally related to the accident of September 12, 2012, and that further treatment, including electrodiagnostic studies, was not indicated. When deposed, he also stated that the brachial plexopathy diagnosed by Dr. Trudeau was not related to the accident due, in part, to Petitioner's morbid obesity.

The Arbitrator finds Respondent's Section 12 examiner, Dr. Monaco, to be credible.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that the medical treatment provided to Petitioner on the date of the accident was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith. All other medical bills are denied.

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6 for medical services provided to Petitioner on September 12, 2012, as provided by Sections 8(a) and 8.2 of the Act, subject to the fee schedule. All other medical bills are denied.

In regard to disputed issues (K) and (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is not entitled to payment of temporary total disability or permanent partial disability benefits because of the Arbitrator's conclusion of law in disputed issue (F).

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mona McElvain,

Petitioner,

15IWCC0251

vs.

NO: 06 WC 52036

Arrow Group,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 2014 is hereby affirmed and adopted.

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

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

15IWCC0251

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $65,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 7 - 2015

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 3/25/15
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McELVAIN, MONA
Employee/Petitioner

Case# **06WC052036**

15IWCC0251

ARROW GROUP
Employer/Respondent

On 1/8/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4463 GALANTI LAW OFFICES PC
LESLIE N COLLINS
PO BOX 99
EAST ALTON, IL 62024

4942 LEAHY WRIGHT & ASSOC LLC
KEVIN M LEAHY
10805 SUNSET OFFICE DR #306
ST LOUIS, MO 63127

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

15IWCC0251

Mona McElvain
Employee/Petitioner

v.

Arrow Group
Employer/Respondent

Case # 06 WC 52036

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 William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on October 25, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On November 14, 2006, 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, the parties stipulated Petitioner earned $28,142.40; the average weekly wage was $541.20.

On the date of accident, Petitioner was 46 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $360.80 per week for 91 3/7 weeks commencing November 14, 2006, through December 7, 2006; July 10, 2007 through October 26, 2007; and August 4, 2010, through December 27, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $324.72 per week for 100 weeks because the injury sustained caused the 20% loss of use of the body as a whole, as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher, Arbitrator

December 30, 2013
Date

JAN 8 - 2014

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on November 14, 2006. According to the Application, Petitioner heard her neck while picking up parts and sustained a disability to her neck. Respondent disputed liability on the basis of accident, notice and causal relationship.

Petitioner worked for Respondent as a production worker and her job duties required her to pack boxes with various metal parts used in the assembly of steel storage sheds. These parts were on a moving conveyor belt and included frames and channels, some of which were six to seven feet long. Petitioner testified that on November 14, 2006, she was in the process of lifting some of the metal parts and that she experienced a popping sensation in three places in her neck. She reported this to her supervisor and sought medical treatment at the ER of St. Joseph's Hospital in Breese that same day. According to the ER records, Petitioner had headaches and neck pain with tingling in both arms. A CT scan was performed which revealed post-operative changes and metal hardware at the C5-C6 level.

Petitioner was seen by Dr. George Schoedinger, an orthopedic surgeon, on November 21, 2006. Petitioner provided Dr. Schoedinger with a history of having sustained a work-related injury on November 14, 2006. Dr. Schoedinger examined Petitioner and noted that Petitioner had a diminished range of motion of the neck and reduced grip strength on the right side. He also noted that Petitioner had a prior fusion at C5-C6 and opined that Petitioner may have sustained a cervical disc rupture. He ordered an MRI scan and authorized Petitioner to remain off work. The MRI scan was performed on November 27, 2006, which revealed the post operative changes and fusion at C5-C6 and extradural defects at C3-C4 and C4-C5, and a small encroachment at C6-C7. Dr. Schoedinger saw Petitioner on December 7, 2006, and prepared a status report which stated that Petitioner was unable to work.

Dr. Schoedinger initially treated Petitioner for prior cervical/neck problems from October through December, 1989. On July 9, 2001, Dr. Schoedinger performed surgery for a ruptured disc at C5-C6 performing fusion surgery with insertion of metal hardware at that level. Dr. Schoedinger subsequently treated Petitioner for a work-related injury that occurred on November 9, 2001. Dr. Schoedinger ordered an MRI scan which was performed on December 11, 2001, which revealed posterior disc protrusions at C3-C4 and C4-C5. He opined that Petitioner aggravated a pre-existing injury. On May 22, 2002, Dr. Schoedinger opined that Petitioner was at MMI and released her to return to work without restrictions.

Petitioner's family physician was Dr. Richard Funneman, and, when he saw Petitioner on June 4, 2004, she informed him that she had been assaulted by her husband and had numerous symptoms including neck pain with left arm numbness. An MRI of the cervical spine was performed on June 8, 2004, which revealed a disc herniation at C5-C6 and a small osteophyte at C6-C7. Dr. Funneman's office record of July 13, 2004, included a recommendation that Petitioner have neck surgery; however, it did not identify the level of the cervical spine where the surgery was to be performed or the type of surgery being recommended.

Subsequent to the work-related injury and the examinations of November 21, 2006, and December 7, 2006, Dr. Schoedinger saw Petitioner again on June 1, 2007. At that time, Petitioner informed Dr. Schoedinger that she was not working and had been treated for some other health issues. In regard to her ongoing cervical complaints, Dr. Schoedinger recommended cervical discography. Dr. Schoedinger saw Petitioner again on July 10, 2007, and opined that she should have an MRI of the cervical spine performed and, because of the driving distance between Pocahontas and East St. Louis, Illinois, that she should be excused from jury duty in East St. Louis, Illinois. He also stated that Petitioner should not engage in any activities that required the use of her upper limbs for any prolonged period of time. Dr. Schoedinger subsequently released Petitioner to return to work without restrictions on October 24, 2007.

In February and March, 2009, Petitioner was treated by Dr. Ei S. Lin and received some epidural steroid injections to the cervical spine which provided some relief of her symptoms. Dr. Lin's records did not indicate whether the Petitioner was authorized to be off work during the time that he provided treatment to her.

Apparently because of a number of other health issues, Petitioner was not seen again by Dr. Schoedinger until July 12, 2010. Dr. Schoedinger renewed his recommendation that Petitioner have a cervical discogram. On July 20, 2010, Petitioner had a cervical discogram at C6-C7 which reproduced Petitioner's symptoms. At that time, Dr. Schoedinger recommended that Petitioner have disc surgery and a fusion with metal hardware and he performed that procedure on August 4, 2010. Petitioner remained under Dr. Schoedinger's care following the surgery. When Dr. Schoedinger saw Petitioner on December 27, 2011, he opined that she was at MMI and discharged her from active medical treatment at that time.

Dr. Schoedinger was deposed on January 11, 2012, and his deposition testimony was received into evidence at trial. Dr. Schoedinger's testimony was consistent with his medical records. In regard to the issue of causality, Dr. Schoedinger testified that the prior fusion at C5-C6 was healed and that the accident of November 14, 2006, caused a disc herniation at C6-C7 which necessitated the surgery that he performed at that level. In arriving at that opinion, Dr. Schoedinger noted that Petitioner had fully recovered from the prior fusion surgery at C5-C6. Dr. Schoedinger agreed that when he released Petitioner on December 27, 2011, she could return to work without restrictions.

At the direction of Respondent, Petitioner was examined by Dr. Robert Backer, a neurosurgeon, on March 30, 2012. In connection with his examination of Petitioner, Dr. Backer reviewed medical treatment records that were provided to him. Dr. Backer opined that Petitioner had degenerative changes at C6-C7 that predated the accident of November 14, 2006, and that the medical did not support that there was any new pathology at that level related to the accident of November 14, 2006. Dr. Backer was deposed on July 18, 2012, and his deposition testimony was consistent with his medical report. He reaffirmed his opinion that there was not a causal relationship between the accident of November 14, 2006, and the disc pathology that was found at C6-C7. This was based on Petitioner's long-standing degenerative disc disease and symptoms in the cervical spine and that there was no evidence that Petitioner sustained an injury on November 14, 2006.

Conclusions of Law

In regard to disputed issues (C) and (E) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained an accidental injury arising out of and in the course of her employment for Respondent on November 14, 2006, and that she gave notice to Respondent within the time prescribed by the Act.

In support of this conclusion, the Arbitrator notes the following:

Petitioner testified that while she was in the process of lifting metal parts, she experienced a popping sensation in three areas of her neck and that she reported this accident to her supervisor immediately thereafter. This testimony was unrebutted.

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to the accident of November 14, 2006.

In support of this conclusion, the Arbitrator notes the following:

While Petitioner had significant symptoms and issues regarding the cervical spine that pre-dated the accident of November 14, 2006, including fusion surgery at C5-C6, no disc herniation at C6-C7 was diagnosed prior to the accident of November 14, 2006.

Prior to November 14, 2006, Dr. Schoedinger treated Petitioner for cervical spine issues and performed the prior fusion surgery at C5-C6. Dr. Schoedinger opined that Petitioner had fully recovered from the prior surgical procedure and that the disc pathology at C6-C7 was related to the accident of November 14, 2006.

In regard to the issue of causality, the Arbitrator finds the opinion of Petitioner's treating physician, Dr. Schoedinger, to be more persuasive than that of Respondent's Section 12 examiner, Dr. Backer.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 9, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits for 91 3/7 weeks, commencing November 14, 2006, through December 7, 2006; July 10, 2007 through October 26, 2007; and August 4, 2010, through December 27, 2011.

In support of this conclusion the Arbitrator notes the following:

The Petitioner was not able to work and was under active medical treatment during the aforestated periods of time because of her cervical/neck condition.

In regard to disputed issue (L) your Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 20% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner sustained a herniated disc at C6-C7 which required a fusion with metal hardware at that level; however, Petitioner was ultimately released to return to work without restrictions.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TERRY BURNS,

Petitioner,

vs.

NO: 10 WC 49378

15IWCC0252

THE AMERICAN COAL CO.,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease, causal connection, nature and extent, and "Sections 1(d)-(f) and 19(d)," and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Although we affirm the Arbitrator's finding that Petitioner has radiologically significant simple coal workers' pneumoconiosis (CWP), we find that he has failed to prove that he suffers from chronic obstructive pulmonary disease (COPD). On this issue, we find the opinion of Dr. Castle most persuasive and most consistent with Petitioner's pulmonary function test and medical records.

Petitioner testified that he can only walk a quarter to half a mile at a regular pace on level ground before he becomes short of breath. He testified that he can only climb two flights of stairs before he has to stop and rest. He testified that he can't carry his grandkids the way he used to and can't climb up a ladder without stopping to catch his breath. T.30. However, this testimony is not consistent with the medical records, which contain numerous references to Petitioner's significant physical abilities and lack of pulmonary complaints including:

6/15/09	Dr. Parham: …doing well; can exercise 25 min. without stopping…; lungs clear (Px7)
8/5/09	Dr. Keller: feels good; …exercises a lot; does treadmill 1.85 3% incline (Px7)

12/4/09	Dr. Parham: doing very well; exercises for 2 miles multiple times per week; can run as fast as 6 mph at the end of his working; also lifting weights without significant limitation due to dyspnea; … no complaints at this time; lungs clear (Rx8)
12/8/10	Dr. Keller: feels great – n/c – goes to cardiac rehab; walked 5-8 miles; no SOB or chest pain, exercise capacity better, no chest pain, or palp, …energy level good (Px7)
6/8/11	Dr. Keller: exercises; no chest pain; runs 5 miles qd; no palp; (Rx7)
6/29/11	Dr. Parham: doing wonderful; works out on a regular basis and did so this morning without difficulty; … Lungs clear…respiratory effort normal (Rx7)
12/7/11	Dr. Keller: feels ok, no chest pain or SOB; walks 5 miles qd; (Rx7)
12/8/11	Dr. Chong (nephrology): Denied history of COPD or asthma; (Rx7)
12/16/11	Dr. Parham: …doing well; can do 9 miles on a stationary bicycle without difficulty; (Rx7)
6/6/12	Dr. Keller: no chest pain or SOB; exercises qd 2.5 miles; (Rx7)
6/25/12	Dr. Parham: doing very well; exercises almost 2 hours a day without any limitation; has no complaints; …Lungs clear…respiratory effort is normal (Rx8)
9/20/12	Dr. Parham: doing well; worked for 30 min. this morning on the elliptical and lifted weights for an hour and a half and did so without CHF symptoms or chest discomfort. …Lungs clear; …He has an excellent exercise capacity as described above. (Rx7)
12/3/12	Dr. Parham: doing well; was at gym at 3:00 this morning working out; "doing quite well and is without complaints"; Lungs clear; respiratory effect is normal (Rx7)
12/5/12	Dr. Keller: no chest pain or SOB; (Rx7)
5/22/13	Dr. Keller: consult regarding black lung; denies he has any diff breathing, no prod cough; exercises qd. Not sob; x-ray showed he has black lung. PFT was good at Springfield; Hx old histoplasmosis; had worked in mine 33 years; …Lungs clear (Rx7)
6/5/13	Dr. Keller: no chest pain, sob or palp; … lungs clear; (Rx7)
12/4/13	Dr. Keller: feels wonderful, no chest pain or sob. … lungs clear (Rx7)

Based on the above and our review of the entire record, we find that Petitioner has sustained the loss of use of 5% of the person as a whole under §8(d)2 of the Act and modify the decision accordingly.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $575.65 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of the person as a whole.

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

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

15IWCC0252

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

SE/
O: 3/4/15
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURNS, TERRY
Employee/Petitioner

Case# **10WC049378**

THE AMERICAN COAL CO
Employer/Respondent

15IWCC0252

On 7/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

15IWCC0252

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TERRY BURNS
Employee/Petitioner

v.

THE AMERICAN COAL CO.
Employer/Respondent

Case # 10 WC 49378

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **April 3, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did a disease 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: Disease/Exposure, Causation, OD Act Sections 1(d)-(f) and 19(d).

FINDINGS

On **April 4, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$49,889.32**; the average weekly wage was **$959.41**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $575.65/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

06/13/2014
Date

JUL 10 2014

15IWCC0252

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

TERRY BURNS
Employee/Petitioner

v. Case # 10 WC 49378

THE AMERICAN COAL CO.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Terry Burns, was born in 1954, and was 59 years old on the day of trial. After graduating from high school Petitioner obtained an Associate's Degree in electronics. He worked as a coal miner for thirty years, where he was regularly exposed to coal dust, silica dust, diesel fumes, and roof bolting glue fumes. Petitioner was 53 years old when he last worked as a master operator in the preparation plant of Respondent, American Coal Company's Galatia mine on April 4, 2008. He went to his doctor and ended up in the emergency room. He was diagnosed with significant heart problems. He did not return to the mines and was awarded Social Security Disability because of his heart. His lawyer advised him to seek disability based on his heart condition. Petitioner stated that he discussed his breathing problems with his physician and was referred to Dr. Dani Tazbaz, who has since left the Southern Illinois area.

After obtaining his Associate's Degree, Petitioner began work at Clarida Engineering performing surveying, construction, and sewer work. He then worked for Amax Coal for two years, and then went to Southwestern Coal Company for another two years. He returned to Clarida and was sent to Kerr-McGee to work on the construction phase of the Galatia mine. Petitioner worked above and below ground for Respondent, and first noticed his breathing problems in the mid-to- early 1990s while shoveling coal. He would become short of breath and would have to sit and rest. He also had a cough. Petitioner described the shovel, the weight of the coal, and the action of shoveling and tossing the coal up to the belt line. Petitioner stated that his face was black by the time he finished. In his last job, Petitioner was required to leave the control room constantly when the mine was not producing. At these times he was required to work on repairs or shovel coal. In any mining job he ever held he was subject to be called in to shovel when there was a coal spill from a problem with the belt. It was a time pressure job that had to be done to get production running again. Petitioner quit mining because he felt he could not do it anymore.

Petitioner stated that currently he is able to walk between a quarter to a half of a mile on level ground before noticing his breathing issues. He can climb two flights of stairs before having to stop due to breathlessness. His breathing problems have gradually worsened since their onset and affect his daily activities. He cannot carry his grandchildren the way he used to, and cannot climb a ladder without having to stop and stand a minute at the top to catch his breath. Tying his shoes also requires taking a breath.

Petitioner stated he does not take the breathing medicine Dr. Tazbaz prescribed because he takes enough medicine for his heart, and is worried about his liver and kidney function. Petitioner smoked from the mid-1970s until January 2007. He stated he quit because he was worried about his breathing. Besides his breathing and congestive heart failure, Petitioner has no other health issues. He would not be physically able to perform his job in the mines today.

On cross-examination, Petitioner stated that he had no intention of quitting the mines when he was hospitalized. He would have liked to have worked until age sixty-five. Petitioner stated that in October 2008, he had a defibrillator implant and then went on a prescription of Amiodarone. He is seeing Dr. Chong for a weak kidney condition.

Petitioner stated that the shortness of breath he experiences from his heart is different from the shortness of breath he experiences though his years of mining. He stated that the heart-related breathlessness is caused by liquid in his lungs.

Petitioner submitted the radiologic interpretations of B-reader/radiologist, Dr. Henry Smith. Dr. Smith interpreted the x-rays of April 9, 2008 and September 17, 2010 as positive for coal worker's pneumoconiosis (CWP) in all lung zones, category 1/0. He also observed cardiomegaly and a calcified granuloma in the right mid-lung. Petitioner's chest film of October 18, 2010 showed CWP opacities in the mid and lower zones in a profusion of 1/0. Also noted were the aforementioned nodules in the right mid-lung and cardiomegaly. Dr. Smith interpreted the CT scans of April 10, 2008 and February 10, 2009 as showing CWP in all lung zones, category 1/0 with the pulmonary nodule being again noted. (Petitioner's Exhibit (PX) 3).

Petitioner also submitted the chest x-ray interpretations of B-reader/radiologist, Dr. Michael Alexander and B-reader/pulmonologist, Dr. Robert Cohen. Dr. Alexander interpreted the October 18, 2010 film as positive for CWP in all lung zones, category 1/0 with right mid lung zone nodules that were probably granulomas. An enlarged heart was present. (PX 4). Dr. Cohen read the September 17, 2010 chest film as positive for CWP in all zones, category 1/0. The right mid lung zone nodule was noted. Dr. Cohen also reviewed the CT scans of February 10, 2009 and April 10, 2008. Dr. Cohen saw CWP opacities scattered throughout the upper lobes between one and three millimeters. The right lung nodules were noted. (PX 5).

At his attorney's request, Petitioner was examined by Dr. Glennon Paul on November 11, 2011. Dr. Paul has worked in Springfield for thirty-two years and is the Medical Director of St. John's Respiratory Therapy Department. He teaches internal and pulmonary medicine at the SIU Medical School. Dr. Paul is the senior physician at the Central Illinois Allergy and Respiratory Care Clinic, which has six doctors specializing in allergy and pulmonary disease. He has written a book on asthma. In his practice he interprets about 5,000 chest x-rays and pulmonary function tests each year. He has treated coal miners since the 1970s. He has examined coal miners for state and federal claims, testifying primarily for coal companies. (PX 1, pp. 6-8).

Petitioner told Dr. Paul that he is able to go up and down stairs or walk a mile without severe shortness of breath. He has congestive heart failure and an ejection fraction of less than 20%. Through physical therapy and exercise he keeps going quite well. His congestive heart failure causes fatigue. Petitioner's chest exam and pulmonary function tests were normal, but his chest x-ray showed changes of histoplasmosis with a large calcified lung nodule. Multiple small fibro-nodular lesions throughout both lungs fields were indicative of CWP. (PX 1, Dep. Exh. 2).

Dr. Paul felt that Petitioner's congestive heart failure and CWP were both causes of his shortness of breath. Petitioner was not taking any breathing medication. Petitioner's lung volumes showed hyperinflation consistent with COPD secondary to smoking and mining exposures. (PX 1, p. 10). Because of his lung diseases Petitioner should avoid any further mining environment exposures. Petitioner's lung diseases caused radiographic, clinical and physiological impairment. (PX 1, pp. 12-13). Dr. Paul stated that by definition the lung tissue affected by CWP is impaired and cannot function. This impairment may or may not be measurable by pulmonary function testing. Because spirometry measures lung function on a global, not localized scale, one can have normal testing despite having pulmonary disease or even losing a lung lobe. (PX 1, pp. 17-19). A person can have radiographically significant CWP with normal pulmonary function and arterial blood gas testing, normal chest exams, and no shortness of breath. (PX 1, p. 21). Dr. Paul agreed that his pulmonary function testing did not reveal an obstruction. (PX 1, pp. 37-38). Dr. Paul is not a B-reader, but when he looks at an x-ray all that matters is the presence of disease. Grading it under the B-reader system is not important to his view of the film. (PX 1, p. 40).

Petitioner's treating physician, Dr. Jack Keller, testified that he has practiced in Southern Illinois since 1979. During this time he has treated current and former coal miners. He began treating Petitioner in 1992. (PX 2, pp. 4-5). Dr. Keller stated that Petitioner began getting chest CT scans after becoming acutely ill in 2008 with cardiomyopathy and a nodule was discovered in his lung. None of Petitioner's radiographic studies were performed to look for CWP. (PX 2, pp. 6-7). Petitioner received a pulmonary consultation at the request of his cardiologist. (PX 2, p. 8). Dr. Keller answered questions posed in a letter from Petitioner's counsel. (PX 6). He felt Petitioner had COPD secondary to coal mining and smoking based on probable x-ray findings and his clinical judgment, and because of the COPD, Petitioner should not continue mining exposures. In his judgment Petitioner's sinusitis would have been caused or aggravated by his mining exposures and a return to mining would risk progression of that condition. He felt Petitioner's heart problems would cause shortness of breath. He opined that Petitioner's airways disease put an extra burden on his heart function and put him at a greater risk from an acute heart event and recovery from the same. The combination of his pulmonary and heart diseases put him at risk from any physically taxing activity. He felt Petitioner's x-ray and CT studies were consistent with CWP. (PX 2, pp. 9-12). On December 18, 2008, Petitioner talked about his struggle with deciding to try and go back to work or take disability. Petitioner's heart and lungs were part of that consideration. Dr. Keller felt that a return to the heavy manual labor of mining would pose a health risk. Petitioner's single biggest problem was his heart, but his lungs were an aggravating factor. If he had no heart problems, his lungs would probably not be limiting him. (PX 2, pp. 12-14). He felt that 99% of Petitioner's problems were heart related. He stated that lung disease puts increased pressure on the heart and affects its ability to oxygenate. (PX 2, pp. 17-18).

On cross-examination, Dr. Keller was asked about entries in his records which have been introduced as a separate exhibit. There were entries showing clear lungs and one entry regarding sinusitis; denials of shortness of breath were also pointed out. On April 7, 2008, a history was taken indicating that Petitioner had not been feeling well for three months. Petitioner had increasing shortness of breath with exertion which progressed quickly to the point that he was sitting up in bed trying to catch his breath, a symptom that is concerning for a heart problem. Dr. Keller sent Petitioner to the emergency room that day. A chest x-ray showed pulmonary edema which had probably been present three months earlier. (PX 2, pp. 28-30). Dr. Keller discussed Petitioner's cardiac problem and the related treatment he received. He noted that Petitioner has not been released to return to work since his cardiac incident. (PX 2, pp. 31-34). In 2010, Petitioner started taking Amiodarone, which over a long period of time can affect lung capacity. This was the reason for Dr. Tazbaz's pulmonary consult. (PX 2, pp. 49-50). Petitioner's rehabilitation was also noted, and by June 8, 2011, he was running five miles a day. (PX 2, p. 56). In December 2011, he was walking five miles a day after knee surgery

in October. (PX 2, pp. 57-58). Petitioner's kidney disease is being watched now, and the treatment consists of avoiding certain drugs and keeping the kidneys hydrated. (PX 2, p. 62). Dr. Keller stated that Petitioner's pulmonary function was borderline obstructive. (PX 2, pp. 67-68). On December 3, 2012, it was noted that Petitioner worked out on a regular basis without heart symptoms or limitation. (PX 2, p. 69).

At Respondent's request, pulmonologist/B-reader, Dr. James Castle, reviewed medical data and treatment records supplied by Respondent. Included were Dr. Meyer's negative radiology reports of the x-rays of April 9, 2008, September 17, 2010, and October 18, 2010, and of the CT scans of April 10, 2008 and February 10, 2009. Dr. Castle interpreted these same x-rays and CT scans as showing no abnormalities consistent with CWP. He observed a granuloma in the right mid lung zone. (RX 1, pp. 47-50).

Dr. Castle concluded that from a ventilatory standpoint Petitioner could "do anything that he had been trained to do in the mining industry." He felt Petitioner had no evidence of a respiratory impairment caused by mine dust exposure but was impaired from a cardiac standpoint with very severe cardiac disease. (RX 1, pp. 46-47). Dr. Castle agreed that Petitioner had sufficient exposure to develop CWP. Petitioner's enlarged heart and his cardiac disease cause significant shortness of breath with exercise. (RX 1, pp. 51-52).

On cross-examination, Dr. Castle agreed that CWP abnormalities can attain the same size as granuloma and can be calcified, though rarely. (RX 1, pp. 58-59). Recent studies have shown as much as 50% or more of coal miner autopsies found pathologically significant CWP not appreciated radiographically during the miner's life. (RX 1, pp. 73-74). He admitted that equally qualified B-readers can disagree on their interpretations. (RX 1, p. 75). Dr. Castle stated that the CWP-affected lung tissue cannot perform the function of normal healthy lung tissue. By definition there is functional impairment at the damage site which, if measurable, can be restrictive or obstructive. (RX 1, pp. 88-89). A person can have radiographically significant CWP, yet have normal pulmonary testing and blood gases, a normal physical chest exam, and maybe even no complaints. When complaints do occur, the most likely one is shortness of breath. CWP can be accurately described as a chronic, slowly progressive disease. (RX 1, p. 91). The only treatment for CWP is to remove the miner from any further exposure. The official American Thoracic Society (ATS) position is that there is no safe level of exposure for a person diagnosed with CWP. (RX 1, pp. 96-97).

Dr. Castle stated that a person could lose an entire lobe of the lung to surgery, yet still have normal pulmonary function testing. (RX 1, p. 105). Having normal pulmonary function testing does not mean the lungs are free of any lung damage, injury or disease. One can even have lung cancer with normal pulmonary function tests. (RX 1, p. 106). Dr. Castle agreed that the heart and lungs work together as a system, and that chronic lung disease can burden the heart. (RX 1, pp. 121-122). Dr. Castle agreed that NIOSH and the Department of Labor concluded that the risk for obstructive lung disease from mining was similar to that of smoking. (RX 1, p. 125).

As noted in the Dr. Castle records review, Respondent had B-reader/radiologist, Dr. Christopher Meyer, interpret Petitioner's radiology. As already noted, the aforementioned films and CT scans were read negatively for CWP. (RX 2, pp. 40-41). Dr. Meyer agreed that the x-ray interpretation of an average radiologist at a small community hospital who looks at a chest x-ray for purposes other than CWP is less valuable. If there were treatment records available that had 50 different chest x-rays and 5 different CT scans read by non-B-readers for purposes other than black lung, they would not affect what Dr. Meyer saw on the x-ray or what his opinion is. (RX 2, pp. 49-50). If he read a chest x-ray as consist with pneumoconiosis treatment record entries of clear lungs, normal pulmonary function testing, and a lack of complaints would not change his diagnosis of radiological CWP. (RX 2, pp. 51-52).

Dr. Meyer stated that removal from any mine dust exposure is the only way to try and prevent progression of CWP. (RX 2, p. 60). He noted that there can be intra or inter-observer variation among B-readers. (RX 1, p. 79). He agreed that granulomas can be the same size as abnormalities of CWP. (RX 2, pp. 75-76). None of the treatment radiologists said anything about CWP one way or the other, and they were looking at the films for reasons other than CWP. There is no indication that they were B-readers. (RX 2, p. 87).

Respondent also introduced negative NIOSH x-ray interpretations from 1984 and 1987. (RX 3).

Both parties introduced medical records, with Respondent's version containing more recent entries. Dr. Keller's records show that on December 14, 2010, Petitioner's cardiologist noted that Petitioner has been asymptomatic, except for fatigue. Recent pulmonary function tests were slightly abnormal, and Petitioner was referred to a pulmonologist. (PX 7, pp. 2-3).

Dr. Tazbaz's exam of October 4, 2010 reported that pulmonary function testing showed a mild reduction in diffusion capacity. Petitioner's exercise tolerance was up to two to three miles, and he had no cough or postnasal drip. Dr. Tazbaz found no obstructive defect, but mild hyperinflation on lung volumes. He noted questionable COPD. The diffusion capacity was normal when adjusted for lung volume. (PX 7, pp. 8-9, 14; see also PX 9). On September 14, 2010, there were faint rales heard at the lung bases. (PX 7, p. 16). Petitioner's chest CT scans reflected stable pulmonary nodules in both lungs with the largest nodule in the right lung being calcified. The nodules were viewed as consisted with calcified granulomas. (PX 7, p. 31, August 13, 2009; p. 38, February 10, 2009; p. 48, August 7, 2008; pp. 71-72, April 10, 2008).

On December 18, 2008, Petitioner's cardiologist noted that Petitioner was conflicted about whether to try and go back to work or apply for disability. In Dr. Walter Parnham's opinion, disability would be appropriate. (PX 7, p. 46). Petitioner's records also show a few sinus issues. (PX 7, pp. 74, 80, 127). Petitioner's acute illness and hospitalization regarding his heart in April 2008 is also documented. (PX 7, pp. 76-78). On April 7, 2002, Petitioner complained that he had found it hard to breathe for quite a while, and he had left arm numbness. (PX 7, p. 105). On April 4, 2002, Petitioner had some increased dyspnea at work climbing. (PX 7, p. 127). Dr. Kelly signed a form indicating Petitioner was disabled from his heart disease since April 2008. (PX 7, pp. 133-134).

On May 22, 2013, Petitioner denied any difficulty breathing and had no productive cough. (RX 7, p. 11). Petitioner was running five miles a day on June 8, 2011. (RX 7, p. 13). On December 16, 2011, Petitioner stated he can do nine miles on a stationary bike without difficulty. (RX 7, p. 51). On June 29, 2007, Petitioner's cardiologist noted he was referred to a pulmonologist for abnormal pulmonary function studies, but had not followed up on this. (RX 7, p. 61).

SLU Care medical records reflect testing for Petitioner's cardiac issues, as do the records of Heartland Regional Medical Care, and River to River Heart Group. (PX 8; RX 5; RX 6; RX 8). The Heartland records reflect the September 17, 2010 pulmonary function testing of Dr. Tazbaz. (RX 6, p. 7). They also note that Petitioner had quit smoking in December 2007. (RX 6, p. 50). A December 19, 2011 x-ray showed stable nodular densities in the right lower lobe apex and no evidence of interstitial fibrotic change. (RX 8, p. 3). Other treatment x-rays and CTs are also noted. (RX 8, pp. 9, 16, 66-67).

CONCLUSIONS OF LAW

Issue (C): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the conflicting radiology in Petitioner's favor. While Dr. Castle and Meyer are qualified, the bulk of the more persuasive evidence shows that Petitioner suffers from CWP. Dr. Castle stated that there are not many miners in Hilton Head, South Carolina, where he is based. He stated he quit practicing in 2007, and now devotes himself to being a paid expert. (RX 1, pp. 68-69). It is also clear that Dr. Meyer makes a substantial monthly income reading radiology for coal companies. (RX 2, pp. 66-67). He became a B-reader at the urging of Dr. Jerome Wiot, a prolific reader of x-rays for coal companies. (RX 2, p. 19-20). *See Lefler v. Freeman United Coal Mining Co*, 08 IWCC 1097 (Sept. 25, 2008).

Dr. Paul's finding of CWP was backed by three B-readers. Dr. Cohen has published, presented, and lectured extensively on occupational lung disease, including coal mine dust- related lung disease; he has been a B-reader since 1998, and has been the Medical Director of the National Coalition of Black Lung and Respiratory Disease Clinics since 1995. (PX 5, Cohen CV, pp. 1, 5, 8-15, 17, 19-20). Dr. Cohen discussed his experience in reading several hundred CT scans in his practice and his participation in a NIOSH workshop regarding B-reading and the use of CT scans. (PX 5, CT report). He is a leading expert in the occupational diseases of coal miners. *See Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs*, 294 F.3d 885, 895 (7th Cir. 2002). Dr. Smith has been a B-reader since 1987, and a consultant to multiple occupational clinics. Radiologist Dr. Alexander, a B-reader since 1992, has made presentations on the Radiographic Aspects of Pneumoconiosis. (PX 3, CV, pp. 2, 5; PX 4, CV, pp. 2, 5). In addition, Petitioner's lung volumes showed hyperinflation consistent with COPD secondary to smoking and mining exposures. (PX 1, pp. 11-12; PX 2, pp. 10, 74, 76; PX 7, p. 9). He has COPD.

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

Petitioner has radiologically significant CWP. The experts agreed that by definition CWP-affected lung tissue can no longer function and is impaired, whether measurable or not. (PX 1, pp. 17-19; RX 1, pp. 88-89; RX 2, p. 55). A concurrence of three justices in a recent Appellate Court decision has recognized that even in the absence of measurable impairment, a CWP diagnosis equates to disability under the Act. *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm.*, 2013 IL App (5th) 120564WC, ¶33-35 (concurrence). The Commission also made such a conclusion. *See, e.g., Samuel v. FW Electric*, 08 IWCC 1296 (2008); *Cross v. Liberty Coal Co.*, 08 IWCC 1260 (2008); *Chrostoski v. Freeman United Coal Mining Co.*, 07 IWCC 226 (2007). Accordingly, Petitioner has suffered a functional impairment. Petitioner also cannot return to coal mining without risking progression of his CWP and COPD. (PX 1, pp. 12-13; PX 2, p. 10; RX 1, p. 96; RX 2, p. 60). The American Thoracic Society states that there is no safe level of exposure for a CWP victim. (RX 1, pp. 96-97).The Appellate court has stated this health risk constitutes disablement in a coal miner. *Freeman United Coal Mining Co.*, 2013 IL App (5th) 120564WC, ¶25-26.

Based on the radiology and pulmonary testing, it is evident that Petitioner had CWP and COPD within two years from his date of last exposure. This case is distinguishable from *Forsythe v. Industrial Comm'n*, 263 Ill. App. 3d 463, 469, 636 N.E.2d 56, 61-62 (5th Dist. 1994). The testimony in *Forsythe* from the claimant's own expert indicated that the miner's pneumoconiosis "did not result in any functional impairment," and "was not physiologically significant." *Forsythe*, 636 N.E.2d at 61. That is not the case here because all experts agreed

hat CWP causes functional impairment which may not be measurable on testing and which can worsen on further exposure.

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

Petitioner left the mines because of his heart, but he seems to have done well with his exercise program. While his disease may contribute to some pulmonary symptoms, his heart causes the bulk of any such problems. Nonetheless, the testimony indicated that the heart and lungs work together and that lung disease can negatively impact the heart. Petitioner also was a smoker for approximately 30 years. The Arbitrator finds that Petitioner has suffered the 10% disability to the person as a whole as a result of his lung diseases.

Issue (O): Was there an injurious practice under Section 19(d) of the Act?

The defense of injurious practice has no merit in this case. Petitioner quit smoking, and in any event smoking would not cure or prevent the permanent damage caused by CWP. Further, there is no evidence that Petitioner smoked to retard his recovery or to malinger. *See Global Products v. Ill. Workers' Comp. Comm'n*, 392 Ill. App. 3d 408, 911 N.E. 2d 1042, 1046 (1st Dist. 2009).

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Hisar Moore,
Petitioner,
vs.

NO: 08WC 50928

Cook County Housing Authority ,
Respondent,

15IWCC0253

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 16, 2013, is hereby affirmed and adopted.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

o040115
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOORE, HISAR
Employee/Petitioner

Case# **08WC050928**

COOK COUNTY HOUSING AUTHORITY
Employer/Respondent

15IWCC0253

On 10/16/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1414 O'CONNOR LAW GROUP LLC
BRYAN J O'CONNOR
221 N LASALLE ST SUITE 1050
CHICAGO, IL 60601

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
STEPHEN FRIEDMAN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Hisar Moore
Employee/Petitioner

Case # 08 WC 50928

v.
Cook County Housing Authority
Employer/Respondent

Consolidated cases:

15IWCC0253

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 Arbitrator Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on July 31, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to Respondent?

F. ☒ 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 _____

15IWCC0253

FINDINGS

On 11-19-08, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

In the year preceding the injury, Petitioner earned $48,926.28; the average weekly wage was $940.89.

On the date of accident, Petitioner was 58 years of age, single, with 0 children under 18.

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Petitioner has failed to prove, by a preponderance of the evidence, that she sustained any disability or medical condition causally connected to an exposure to mold, arising out of or in the course of her employment; therefore all claims for benefits are hereby denied, pursuant to the Act.

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

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

15IWCC0253

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
Case # 08WC50928
SIGNATURE PAGE

L Thompson Smith
Signature of Arbitrator

October 16, 2013
Date of Decision

OCT 16 2013

15IWCC0253

STATEMENT OF FACTS

The disputed issues in this matter are: 1) accident, exposure to mold; 2) causal connection; 3) temporary total disability; 4) wage differential or permanent total disability; and 5) the nature and extent of Petitioner's disability. *See,* AX1.

Petitioner has a bachelor's degree in psychology from Governors State University. She began work for Respondent in 1996. Previously, she had worked for the State of Illinois in the Department of Mental Health, and Southwest Co-Op Association working with the Department of Education helping disabled students with their regular classrooms. She began working for the Housing Authority ("HACC") as a drug elimination coordinator. In January 1998, she was promoted to the position of property manager of two (2) HACC properties, i.e. Chicago Heights Golden Towers and Juniper Towers in Park Forest. She worked this job until she was terminated in January of 2010. Her duties were to collect rent and manage the day-to-day operations including mechanical operations and assist tenants in their well-being. She had an office on the first floor of each building but she spent more time physically in Juniper Towers. Petitioner's Exhibit No. 28 documented Petitioner's job duties. Petitioner routinely worked from 8:30 in the morning until approximately 6:00 p.m. Mondays through Fridays. She would occasionally be called to work on weekends, attending to tenant complaints.

There were several floods at the Juniper Towers building; the first was in July of 2003. There were also floods in April and August of 2006 and January of 2008. There also was a flood in September of 2008. At that time, the entire first floor, parking lot and elevator of the building had taken on water. Petitioner's Exhibits 5A and 5C demonstrated the level of water, which was in the building. It was approximately 2' deep in each office on the first floor. Petitioner's office was located on the first floor.

Petitioner reported certain flood damage and repairs that were needed following the 2006 floods, in a memo dated April 18, 2006. On August 21, 2007, Petitioner sent a memo to Mr. Olszewski that she noticed rotting damp wood on the first floor and moldy smells as she entered every day. She testified that it seemed evident that there was mold growing in the walls and floors of the first floor.

Petitioner testified that her health was good until 2003. She had arthritis in her knees and did a test to see whether she had lupus. She testified that she was never treated for lupus or received any medication for the disease. She alleges slight joint pain in her knees prior to 2003. Following 2003, she started having a lot of anxiety and fatigue. She could not stay awake in the office. She developed a rash that became more severe over time. She complained of headaches, shortness of breath and a short attention span; and she testified that these symptoms came on gradually. Petitioner testified that co-employees, Sheila Ballard, complained of shortness of breath in 2006 and 2007 and Johnny Galloway developed a rash. She noted that co-worker, Yvonne Myles, lost her voice on occasion. Petitioner developed a rash over the back of her body, chest, neck and arms. *See,* PXs 13, 32A, B, C and D.

Following the fifth flood, in September 2008, Petitioner was given permission to arrange for mold testing. The contractor, Aaron Reilly, determined there was a substantial mold infestation and that extensive repairs were required. Petitioner testified that she stopped working in March of 2009 and when she attempted to return to work around April 1, 2009, she became very ill and went to the hospital for anxiety. Her employment was terminated in January of 2010.

Petitioner applied for unemployment compensation and sought employment as required by that department. She conducted a job search as documented by Petitioner's Exhibit 21, however did not receive any jobs offers.

On or about February 1, 2011, Petitioner was hired by Reverend Cheryl Anderson, at a church daycare center, earning $10.00 per hour. Petitioner miscalculated figures on certain forms while she was there and subsequently left this position. Petitioner then applied for Social Security Disability, which was approved.

Petitioner currently indicates that she can drive and does so on a regular basis; but does not drive long distances as she testified that she has problems with directions; and complains that her memory is bad. The anxieties and fatigue are still part of her daily symptoms and she is currently on an antidepressant and medication for high cholesterol and high blood pressure. She is under the care of Dr. Hall, who is a psychiatrist.

Petitioner testified that she could not recall any medical treatment that she received before 2003. She did not recall seeing a Dr. Singh in 1999 complaining of chest pain, cough and pressure. She did recall having knee pain. She did not recall complaining of shoulder pain in 1999 nor having physical therapy for her shoulder in 1999. She did not recall complaining of chest pain in January 2000 or complaints of pain in her wrist in 2001. She did not recall being told she might have an autoimmune syndrome problem in 2001. She does recall seeing Dr. Geringer in 2002, before the first flood in 2003, and remembers discussing having possibility of lupus and arthritis. In 2002, she was complaining of knee, hand, and wrist pain and was having difficulty climbing stairs. She was given injections into her hands and knees and physical therapy. She had additional treatment for shortness of breath and a rash between 2003 and 2008. The first time that mold was confirmed in the property was after the walls were opened in 2008 however, it had obviously been present in earlier years. By December 2008, Petitioner's work product had deteriorated to the point that she was receiving letters of reprimand.

Petitioner's Exhibit No. 21 includes her resume. Petitioner has a degree in psychology and notes that she had been a workers' compensation coordinator with the State of Illinois. She testified that she applied for jobs using Career Finder, Fox Finder the newspaper and computer. The positions she applied for were those that she believed she could perform. She told Dr. Dzudza that she was ready to return to work on May 26, 2009 and he released her to return to work on that date.

Petitioner went to the Cook County Housing Authority in September 2009 to discuss, with her superiors, a secretarial position, which would have been located at Golden Towers. They discussed her returning to work in a less stressful position. She subsequently did not accept this position. Petitioner's employment was terminated by Respondent on January 7, 2010. Presently, Petitioner is active in her church and she testified that she stopped looking for work when her unemployment benefits ceased, in early 2012.

Petitioner's witnesses

Petitioner presented the discovery deposition of Don Juhasz, the Assistant Director of Management for the South Region for HACC. He testified that he was aware of the flood in September 2008 and

the finding of mold on the first floor of Juniper Towers thereafter. He testified that Ms. Moore's health problems would make her tend to drag at times and become lethargic. Prior to September 2008, he had no knowledge of any mold in Juniper Towers. Mr. Juhasz' previous evaluation of Petitioner's job performance showed that she was accomplished at her job, was excellent at processing her paperwork; and kept very good records. The performance evaluations in 2009 demonstrated deterioration in petitioner's job performance. *See,* PX14, 29, & 31.

Petitioner also presented the deposition testimony of Yvonne Myles Levert. Respondent employed this witness beginning August 2008 through June 2009 as an Assistant Asset Manager. She worked at Juniper Towers and recalled the flood in September 2008. She testified that the contractor tore the walls apart and she identified photographs of the site. There was blackish growth 5' by 3'. *See*, PX15.

Ms. Levert further testified that she noticed that the petitioner had begun to slur of her speech and that her thinking began to slow. The witness testified that she herself was never treated for any condition related to mold; and that she had never been diagnosed as having mold exposure by a doctor. She testified that she would, on occasion, lose her voice but it would come back the next day. She has become close friends with the petitioner since she left the employment of Respondent and sees Petitioner socially and speaks with her by phone.

Respondent also offered the discovery deposition of Natasha McGruder, who was employed as Director of Resident Services at HACC, as of April 1, 2009, although she starting working for Respondent on March 10, 2008 . She had no information concerning the condition of Juniper Towers before March, 2008. She was an executive assistant for the HACC and testified that she had a meeting with Ms. Moore in September of 2009. The purpose of the meeting was to determine whether the Petitioner was coming back to work. Ms. McGruder testified that Petitioner said she was overwhelmed by the property manager's duties and did not want to come back as she had to be on call, 24 hours a day. She recalls Petitioner asking if there was another position available. There was a position open as the receptionist in central management office. This was a satellite office in Chicago Heights, with a job that involved answering phones during normal business hours and receiving clients that would come into the office with questions. The witness did not remember the petitioner's response regarding this position. She thought that she had been copied on an e-mail that indicated

that Petitioner was not interested in the reception position however, she did not know if this e-mail was sent to the petitioner. The witness testified that the basis of Ms. Moore's termination was that she did not want to return to work as an asset manager. *See,* RX10.

At trial, Reverend Cheryl Anderson testified on Petitioner's behalf, that she is the co-pastor of Chicago Miracle Temple Church. She has been familiar with Ms. Moore since 1996 and testified that Petitioner used to be a very articulate person. On or about January 31, 2012, she hired Petitioner and offered a salary of $10.00 per hour. Petitioner had worked for the church as a volunteer in January 2011 through April of 2011. She would answer the phones but would make errors in the messages and she would bag groceries. Mrs. Anderson testified that Petitioner was just not herself and would have difficulty verbalizing her thoughts. Her ability to handle small tasks and stay focused had changed for the worse.

She testified that in January 2012, she offered Petitioner a position as Acting Director of the Academy. That job involved clerical and office work. It included filling out a lot of paperwork and interacting with the children. It also included teaching children. Petitioner worked for Reverend Anderson briefly. The church Board thought that they would give her an opportunity to attempt this job however; they needed an answer within a week's time, according to Petitioner; as she was taking an increased dosage of Clonazepam, she was not able to accept the position that quickly.

Petitioner identified a series of photographs taken by Aaron Riley, the contractor who performed the removal and repair work at Juniper Towers after the September 2008 flood. These photographs show the extensive mold growth throughout various rooms on the first floor, including Petitioner's office. *See,* PX6.

Additional records from Ace in the Home and the remediation work performed in Juniper Towers were offered into evidence as Petitioner's Exhibits 1, 2, 3 and 4 and Respondent's Exhibit 3. The records confirm that the mold identified in the September 20, 2008 analysis, included *Cladosporium*, *Basidiospores* and *Penicillium/Aspergillus*. The records confirm that there was extensive mold infestation and extensive reconstruction and remediation of the walls.

Following the September 2008 flood, Bill Rusin, from Ace in the Home, conducted mold testing. Rusin opined in his September 26, 2008 report that mold had been growing in the walls for quite some time and that the last water intrusion contained enough moisture to feed it and have it show external signs. He stated further that mold can create an indoor air problem and is considered, by some, a health hazard. Testing in the manager's office, where Petitioner was stationed on a regular basis, showed moisture content over 20 percentage points, which was as high as his meter could read. Rusin concluded that unusual mold conditions existed and that many of the other rooms on the first floor contained similar findings. Some of the mold was classified as containing Aspergilius spores. Other testing from EnviroScreening Lab showed limited mold contamination in its Report from Living Well in Him LLC, dated September 27, 2008. An assessment form was signed by Johnny Galloway and initialed by Petitioner, indicating that ill-health effects were being experienced, as a result of the environment. *See,* PX1 & 2.

Aaron Riley of PR Developers was hired by Respondent to perform removal and repair, i.e., remediation services, for Juniper Towers, following the 2008 flood. In his written proposal, Riley noted mold in stages 1 and 2 in the front lobby area with a musty odor common with air spores of penicillin/aspergillus. Riley noted visible mold on the lower walls and base trim of the manager's office and classified it as Stage 3. He noted Stage 2 mold in the Social Service office, Stage 3 black mold in the kitchen; black mold in the Community/Café and mold in other locations. *See,* PX4.

Petitioner's medical history

Petitioner's exhibits from WellGroup Health Partners documents Petitioner's prior, as well as current, medical problems. On January 5, 1999, Petitioner was diagnosed with fibrocystic breast disease; and on February 26, 1999, she complained of right shoulder pain, but had a full range of motion in that extremity. Her medical records note that she had prior problems with her left shoulder and had received physical therapy in the past. On March 16, 1999, she complained of pain radiating from her right shoulder to the arm and on March 22, 1999, she complained of a cough for two weeks, with chest pain. She was diagnosed with bronchitis and chest pain and it was noted that it was typical for coronary artery disease. On August 26, 1999, Petitioner complained of severe pain in the right shoulder and was diagnosed as having right shoulder tendonitis with a limited range of motion.

On October 23, 2000, she complained of headaches as well as painful wrists for a couple of months. Her lungs were clear. She notes a family history of rheumatoid arthritis and testing for rheumatoid arthritis was performed at that time. Petitioner was noted to have high cholesterol. On January 9, 2001, Petitioner was seen for chest pain but also had a negative cardiac workup. She was noted to have a persistently elevated ANA and appears to have an autoimmune syndrome. X-rays of her wrists were taken and soft tissue swelling was noted.

In November 2001, she complained of developing increased joint pain with stiffness and pain in her knees with climbing stairs. The doctor also noted mild alopecia on her scalp. The doctor's impression was that she had rheumatoid arthritis with a mild lupus overlap, without significant disease activity at present.

On December 10, 2002, Petitioner was seen for a diagnosis of rheumatoid arthritis and mild lupus. She reported a history of rheumatoid arthritis with lupus overlap diagnosed two years ago by a Dr. Serushan. She complained of intermittent joint pain. *See,* PXs7, 7A & 8.

Petitioner was seen in follow-up from an emergency room visit on September 26, 2003, for joint pain. It was noted that she had developed chest pain on September 21, 2003 and she complained of an intermittent quivering, radiating from the area of the left AC joint down to her sternum and up to her neck. She also noted that she had mild knee pain, which could be early chondromalacia. Petitioner continued with regular complaints of pain in her knees and left hip noted on July 2, 2004. She was also noted to have persistent left hip muscle strain and moderate bilateral patellar chondromalacia. Petitioner complained of skin eruptions on May 11, 2005. The rash was suspicious for impetigo. She was provided with Keflex and topical Neosporin. X-rays of the knees on February 3, 2006 showed degenerative joint disease.

Petitioner's medical notes of April 16, 2008, before the September 2008 flood but after at least three other floods, evidenced a bilateral receding hairline with hyper-pigmentation on her shoulders and chest. She notes that there is a family history of hair loss. Petitioner was noted as having anemia and a hormonal imbalance. Also, she stated that she was receiving a chemical process to straightened her

hair every three months and chemical hair loss was noted. She was instructed to stop using this process.

The medical evidence reveals that Petitioner's primary care physicians practiced under the names of either Suburban Heights Medical Center or Well Group Partners. Petitioner has treated at Well Group and presented to Dr. Dzudza, a psychiatrist. Her joint pain was being treated and she testified that her rash went away after she was out of the office. She received injections for her knees and hands and physical therapy for her headaches, which helped some symptoms improve. The anxiety, fatigue headaches and lack of concentration did not improve.

On July 25, 2008, Petitioner was seen by Kevin Reitsma, DO, for complaints of dizziness and fatigue which had been ongoing for couple of weeks. She also reported that she had lot of fatigue when she sits and feels like she could just go to sleep anywhere. She saw Dr Reitsma again on October 8, 2008, for fatigue, joint pain and headaches. Petitioner told Dr. Reitsma she was concerned that her symptoms were connected to the mold exposure at Juniper Towers. She saw Dr. Dennis Rademaker on October 15, 2008, with complaints of headaches, skin rash, fatigue and joint pain. The physical examination indicated chest tightness with exertion. Her skin showed evidence of dermatitis across her neck and upper breast area, but her lungs were clear. Dr. Rademaker's impression was allergic dermatitis; perennial allergic rhinosinusitis, and fatigue of uncertain etiology. Petitioner saw Dr. Rademaker again on November 5, 2008. His impression was perennial allergic rhinitis and possible endotoxic response to molds. *See,* PX8.

Petitioner was referred to a cardiologist, Muhammad Siddiqi MD, whom she saw on December 30, 2008. Petitioner's first visit following the finding of the mold was with Dr. Siddiqi on this date as this was a new referral. Her complaints were of concerns about her heart. She noted a family history of coronary artery disease. She noted she has had intermittent chest pain for approximately five years. Nothing positive was found and she was advised to modify her risk. She also was noted to have anxiety. Her complaint was of chest tightness and pressure with symptoms akin to acid reflux. She had occasional shortness of breath. She specifically denied dizziness, lightheadedness or palpitations. She denied swelling in her ankles or upper extremities. She had no weakness, headaches, dizziness, lightheadedness, loss of consciousness or syncope. The doctor recommended a stress myocardial

perfusion and advised Petitioner to control her diet for high cholesterol. On December 31, 2008, Petitioner was seen for complaints of left wrist pain. A radiology report was noted to be unremarkable and the diagnosis was tenosynovitis. Petitioner's complaints were anxiety, chest tightness and pressure, with symptoms akin to heartburn, plus occasional shortness of breath. Dr Siddiqi noted that Petitioner did seem to have slight slurring of words, but the physical examination and ECG were negative for heart problems.

On January 5, 2009, Petitioner was seen by Dr. Chaudhry, complaining of pain in all her joints, as well as heart palpitations, patchy hair loss, bi-frontal headaches, a weight gain of 20 pounds, increased fatigue, anxiety and stress. She also reported slurred speech, which she had not noticed, but had been so advised by her co-workers. She also complained of numbness, tingling in her fingers, periodic dizziness and lightheadedness. She noted she had seen a psychologist for questionable depression and she complained of occasional photophobia. The doctor noted that these symptoms may be secondary to depression but neurological causes should be ruled out. Petitioner's complaints included numbness and tingling in her fingers, as well as periodic lightheadedness and dizziness. She also reported that she had poor sleep and had crying episodes. A stress test on January 8, 2009, showed no significant abnormality of the heart. A brain MRI was performed and Petitioner was noted to have a Chiari I malformation on January 7, 2009. A January 15, 2009 follow-up with Dr. Geringer noted an impression of arthralgias with a positive ACE level. He advised Petitioner to use stretching and ice for her complaints of tendinitis in the left arm. A CT scan of the chest performed on January 17, 2009, showed no evidence of pulmonary embolism. *See,* PX8.

According to Dr. Charles Geringer, at Well Group, whom Petitioner presented to on January 15, 2009, Petitioner's work up included an MRI, which showed some tendonitis of the left arm and positive tests for ACE enzyme. Petitioner saw Dr. Robert Coats on March 10, 2009, with complaints of swelling and limited motion in her left wrist since September 2008. Dr. Coats' examination showed left arm swelling along the fourth distal compartment; with some tenderness to palpation at same site; pain with wrist ROM especially passive flexion and active extension. Dr Coats' impression was likely tenosynovitis, and he thought she probably had some type of seronegative arthropathy, which is not uncommon in African-American women. *See,* PX8.

Petitioner presented to Dr. Azad, in consultation, on March 17, 2009, for complaints of shortness of breath, arthralgias, myalgia, skin rash and general lethargy for approximately the last couple of years. The doctor noted that an extensive workup had been unremarkable. Petitioner brought in an evaluation noting different mold levels that she had been exposed to and stated that she was concerned about a fungal infection. The doctor's physical examination confirmed a positive scaly rash on the upper extremities and trunk. He therefore requested a fungal blood culture. On April 7, 2009, the doctor reported that these were negative however; he noted that her ACE levels were still elevated. According to Dr. Azad, after examining some of the mold testing, he opined that Petitioner had been exposed to high levels of Penicillium, Alternaria and other hypnal elements; but doubted that she had an active disseminated fungal infection. Petitioner was prescribed itraconazole. *See,* PX8.

On March 23, 2009, Petitioner was referred to a psychiatrist at Well Group, Eldin Dzudza MD, who ordered that Petitioner be off work through June 9, 2009. Petitioner reported symptoms of feeling sad; losing interest in doing things; feeling anxious, tense, and sometimes, mildly irritable. Dr. Dzudza's mental status examination showed Petitioner's affect was restricted and her mood was sad and anxious. Dr. Dzudza diagnosed Petitioner as suffering from a major depressive disorder severe, with generalized anxiety disorder. She prescribed Lexapro and Klonopin. On April 13, 2009, Petitioner saw Dr. Dzudza regarding a rash on her face. Dr. Dzudza noted that Petitioner had had the rash for a week at the time of the visit. She instructed Petitioner to consult her primary care physician and her infectious disease doctor regarding the rash. Petitioner saw Dr. Dzudza on several other occasions in 2009.

Petitioner was referred to Dr. Coats for an evaluation on March 10, 2009, for complaints in her left wrist and hand. His impression was tenosynovitis. On May 6, 2009, Petitioner saw Dr. Pankaj Jain at Well Group with complaints of shortness of breath and chest wall soreness. Her history was reported as mold exposure for four years at work. Dr Jain reported Petitioner's ACE level was slightly elevated and she had some joint pain. Dr. Jain reviewed the CT of the chest, which showed no infiltrates in the lungs. The doctor recommended exercise. *See,* RX1-C.

Petitioner has treated with Dr. Eldin Dzudza for anxiety, stress and pressure and he has diagnosed her as having major depressive disorder. Dr. Dzudza stated that the petitioner was disabled through May

26, 2009, when he advised her that she was ready to return to work. An MRI of the right knee on October 5, 2009, showed degenerative osteoarthritis and chondromalacia.

Petitioner saw Dr. Reitsma on June 7, 2010, complaining of dizziness "for the last couple of weeks." The diagnosis was an inner ear Eustachian tube dysfunction. Petitioner has continued to treat for complaints in the hand and both knees as well as fatigue, memory loss, chest heaviness, headaches and shortness of breath. The treating physicians' assessments continue to state positive rheumatoid factors. She received injections into her knees and wrist. On June 8, 2009, Dr. Geringer indicated that Petitioner's symptoms appear related to anxiety and she was encouraged to follow up with psychiatry and psychology. He believes that her problems are myofascial in origin and should improve, as her underlying anxiety improved.

On February 1, 2010, Petitioner saw Dr. Chaudhry for her test results and follow-up for "multiple somatic complaints." He notes she was prescribed medications for "questionable depression" but was not currently taking them. He notes all test results were normal. Petitioner continues with care through Oak Forest Hospital, for multiple symptoms. Some of her diagnoses were osteoarthritis, depression, and anxiety.

Petitioner's Exhibit No. 18 is a record review report by Dr. Jeffrey Coe, who is board-certified in occupational medicine. Dr. Coe reviewed initial reports from Dr. Reitsma on October 8, 2008 and Dr. Rademaker on October 15, 2008, with a follow-up. Dr. Coe notes that Petitioner was experiencing "diffuse systemic complaints including headaches and joint pain and that she was examined by several specialists including rheumatologists and infectious disease specialists." Dr. Coe further notes that Ms. Moore was exposed, for a significant time, to airborne mold spores and other mold products in her work environment. He states that the petitioner's symptoms are consistent with acute mold exposure. He recommended that she remove herself from her work environment until mold remediation was completed.

Petitioner presented the records and deposition transcript of Dr. Ernest Chiodo. Dr. Chiodo noted that he is board-certified in internal medicine as well as occupational medicine. He also is board-certified in public health, general preventive medicine, and is an industrial hygienist. He notes that

the photographs, which he observed, of Petitioner's work environment, demonstrated very extensive mold growth. He is of the opinion that Petitioner had exposure to mold and that her symptoms including the rash, depression, malaise, mental slowness and allergic diseases are related to that exposure. He opined that these symptoms were related to the ongoing invasion of mycotoxins, suffered by the petitioner.

Dr. Chiodo did not examine the petitioner, as his opinions were based upon review of her medical records and photographs of the mold infestation. He notes that there is no methodology to determine whether there is mold exposure or toxicity in a specific individual. He further noted that a Chiari I malformation may cause headaches and lupus can cause fatigue as well as joint pain, stiffness, swelling and rash. It could also cause shortness of breath and chest pain. It could, on rare occasions, cause dry eyes and it can cause anxiety or depression and memory loss. However, he was adamant that the degree of mold infestation that the petitioner had been exposed to, had adverse effects on her health, exacerbating her condition of ill-being.

Petitioner also presented Exhibit No. 25, a mycotoxins panel report from EHAP Labs. Petitioner testified that she found this organization online, answered a questionnaire and mailed in a urine sample; and they subsequently provided this report, without examination.

Petitioner also presented the report of Dr. David McNeil, a psychological evaluation. Dr. McNeil reviewed various medical records including Dr. Chiodo's report and did an examination of the Petitioner. His diagnosis was depression, anxiety, cognitive disorder, amnesiac disorder, sleep disorder and adjustment disorder due to mold exposure. He believes that Petitioner became unable to perform management or executive functions, as a result of her condition. *See,* PX26.

Respondent presented the reports of Dr. Henry P. Shotwell, who is an industrial hygienist, toxicologist and workplace safety professional. He is certified in comprehensive practice of industrial hygiene, by the American Board of Industrial Hygiene. Dr. Shotwell reviewed documents with respect to the mold infestation at Juniper Towers, noting the earlier floods in 2003 and 2006. He noted that the areas were cleaned and sanitized thereafter. He was aware of the mold exposure as documented in the reports including the swab samples, indoor samples and additional samples. It was his opinion

that Petitioner did not sustain exposure to mold in her workplace following the September 2008 water intrusion. *See*, RXs 6 and 7.

In Dr. Shotwell's subsequent rebuttal report, he opines that Dr. Chiodo appears to have confused the exposure to remediation workers with exposure to Ms. Moore. He notes that airborne ingestion and physical contact between the mold and susceptible cells or membrane tissue is required for one to have a reaction to mold, suggesting that this did not occur with Petitioner. Respondent offered Respondent's Exhibit Nos. 4 and 5, which were record review reports by Dr. David Shenker.

On July 22, 2009, Dr. Shenker provided a review of the medical records including Petitioner's complaints beginning on December 10, 2002 and her treatment through May 2009. He opined that there was no injury because of mold exposure. He notes a long history of pre-existing problems including rheumatoid arthritis, systemic lupus, joint pain, skin rash, headache, hair loss, allergic dermatitis, eczema, allergic rhinosinusitis and fatigue of unknown etiology. He notes that some or all of Ms. Moore's symptoms may be related or caused by the Chiari I malformation, an abnormality that would have been present from an early age.

He further stated that the obliteration of spinal fluid spaces is significance with a Chiari I malformation. He noted no causal connection between her symptoms and the claimed mold exposure and no objective findings of disability related to the mold exposure. He notes that she could return to work, without restrictions, and had reached maximum medical improvement ("MMI"). His subsequent February 24, 2010 report included a review of the findings of Ace in the Home with respect to the mold identified. He also reviewed additional medical records and reiterated his prior position that: the petitioner had suffered no serious injury or any injuries, as a result of the mold exposure and that her skin condition was personal and unrelated to mold exposure. Her nasal condition is indeed one of seasonal allergies and some or all of her symptoms may be related to or could be caused by the Chiari I malformation.

Respondent offered the deposition transcript of Dr. Karen Levin, a neurologist, as well as her subsequent April 26, 2012 report. Dr. Levin stated that her record review noted multiple complaints as far back as 2002. She stated that the reports that she reviewed did not state that the mold was

Respondent offered the deposition transcript of Dr. Karen Levin, a neurologist, as well as her subsequent April 26, 2012 report. Dr. Levin stated that her record review noted multiple complaints as far back as 2002. She stated that the reports that she reviewed did not state that the mold was neurotoxic. The only positive finding in her entire workup from a neurological point of view was the Chiari I malformation and an elevated ACE level. She noted that headaches could be contributed to a Chiari I malformation. She did not find any reason that there would be a toxic, neurological problem in this patient. From a neurological standpoint, she opined that the petitioner was at MMI. Her subsequent April 26, 2012 report included a physical examination. The neurological examination indicated no objective findings. Dr. Levin believed Petitioner could return to work in a full duty capacity, from a neurological standpoint and that she was at MMI. *See,* RX9.

Respondent also presented the deposition of Dr. Hartman, board certified in clinical psychology and neuropsychology; i.e. Respondent's Exhibit No. 11. Dr. Hartman testified to his extensive testing of the Petitioner. He noted a very high malingering score, which indicated that Petitioner was attempting to enhance her disability. He does not believe Petitioner has any condition related to mold exposure. He notes that she is angry because she is not being treated for toxic mold effects. He notes that there is no reasonable scientific basis to assume mold-related causation of her symptoms. He notes the EHAP results have not demonstrated clinical validity with respect to the specific symptom constellation and their causes. The doctor describes his disagreement with Drs. Chiodo and McNeil and their conclusions based upon a reasonable degree of scientific certainty. He believes that Petitioner's condition is likely the consequence of lupus, hypertension and the Chiari malformation. He believes that she may have some mild neuropsychological limitations but these are unrelated to mold exposure. He opined that Petitioner had no restriction, disability or limitation attributable to mold exposure.

Respondent also offered the investigation videotape showing Petitioner driving a car and conducting normal interaction with social colleagues. *See,* RXs12 & 13.

Petitioner has continued to treat with respect to the orthopedic problems through May 24, 2012. Petitioner had complaints of bilateral knee pain as well as pain in her hands and back. Petitioner has undergone Synvisc injections and has been diagnosed with degenerative arthritis.

CONCLUSIONS OF LAW

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

A claimant has the burden of proving, by a preponderance of the evidence, all of the elements of her claim. It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in medical evidence. *See, O'Dette v. Industrial Comm'n*, 79 Ill. 2d. 249, 253, 403 N.E.2d 221, 223 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses and assign weight to the witnesses' testimony. *See, R & D Thiel*, 398 Ill. App.3d at 868; *See also, Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury to be compensable to be compensable under the Workers' Compensation Act, she must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *See, Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App.3d. 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accident injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. *See, Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill.2d 207 at 214, 254 N.E.2d 522 (1969).

Petitioner Hisar Moore was employed as a property manager for Respondent on the date of the alleged last exposure. i.e., September 26, 2008. The Arbitrator finds that undisputed evidence confirms that there had been several floods in the building at Juniper Towers where her office was located, resulting in extensive water damage: the first was in July of 2003 the second in April of 2006; the third in August of 2006; the fourth in January of 2008; and the fifth in September of 2008. The records of Ace in the Home confirm that there was a finding of mold infestation in the fall of 2008. Petitioner's photographs of the repair work and the documentation of that repair work provide documentation of the pre-existence of three types of mold.

And while, Petitioner testified that she was required to have continued presence in the building, prior to and during the repair work, all of Petitioner's symptoms that she attempts to attribute to the mole infestation, were pre-existing conditions as evidenced by her extensive medical records. The

Arbitrator finds that there is no doubt that the petitioner was exposed to mold in the workplace. However, the petitioner has not proven, by a preponderance of the evidence, that she sustained any disability, medical condition or injury, due to this exposure, which arose out of and in the course of her employment by Respondent; therefore no benefits will be awarded, pursuant to the Act. All other issues are moot and will not be addressed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Illinois Workers' Compensation Commission,
Insurance Compliance Division,

Petitioner,

vs.

NO: 12 INC 226

15IWCC0254

Hanna T. Vitela, Individually,
and as President/Secretary of Chicago Tire
& Service, Inc.,
Respondent,

DECISION AND OPINION RE: INSURANCE COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action, by and through the Office of the Illinois Attorney General against the above named Respondents, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act ("the Act") and Section 7100.100 of the Rules Governing Practice Before the Commission ("the Rules"), codified as 50 Illinois Administrative Code, Chapter 11. Proper and timely notice was given to Respondents and Commissioner Charles DeVriendt conducted a hearing on September 8, 2014, in Chicago, Illinois. After considering the entire record, and for the reasons set forth below, the Commission finds that Respondent knowingly and willfully failed to provide workers' compensation coverage as required by Section 4(a) of the Act from March 2, 2012 through September 8, 2014, a period of 920 days. The Commission finds Respondent liable for penalties pursuant to Section 4(d) of the Act and 7100.100(b)(1) of the rules at the maximum rate of $500.00 per day during this period, for a total amount of $460,000.00 (920 days x $500.00/day).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. The Respondent testified that she opened Chicago Tire & Service in November of 2004. She only sold tires at that time and she was the only person involved in the business.

2. Frank Capuzi is an investigator for the Illinois Workers' Compensation Commission. He visited Respondent's place of business on March 2, 2012. On that date he noticed two employees were working at that site. The first employee was introduced to him as the Respondent's son and the other person was introduced as Respondent's daughter's boyfriend. On that date Mr. Capuzi issued a citation and sent a Notice of Non-Compliance to the Respondent on or about March 19, 2012. He also sent to Respondent a Notice of Non-Compliance hearing on February 27, 2014.

3. Michael Cummins is an investigator for the Illinois Workers' Compensation Commission and visited Respondent's place of business on August 8, 2014 and August 29, 2014. He went under the pretext of being a customer inquiring about purchasing tires. An individual, identified as the owner's son, Francisco David, had a conversation with him and gave the investigator some price quotes and advice on the purchase of tires. At one point, he unlocked an office space next to the garage in order to consult a product catalogue. He was observed by the investigator through a glass window getting the product book. This occurred on the August 8, 2014 visit.

4. Petitioner Exhibit 5 contains the Articles of Incorporation for Chicago Tire and Service, Inc. for 2004. Hanna Vitela is listed as the Incorporator. Petitioner Exhibit 6 lists the wages paid by the Corporation from 2004 through 2012. Hanna Vitela is listed as the President of said Corporation.

5. Respondent further testified the Corporation's Illinois Unemployment Compensation Tax returns list Francisco David as an employee in the first quarter of 2012. Francisco was also listed as an employee in 2013. (Petitioner Exhibit 6) Respondent never maintained workers' compensation insurance from November 19, 2004 through March 1, 2012 because she was the only one who worked for Chicago Tire. She cannot remember the exact date that her son, Francisco came to work for her. However, he still works for Chicago Tire.

6. According to the Respondent's testimony, Francisco changed tires on the premises while employed for Chicago Tire. He also used the lift located on the premises.

The Commission finds that Chicago Tire & Service and Hanna Vitela qualifies as "employers" under Section 3 of the Act since they are engaged in "extra hazardous" activities by virtue of operating a tire shop where tires are installed or changed on motor vehicles.

Section 4(a) of the Act provides that any "employer" who comes within the provisions of Section 3 of the Act is required to provide workers' compensation coverage, whether this is accomplished through self-insurance, "security, indemnity or bond," or a purchased policy. Section 4(d) provides:

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure of an employer to comply with any of the provisions of paragraph (a) of this section... the Commission may assess a civil penalty of up to $500 per day for each day of such failure or refusal after the effective date of the amendatory Act of 1989. Each date of such failure or refusal shall constitute a separate offense. The Commission may assess the civil penalty personally and individually against the corporate officers and directors of a corporate employer, the partners of an employer partnership, and the members of an employer limited liability company, after a finding of a knowing and willful refusal of each named corporate officer, director, partner or member to comply with this section. The liability for the assessed penalty shall be against the employer first, and if the unnamed employer refuses to pay the penalty to the Commission within 30 days after the final order of the Commission, then the named corporate officers, directors, partners or members who have been found to have knowingly and willfully refused or failed to comply with this Section shall be liable for the unpaid penalty or any unpaid portion of the penalty."

Based on the credible testimony of Frank Capuzi, along with the documentary evidence offered by the Petitioner, as well as the testimony of the Respondent, the Commission finds that Respondents, knowingly and willfully refused to comply with Section 4(a) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents Hanna T. Vitela, individually and as President/Secretary of Chicago Tire & Service, Inc., are found to be employers who are in non-compliance with the insurance provisions of Section 4(a) of the Act and Section 7100.100 of the Commission Rules. Respondents are hereby ordered to pay the Commission a fine of $460,000.00 pursuant to Section 4(d) of the Act and Section 7100.100 of the Commission Rules.

Pursuant to Commission Rule 7100.100 payment shall be made according to the following procedure: Payment shall be made by certified check or money order made payable to The State of Illinois; 2) payment shall be mailed or presented within thirty days of the final order of the Commission or the order of the Court of Review after final adjudication.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

CJD/hf
d040115
049

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNABAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brian Bottcher,
Petitioner,
vs.
Illinois State Police,
Respondent.

15IWCC0255

NO: 10WC45984

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 6, 2014, is hereby affirmed and adopted.

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

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

DATED:
MJB/bm
o-4/6/2015
052

APR 10 2015

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOTTCHER, BRIAN
Employee/Petitioner

Case# **10WC045984**

ILLINOIS STATE POLICE
Employer/Respondent

15IWCC0255

On 7/6/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1097 SCHWEICKERT & GANASSIN
MARK M WILSON
2101 MARQUETTE RD
PERU, IL 61354

2202 ILLINOIS STATE POLICE
801 S ADAMS ST
SPRINGFIELD, IL 62703-2487

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 10 2014

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

15IWCC0255

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnabago)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Brian Bottcher
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # 10 WC 45984

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 **Douglas Holland**, Arbitrator of the Commission, in the city of **Rockford**, on **September 20, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0255

FINDINGS

On **February 29, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$64,279.28**; the average weekly wage was **$1,236.14**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of **$8,180.09** under Section 8(j) of the Act.

ORDER

All benefits are denied because the accident did not arise out of and in the course of employment.

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.

#01 Arb. George Andros — Signature of Arbitrator

June 23, 2014 — Date

JUL 10 2014

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Brian Bottcher	)	
	)	
Employee/Petitioner	)	Case No. 10 WC 45984
v.	)	
	)	
Illinois State Police	)	
	)	
Employer/Respondent	)	

Findings of Facts and Conclusions of Law

After hearing the proofs and reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues below and includes those findings in this document.

I. FINDINGS OF FACT

At the time of the alleged incident, Petitioner Brian Bottcher (hereinafter "Petitioner"), was employed by the Illinois State Police as state trooper for District 16 in the set team unit. Petitioner had been working for the Illinois State Police since 2004. In 2010, the set team unit was a special enforcement directed at high crime areas. He testified it is a very physical job; he may be forcibly placing someone under arrest or chasing a suspect on foot. At the time, he worked nights from 4 m to 2 am.

On February 28, 2010, Petitioner was off duty and playing basketball at Belvidere North High School. Around 11:30 pm, Petitioner went up for a shot during a game and landed on his ankle. He heard a pop sound and fell to the ground. He had to be helped off the court. Jody Flynn, a physical education teacher that opened up the gym for the group

to play basketball, went to the training room and brought the Petitioner ice. The accident was witnesses by the other members of his basketball group including Jody Flynn and William Kaiser. Both Flynn and Kaiser provided witnesses reports that corroborate Petitioner's testimony about the accident.

Petitioner initially thought he had just sprained his right ankle. He did not seek out any formal medical treatment. Later that day, Petitioner called his supervisor, patrol Master Sargent Liz Ditzler and informed her that he had sprained his ankle playing basketball that weekend. Retired Sargent Ditzler confirmed this in her testimony. The day after the accident, Petitioner left for canine training in Pawnee through the police academy. He had applied for this very selective position three months prior to the accident. Petitioner continued to ice, elevate, tape and wear a brace on his right ankle. He continued to have swelling, stiffness and pain. After canine training, Petitioner returned to his normal job. He thought his ankle was getting better, it was tolerable but he still had some problems. Sergeant Detzler testified that after Petitioner came back from canine training she recalls him limping on his right ankle from time to time.

Petitioner played basketball in high school and had continued playing as an adult. Petitioner played basketball once a week with the same group of men, many of them also police officers, for years, even before he worked with the ISP. They had not always played at Belvidere North High School. The high school gym was made available to the group by Jody Flynn Belvidere North High School. They typically played for two and a half hours, usually from 9:45 am to 12:30 pm. Petitioner drove himself to his weekly basketball games. He was not supervised by anyone from District 16. He did not have to report his basketball games to any of his supervisors.

Petitioner asserts that he played basketball to fulfill his fitness duty requirements as a part of the wellness initiative in place in 2010. Petitioner admitted the wellness program into evidence. PX 5. According to the wellness program, the ISP encourages all employees to enjoy a healthy lifestyle, officers are required to demonstrate the physical abilities necessary to perform duties, and cadets and probationary officers must complete at least two mandatory physical inventory tests in their first year. PX 5. The physical fitness testing consists of a sit and reach; 1 minute timed sit-ups or curl ups, maximum bench press and a 1.5 mile run or 3 mile walk test. PX5 see section IV. B.4. The minimum standard for each test is the 40th percentile of the officer's age and gender group. The fitness test is administered once a year and Petitioner has never failed a test.

Officers are encouraged to participate in activities that maintain fitness and improve health and wellness. The list of authorized programs/activities for maintaining fitness through vigorous physical activity include: aerobic/anaerobic conditioning, strength and flexibility training, etc. PX 5 see section IV.F1. Examples are included: "running/jogging, aerobics, swimming, bicycling, basketball, racquetball, weightlifting and martial arts training." PX 5 see section IV.F1. "Other authorized programs/activities are those to improve health and wellness, such as weight control, smoking cessation and stress management." PX 5 see section IV.F2. Some activities are specified as not a part of the wellness program, such as golf, bowling and softball. PX 5 see section IV.G1.

Both Petitioner and his supervisor, Liz Detzler, testified that Petitioner's basketball activities were not monitored or supervised. Petitioner did not report his basketball activities or turn in paperwork regarding this to his department. Liz Detzler

testified that she was not aware of anyone reporting their off duty wellness program activities. Petitioner drove his own vehicle to games and played while he was off duty.

Petitioner did not seek medical treatment of his ankle until August 2, 2010. Petitioner sought treatment regarding blood tests he took to increase his life insurance coverage. While he was there, he noted pain in his right knee from a softball tournament the day before as well as ankle pain and swelling for six months. Petitioner underwent x-rays of his right knee and right ankle. His right knee had joint effusion and his right ankle had osteochondral defects along the lateral talar dome with adjacent loose bodies.

On August 10, 2010, Petitioner had an MRI of his ankle which revealed moderate joint effusion, possibility of synovitis, edema, attenuation of anterior talofibular ligament consistent with a near complete tear, and unstable osteochondral fracture of the talus. On October 20, 2010, Petitioner underwent a right ankle arthroscopy with removal of the osteochondral defect, partial synovectomy and removal of loose bodies. Petitioner was off work for an unspecified amount of time. During that time Petitioner was paid and was on sick leave.

Petitioner was seen for a follow up on the 28th and reported that he had some pain, but was not taking pain medication or in physical therapy. On November 4, 2010, Petitioner had his sutures removed; he was instructed to continue wearing his cam boot for another one to two weeks. On November 8, 2010, Petitioner had a physical therapy evaluation. It noted decreased range of motion and strength as well as swelling. He could walk at the time and was instructed on home exercise programs. On November 29, 2010, reported that he was doing better, but had stiffness in the morning. He was still doing his home exercise program. He was instructed to avoid running, jumping and cutting.

Petitioner continued to have complaints of stiffness and locking up in his right ankle. He had an injection by Dr. Enke and no longer has locking in his ankle. He was last checked by Dr. Blint, his surgeon, on November 19, 2012. Petitioner reports that his right ankle is not the same as his left. His right ankle has stiffness and less mobility. Petitioner no longer plays basketball since the accident, because he is worried about hurting either his right or his left ankle. He does not play softball either. He has had no subsequent accidents.

Petitioner continues to work as a state trooper. He testified that his job is more physical since he became a canine officer. He currently runs three to four days a week and lifts weights to stay in shape. He has no job modifications or accommodations. He does not wear an ankle brace. He continues to pass his yearly fitness test. In 2010, he ran the 1.5 miles in 9 to 9:50 minutes. He ran his most recent fitness test 1.5 mile in 8:56.

II. CONCLUSIONS OF LAW

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

An injury is compensable under the Act only if the claimant can prove by a preponderance of the evidence that arose out of and in the course of his or her employment. Sisbro, Inc v. Industrial Comm'n, 207 Ill.2d 193, 203, 797 N.E.2d 665 (2003). An injury is said to "arise out of" one's employment if its origin is in some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the accidental injury. Technical Tape Corp. Industrial Comm'n, 58 Ill.2d 226, 230, 317 N.E.2d 515 (1974). An injury is "in the course of" employment when it occurs within the period of employment at a place where the

employee can reasonably be expected to be in the performance of his or her duties and while he or she is performing these duties or a task incidental thereto. All Steel, Inc. Industrial Comm'n, 221 Ill.App.3d 501, 503, 582 N.E.2d 240 (1991).

The issue of recreational activity, even ones that may provide the employer with some benefit, has been addressed by Statute. "Accidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof. This exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program." 820 ILCS 305/11.

The issue has been repeatedly addressed by the Appellate Court, First District. In Kozak v. Industrial Comm'n, 219 Ill.App.3d 629, 579 N.E.2d 921 (1st Dist 1991), the Court held that a voluntary round-robin tennis tournament undertaken on behalf of the employer, which resulted in the death of the employee, was not compensable and specifically excluded under Section 11 of the Act. The tournament was to determine who would represent the company in competition in Texas. Kozak, 219 Ill.App.3d 629, 630-631. The travel expenses, accommodations and equipment were all paid for by the employer. Id. at 631. Petitioners argued that the tournament was not a recreational activity but a promotional activity which benefited the employer, the Court found the benefit immaterial under Section 11. Id. at 631-632.

Similarly, in Pickett, Industrial Comm'n, 252 Ill.App.3d 355, 625 N.E.2d 69 (1st Dist. 1993), a cook county sheriff's department correctional officer was injured his left knee while playing basketball for the employer's sponsored team. Petitioner was never

instructed or asked to play for the team by his immediate supervisor. Pickett, 252 Ill.App.3d 355, at 356-357. Petitioner played during normal work hours but he also sometimes took off personal days to work around his playing schedule. Id. 356. His employer provided a uniform and provided the prison gymnasium for the team to practice. Id. 356. Petitioner was coached by a co-employee. Id. 356. Petitioner provided his own transportation to games. Id. 357. Despite the fact that the employer maintained control and supervision of the activity and received a benefit from the basketball team, the claim was still found not to be compensable because the recreational activity was voluntary. Id. 358-359.

The Petitioner testified that he had played basketball in high school. He had also been playing regular pick up games with this particular group of men since before he joined the Illinois State Police. His team was not made up of exclusively other Illinois State Troopers and had no association with Respondent. The weekly games took place while Petitioner was off-duty and not working. He drove himself in his own private vehicles to the weekly games that took place off Respondent's premises. He was not monitored, nor did he report his activities to any of his supervisors. Respondent did not provide uniforms or any incentive for employees to participate in the weekly pick-up games. Both Petitioner and former supervisor Liz Detzler testified that he was not instructed to play basketball. Petitioner had never failed a fitness test. He had never been given specific instructions to improve his fitness.

Petitioner was required to pass a yearly fitness test, but he had no specific requirement to work out. He was not required to play basketball. The manner in which he decided to regularly exercise was within his full discretion. The origin of the risk

involved in playing basketball is not causally or incidentally connected to Petitioner's employment. The Arbitrator finds that the accident did not arise out of the Petitioner employment. Petitioner was not on shift at the time of the accident. He was not at the station, nor did he provide any testimony that he was at Belvedere North High School for any reason other than his weekly basketball game. Petitioner was not undertaking any specified duties at the time of the accident. Therefore, Arbitrator finds that Petitioner has also failed to show that the accident arose out in the course of employment.

Arbitrator notes that to find that a voluntary game of basketball, with no direct connection to the employer, played while the employee is off duty and off the employer's premises, that provides some benefit to the employer in fit and healthy employees would open employers to unlimited liability for all sorts of recreational activities. Specifically, the Illinois State Police, which does require officers to be physical fit, would be financially responsible for any and all injuries sustained while an employee was taking any action to improve his or her health and fitness. Taken to its logical conclusion, the Respondent would be required to pay compensation for an employee injured while hiking Mount Everest, swimming with sharks, participating in an MMA fight, or skiing a black diamond mountain slope. Any of these activities could contribute to an employee's health and fitness, but also exposes them to an uncontrolled risk that is personal to the employee, not specific to their employment.

Is Petitioner's present condition of ill-being causally related to the injury?

As the accident did not arise out of and in the course of Petitioner employment (See Section A Supra), the issue of causal connection is moot.

Petitioner testified that he delayed 6 months for medical treatment because he thought his injury was just a bad sprain. He testified that he had various sprains on both ankles in the past. Petitioner did attribute his chronic pain and swelling to his basketball injury during his treatment with Dr. Blint. Petitioner's treatment records do not provide a causation opinion. However, on February 23, 2012, Dr. Blint wrote a narrative letter to Mark Wilson of Schweickert & Ganassin, Petitioner's attorney. PX4. He reports that he believes Petitioner ankle pain relates to a basketball injury. PX4. He somewhat confusingly reports the medial talar osteochondral defect was exacerbated by the injury. PX4. Dr. Blint then states, "this previous injury was reported to be work-related." PX4. Petitioner testified he did not have any subsequent injuries to his right ankle.

B. Were the medical services that were provided to petitioner reasonable and necessary? Has Respondent paid all appropriate changes for all reasonable and necessary medical expenses?

Arbitrator notes that both parties agree that Respondent is entitled to an 8(j) credit of $8,180.09. for payment of the medical bills by the employer provided insurance. The Petitioner paid $130.00 and there was an outstanding balance of $110.00. As the accident did not arise out of and in the course of Petitioner employment (See Section A Supra), the issue of medical services is moot.

C. Is the Petitioner entitled to any TTD?

The Arbitrator notes that Petitioner testified that he was paid for all his time off work. Petitioner used his sick time while off work and there are not specific doctor's notes instructing Petitioner to stay off work for his full period of lost time. As the

accident did not arise out of and in the course of Petitioner employment (See Section A Supra), the issue of TTD is moot.

D. What is the nature and extent of Petitioner's injury?

The Arbitrator adopts his conclusions with respect to the findings that this alleged accident did not arise out of Petitioner's employment (see Section A, supra) and for those reasons finds that Petitioner is not permanently and partially disabled.

Petitioner testified that he has no work modifications or accommodations. He continues to work at a very physically demanding job, which he indicates is more physically demanding since he became a canine officer. He continues to pass his yearly physical fitness tests. His 1.5 mile running pace has actually improved since his injury. He did report some stiffness in his right ankle. He had locking in his ankle, but that was addressed with an injection and he has not had locking since. Dr. Blint's letter indicates that he is uncertain if Petitioner will develop tibiotalar arthritis requiring future treatment. PX4. Petitioner does have signs of very early arthritis with mild subchcondral sclerosis. PX4.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEBORAH ROSA,

Petitioner,

15IWCC0256

vs.

NO: 12 WC 17386

SEARCH DEVELOPMENT CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner worked as a Direct Support Professional for Respondent. She worked with adults with mental disability, autism, and down syndrome.

2. On April 4, 2012 Petitioner was changing adult diapers and was walking out of the restroom when another client entered and head-butted her and slammed her into the door. She felt dizziness, throbbing pain in her neck and head, and blurred vision.

3. Petitioner was driven to Alexian Brothers and was then sent via ambulance to Northwest Community Hospital. After several referrals Petitioner finally underwent a CT scan on April 5, 2012. She was taken off of work.

4. On April 9, 2012 Petitioner returned to Alexian Brothers complaining of dizziness and a heavy feeling in her left arm. She then visited with her primary physician, Dr. Patricio at Young Family Health Center on April 12th. At that time she complained of neck and shoulder pain and headaches.

5. Petitioner was sent for an MRI on her head on April 16, 2012. She was then referred to a neurologist. On May 2, 2012 Petitioner saw Dr. Byrne at Rush University and was diagnosed with possible post-concussive syndrome and possible radiculopathy. She was recommended for x-rays and a cervical MRI.

6. On May 18, 2012 Petitioner saw Dr. Lichtenbaum on referral. She still had numbness in her arm, pain in her head and neck and constant blurred vision at that time. After the cervical MRI Petitioner was referred for physical therapy.

7. On July 10, 2012 Dr. Patricio continued Petitioner's pain medications and kept her off of work.

8. Petitioner last attended physical therapy August 17, 2012. At that time she noticed bulging on her left side between her shoulder and neck. She was discharged due to persistent pain and swelling in her neck.

9. Petitioner underwent a second cervical MRI on August 15, 2012. The results revealed diffuse disc bulging at C3-4, C4-5 and C5-6.

10. On August 31, 2012 she met with Dr. Andreshak at Respondent's request. The visit lasted 20-25 minutes and she was recommended to undergo an epidural injection and proceed with physical therapy.

11. Petitioner was kept off work by Dr. Patricio, and on December 12, 2012 she underwent an EMG on her neck. The results were normal.

12. Petitioner subsequently had prolonged subjective pain complaints which could not be objectively explained by Dr. Patricio.

The Commission affirms the Arbitrator's finding of causal connection, but disagrees with the longevity of said finding. The Commission agrees with the stance of Dr. Andreshak, who opined that Petitioner's cervical strain would have resolved within 3 months after the April 2012 injury. The normal findings of the December 2012 EMG support Dr. Andreshak's opinion. This fact, combined with Dr. Patricio's inability to pinpoint the apparent ongoing cause of Petitioner's pain, leads the Commission to find that causal connection terminated (on December 12, 2012) when Petitioner reached MMI due to the normal EMG results.

Accordingly, the Commission also modifies the awards for medical expenses and temporary total disability, terminating each on December 12, 2012 as well. With no

15IWCC0256

objective evidence of injury after this date, Petitioner's apparent inability to work and need for additional medical treatment are invalidated.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 34 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses incurred between April 4, 2012 and December 12, 2012 under §8(a) of the Act.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for a determination on permanent partial disability.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $19,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015
O: 2/5/15
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROSA, DEBORAH
Employee/Petitioner

Case# **12WC017386**

15IWCC0256

SEARCH DEVELOPMENTAL CENTER
Employer/Respondent

On 12/30/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & PALERMO
DANIEL R KLOSOWSKI
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

1604 STELLATO & SCHWARTZ LTD
BRUCE D OGRON
120 N LASALLE ST 34TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

15IWCC0256

Deborah Rosa
Employee/Petitioner

v.

Search Developmental Center
Employer/Respondent

Case # 12 WC 17386

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **March 14, 2013 and May 15, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0256

FINDINGS

On **April 4, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$22,308.00**; the average weekly wage was **$429.00**.

On the date of accident, Petitioner was **31** years of age, *single* with **2** dependent children.

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

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

Respondent shall be given a credit of **$4,085.72** for TTD, **$0** for TPD, **$0** for maintenance, and **$499.65** for medical benefits (which has already been applied per Pet. Ex.13), for a total credit of **$4,585.37**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $286.00/week for 49 weeks, commencing April 5, 2012 through March 14, 2013, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $36.26, Alexian Brothers Medical Group; $864.75, Young Family Health Center; $35.07 Rush University Medical Center; $90.00 Pain Management Clinic; $4,543.88, Illinois Dept. of Healthcare and Family Services, as provided in Section 8(a) of the Act.

Other: Prospective Medical Care

The Arbitrator orders Respondent to pay for the physical therapy treatment as recommended by Dr. Marek Rozynek from Pain Management Clinic.

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

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

Signature of Arbitrator

December 28, 2013
Date

DEC 30 2013

STATEMENT OF FACTS:

Petitioner testified that she had been employed by Respondent since August 2011. (TX 9 (3/14/13)) On April 4, 2012, Petitioner worked as a Direct Support Professional for Respondent. (TX 22 (3/14/13)) This position required Petitioner to assist adults with mental disabilities with daily living activities. (Id.) These activities included teaching the students or clients how to hold objects as well as changing the clients' diapers, lifting them up, and carrying them to beds. (Id.)

On April 4, 2012, Petitioner testified that she had finished a changing and was walking out of the bathroom when another client head-butted her and slammed her into a door. (Id.) Petitioner felt a throbbing pain in her neck and head along with dizziness and blurred vision. (TX 9-10 (3/14/13)) Petitioner was driven by a co-worker to Alexian Brothers Medical Center on April 4, 2012. (TX 10 (3/14/13)) From there, she was transported by ambulance to Northwest Community Hospital where she was examined and told to follow-up with her primary care physician. (Id.) Petitioner was taken off of work by the doctors at Alexian Brothers Medical Center on April 4, 2012. (Pet. Ex. 2)

Petitioner followed up at Alexian Brothers Medical Center on April 5, 2012. (TX 11 (3/14/13)) On that date she underwent a CT scan of the brain that revealed no acute intracranial abnormalities. (Pet. Ex. 2) She was also prescribed pain medication. (Id.) Petitioner met with the doctors at Alexian Brothers on April 9 and April 12, 2012 at which time she complained of dizziness, headaches, and blurred vision and was told to continue her pain medications. (Id.)

Petitioner presented to her primary care physician, Dr. Myrna Patricio, at Young Family Health Center on April 12, 2012. (Pet. Ex. 5) Dr. Patricio noted an accident history consistent with Petitioner's testimony at trial. (Id.) Petitioner complained of pain in the neck radiating to the right arm as well as occasional numbness and headaches at that time. (Id.) Dr. Patricio prescribed Naprosyn and an MRI of the brain. (Id.) Dr. Patricio also opined that Petitioner should be off-work. (Id.) Petitioner underwent an MRI of the brain on April 16, 2012, which revealed nasal cysts, but no other abnormalities. (Pet. Ex. 2)

Petitioner met with Dr. Patricio on April 19, 2012 and was referred for a neurological consultation. (Pet. Ex 5) Petitioner was also seen by Dr. Thomas Reese with Alexian Brothers Medical Center on April 19 who concurred with the recommendation for a neurological consultation. (Pet. Ex. 2) Petitioner was examined by Dr. Richard Byrne, a neurosurgeon at Rush University Medical Center on May 2, 2012. (Pet. Ex. 5) Dr. Byrne noted an accident history consistent with Petitioner's testimony at trial. (Id.) At this time, Petitioner reported popping in her neck and numbness, cramps, and weakness in her left arm. (Id.) Dr. Byrne diagnosed post-concussive syndrome and possible left cervical radiculopathy and recommended a cervical MRI. (Id.)

Dr. Patricio examined Petitioner on May 18, 2012 and prescribed pain medication and muscle relaxants. (Id.) She also referred Petitioner to an otolaryngologist for her unrelated, chronic nasal congestion. (Id.) She opined that she would await the results of the cervical MRI before providing a future course of treatment. (Id.) On the aforesaid date, Dr. Patricio issued an off-work slip. (Pet. Ex. 15)

Petitioner testified that she was referred by Dr. Patricio to Dr. Roger Lichtenbaum with Resurrection Healthcare on May 18, 2012. At that time, Dr. Lichtenbaum agreed that Petitioner should undergo a cervical MRI and continue taking pain medications. (TX 15 (3/14/13)/Pet. Ex.)

Petitioner underwent the cervical MRI on May 25, 2012, and it revealed a straightening of the normal lordotic curvature.

On June 8, 2012, Dr. Lichtenbaum met with Petitioner again. (Pet. Ex. 3) He noted that Petitioner continued to have headaches and neck pain and it had not changed since the previous visit. (Id.) He opined that she could proceed with an unrelated nasal surgery and believed Petitioner's neck pain would improve without the need for surgery. (Id.)

Petitioner met with Dr. Patricio on June 12, 2012 and was referred for a physical therapy consultation. (Pet. Ex. 6) Dr. Patricio also opined that Petitioner should remain off-work. (Id.) Petitioner began a course of physical therapy for her neck condition on June 25, 2012 at Resurrection Healthcare. (Pet. Ex. 4) During the initial physical therapy evaluation, Petitioner reported 10/10 neck pain, decreased range of motion, decreased strength, and increased spasms in the neck along with poor posture. (Id.) She continued with physical therapy at Resurrection until August 17, 2012 at which time she was discharged due to persistent pain and swelling in the neck. (Id.)

Petitioner continued to treat with Dr. Patricio through July 2012. (Pet. Ex. 6) Petitioner remained on a regimen of pain medication. (Id.) Dr. Patricio also kept Petitioner off of work. (Id.)

Petitioner underwent a second MRI of the cervical spine on August 15, 2012 at MRI Lincoln Imaging Center. (Pet. Ex. 10) Djordje Boskov, M.D., interpreted the MR images. His findings included the following:

At C3-4, 2.5 mm. diffuse disc bulging with tiny central herniation, no spinal or neural foraminal stenosis.

At C4-5, 2.5 mm. diffuse disc bulging with tiny central herniation and mild hypertrophy of the uncovertebral joints, no spinal or neural foraminal stenosis.

At C5-6, 3 mm. diffuse disc bulging with tube within the central herniation abutting the cord. There is no neural foraminal stenosis. (Pet. Ex. 4)

At the Respondent's request, John L. Andreshak, M.D., who is affiliated with OAD Orthopedics, performed a Section 12 examination on August 31, 2012. (Resp. Ex. 1) After evaluating Petitioner, he recommended she undergo an EMG, a trial epidural steroid injection in the cervical spine and continue physical therapy. (Id.) Dr. Andreshak provided an addendum to his August 31st exam on September 19, 2012. (Resp. Ex. 2) In this report, Dr. Andreshak opined that Petitioner's cervical condition may have been aggravated by the injury on April 4, 2012. (Id.) He stated he would have to await the results of the EMG that he had recommended. (Id.) Dr. Andreshak provided one final report dated February 6, 2013. (Resp. Ex. 3) He opined that given the normal results of the EMG performed on December 12, 2012, Petitioner's arm complaints were not related to the cervical injury. (Id.) He stated that Petitioner could return to full-duty work and had reached maximum medical improvement as of December 12, 2012, which was the date on which the EMG was performed. (Id.)

Petitioner was referred to Dr. Hong-Chan An at Pain Management Clinic and underwent her first cervical epidural steroid injection on September 25, 2012. (Pet. Ex. 10)

Petitioner continued to follow-up with Dr. Patricio in the months following this injection, each time complaining of neck pains, pain in the left shoulder, and numbness in the left arm. (Pet. Ex. 9) Dr. Patricio

continued to prescribe pain medications and keep Petitioner off work, as well as recommend she continue with the doctors at Pain Management Clinic. (Id., Pet. Ex. 15) On physical exam during these visits, Dr. Patricio noted tenderness of the left shoulder and decreased range of motion, stating that Petitioner was unable to raise her arm above her head on October 26, 2012. (Pet. Ex. 9) Dr. Patricio also noted decreased range of motion in Petitioner's neck. (Id.) Petitioner underwent a second epidural steroid injection in her cervical spine on December 21, 2012. (Pet. Ex. 10) Petitioner testified that she had noticed no change in her condition following the two injections. (TX 20 (3/14/13))

Petitioner continued to meet with the doctors at Pain Management Clinic following the second epidural steroid injections, as well as with Dr. Patricio. Marek Rozynek, M.D., recommended Petitioner undergo a course of physical therapy as of January 21, 2013. (Pet. Ex. 10) Petitioner testified on March 14, 2013 that she was participating in that course of physical therapy. (TX 21 (3/14/13)) Petitioner also testified that she had not been released back to work by Dr. Patricio at any time prior to the hearing date of March 14, 2013. (Id.) Petitioner further testified that she had not worked for Respondent or any other employer since her date of accident of April 4, 2012. (TX 21-22 (3/14/13))

She testified to her current condition and stated that she did not have the strength and mobility that she used to have. (TX 23 (3/14/13)) She said that it takes longer to get dressed, including difficulty moving her arm to put it into a sleeve. (Id.) She testified to experiencing pressure and throbbing in her neck, along with spasms and slight dizziness. (TX 23-24 (3/14/13)) Besides the physical therapy regimen, Petitioner was taking Vicodin, Norflex, Gabapentin and Tramadol to attempt to relieve her pain and discomfort. (TX 24 (3/14/13))

Dr. Myrna Patricio testified on behalf of Petitioner at a hearing on May 15, 2013. She testified that Petitioner first visited her regarding her neck complaints on April 12, 2012. (TX 11 (5/15/13)) She testified that, at that time, Petitioner was complaining of headaches, pain in the neck, and numbness of the left arm. (Id.) Dr. Patricio stated that she had Petitioner off-work as of April 12, 2012. (TX 16 (5/15/13))

Dr. Patricio also testified to the procedure that is used in her office when generating work status notes. Specifically, Dr. Patricio testified that she authorizes her support staff, including receptionists, to print work status notes, which reflect her opinion on the patient's ability to work. (TX 14 (5/15/13)) Dr. Patricio testified that once the work status note is printed and signed by a member of her staff, it is scanned back into the computer system and becomes a part of the patient's permanent file. (TX 15 (5/15/13)) She testified that each of the work status notes that were provided for Petitioner were prepared in the same manner. (TX 17 (5/15/13)) Dr. Patricio also testified to the process she used to prepare work status notes that were sent to her office by Respondent. (TX 18 (5/15/13)) She stated that the notes were filled out and a copy was provided to Petitioner, faxed to Respondent, and scanned into Petitioner's permanent file. (TX 19 (5/15/13))

Additionally, Dr. Patricio testified that Petitioner had seen her for other health issues while treating for her neck complaints. (TX 20 (5/15/13)) However, Dr. Patricio testified that she kept Petitioner off work because of the complaints of pain in her neck and numbness in her arm. (TX 22-23 (5/15/13))

On cross-examination, the following exchange took place:

Q: In light of the negative cervical MRI and negative EMG, do you have an opinion based upon a reasonable degree of medical certainty as to the cause or source of Ms. Rosa's pain?

A: At this point, no. (TX 39 (5/15/13))

On redirect examination, Dr. Patricio testified that throughout the more than one year that she has been treating Petitioner for her shoulder complaints, there has not been a period of time that her pain has completely resolved. (TX 39 (5/15/13))

CONCLUSIONS OF LAW:

F. In support of the Arbitrator's Decision relating to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?," the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury at work on April 4, 2012. The Arbitrator's finding is based on the credible testimony of Petitioner and Petitioner's treating physician, Dr. Myrna Patricio, along with the records of Petitioner's treating physicians. (Pet. Ex. 1-11, 15)

Petitioner testified that she felt fine when she arrived at work on April 4, 2012. (TX 9 (3/14/13)) Petitioner was then head-butted and slammed against a door by one of the students or clients of Search Developmental Center. She experienced immediate pain in the neck and head, as well as dizziness and blurred vision. (TX 9-10 (3/14/13)) Petitioner received medical treatment that day and in the days following at Alexian Brothers Medical Center.

On April 12, 2012, Petitioner presented to her primary care physician, Dr. Myrna Patricio, with headaches and pain in the neck that radiated. (Pet. Ex. 5) Petitioner was started on a regimen of pain medications to try and alleviate her neck and left arm pain. Petitioner underwent several diagnostic tests before beginning a course of physical therapy on June 25, 2012. Petitioner continued to undergo physical therapy until August 17, 2012 when she was discharged. It was noted that she did not totally meet all the goals secondary to persistent pain and swelling. (Pet. Ex. 4)

On September 25, 2012, Petitioner underwent her first cervical epidural steroid injection. This course of treatment was recommended by her treating physician, Dr. Patricio, and Respondent's Section 12 physician, Dr. John Andreshak. Petitioner underwent a second cervical epidural steroid injection on December 21, 2012. She testified at trial that she did not experience relief from these procedures. (TX 20 (3/14/13))

As of the March 14, 2013 hearing, Petitioner was enrolled in a course of physical therapy and continued to follow up with Dr. Patricio and the doctors at Pain Management Clinic. (TX 21 (3/14/13))

Each of Petitioner's treating physicians relate an accident history fully in-line with Petitioner's testimony at trial. All doctors related by history Petitioner's complaints to this trauma. Petitioner has experienced no intervening accidents since the accident on April 4, 2012. There have been no opinions offered that relate Petitioner's symptoms to any other cause. Finally, Petitioner's treating physician, Dr. Patricio, testified at a live hearing that there has never been a period of time where her pain has completely resolved. (TX 39 (5/15/13))

Although none of Petitioner treating physicians provided a specific causation opinion, the Arbitrator finds, based on Petitioner's testimony, the treating medical records and the chain of events, that Petitioner's current condition of ill-being is causally related to the accident of April 4, 2012. In support thereof, the

Arbitrator relies on the Court's holding in *International Harvester v. Indus. Comm'n*, 93 Ill. 2d 59, 63-64 (1982):

"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."

J. In support of the Arbitrator's Decision relating to issue (J) "Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?," the Arbitrator finds as follows:

The Arbitrator finds that all medical services provided to Petitioner were reasonable and necessary. In addition, the Arbitrator finds that Respondent has not paid all appropriate charges for all reasonable and necessary medical services. It was necessary that Petitioner undergo her initial consultations at Alexian Brothers Medical Center in the days following her work accident of April 4, 2012. It was also necessary that Petitioner be evaluated by Dr. Richard Byrne, a neurosurgeon at Rush University Medical Center, on May 2, 2012. Petitioner's course of treatment with Dr. Myrna Patricio has been reasonable and necessary to address her neck condition and to try to alleviate Petitioner's pain. Finally, the treatment with Pain Management Clinic has been reasonable and necessary as well in attempting to alleviate Petitioner's pain.

Therefore, the Arbitrator orders the Respondent to pay, pursuant to Section 8(a) and subject to Section 8.2 of the Act, the following charges: Alexian Brothers Medical Group - $36.26; Rush University Medical Center - $35.07; Young Family Health Center - $864.75, and Pain Management Clinic - $90.00. (Pet. Ex. 13) In addition, the Arbitrator orders the Respondent to satisfy the outstanding balance from the Illinois Department of Healthcare and Family Services in the amount of $4,543.88, which reflects the amount paid for treatment related to Petitioner's accident from April 4, 2012. (Pet. Ex. 14)

K. In support of the Arbitrator's Decision relating to issue (K) "What temporary benefits are in dispute? TTD," the Arbitrator finds as follows:

The Arbitrator finds that Petitioner has been temporarily and totally disabled throughout the period of April 5, 2012 through March 14, 2013. The Arbitrator bases this decision on the credible testimony of Petitioner and Petitioner's treating physician, Dr. Myrna Patricio, as well as the records of Petitioner's treating physicians. (Pet. Ex. 1-11, 15) P

Petitioner testified that she has been kept off work by Dr. Patricio throughout the period of time stated above. (TX 21 (3/14/13)) Moreover, Dr. Patricio testified that she has kept Petitioner off work throughout this time due to the pain complaints of pain and numbness. (TX 25 (5/15/13)) Dr. Patricio testified to the manner in which work status notes are generated in her office. (TX 14 (5/15/13)) In addition, she testified to the manner in which she would fill out work status notes that were sent to her by Respondent. (TX 15 (5/15/13)) She stated that a copy of these notes would be provided to Petitioner, a copy would be faxed to Respondent, and a copy would be scanned into Petitioner's permanent file. (TX 16 (5/15/13))

The Arbitrator finds the opinions of Dr. Roger Lichtenbaum, as expressed in his report dated June 8, 2012, to be deficient regarding Petitioner's work status. (Pet. Ex. 3) On said date, Dr. Lichtenbaum reviewed the cervical MRI dated May 25, 2012 and indicated that it did not demonstrate any significant abnormality. Dr.

Lichtenbaum urged Petitioner to be patient and felt she would improve without the need for surgical intervention. Dr. Lichtenbaum never reviewed a second cervical MRI that Petitioner underwent on August 15, 2012, which showed:

At C3-4, 2.5 mm. diffuse disc bulging with tiny central herniation, no spinal or neural foraminal stenosis.

At C4-5, 2.5 mm. diffuse disc bulging with tiny central herniation and mild hypertrophy of the uncovertebral joints, no spinal or neural foraminal stenosis.

At C5-6, 3 mm. diffuse disc bulging with tube within the central herniation abutting the cord. There is no neural foraminal stenosis. (Pet. Ex. 4)

Based on the foregoing, the Arbitrator finds that Petitioner was temporarily and totally disabled from April 5, 2012 through March 14, 2013, a period of 49 weeks and is entitled to TTD benefits for that period, subject to Respondent's credit of $4,085.72.

O. In support of the Arbitrator's Decision relating to issue (O) "Prospective Medical Care," the Arbitrator finds as follows:

The Arbitrator finds that Petitioner has not reached Maximum Medical Improvement and is entitled to prospective medical care. Specifically, the Arbitrator finds that Respondent shall pay for physical therapy treatment as recommended by Dr. Marek Rozynek from Pain Management Clinic on January 21, 2013. The Arbitrator notes that Petitioner testified she had begun this course of physical therapy as of the hearing date of March 14, 2013. The Arbitrator bases his decision on the credible testimony of Petitioner, along with the records of Petitioner's treating physicians. Petitioner testified to her continued pain complaints at the hearing on March 14, 2013. Petitioner testified that she has difficulty with putting on a shirt because of the decreased range of motion in her left arm. (TX 23 (3/14/13)) She testified that she was experiencing spasms and feeling pressure in her neck, throbbing, and slight dizziness as she sat on the stand. (TX 23-24 (3/14/13)) Petitioner also testified to the fact that she did not experience relief from the two epidural steroid injections that she had previously received. (TX 20 (3/14/13)) In addition to Petitioner's testimony, Dr. Rozynek noted in his report for the January 21, 2013 visit with Petitioner, that she was complaining of neck pain radiating to both shoulders and down the arms. (Pet. Ex. 10) The pain at this time was noted to be 6/10 at rest, but 9-10/10 depending on activity. (Id.) Dr. Myrna Patricio noted on a work status note dated February 28, 2013 that Petitioner was still in pain, and was still undergoing physical therapy. (Pet. Ex. 15)

Therefore, the Arbitrator orders Respondent to authorize and pay for the physical therapy treatment as recommended by Dr. Marek Rozynek from Pain Management Clinic on January 21, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Heather Marie Escobedo,
Petitioner,

vs. NO: 10 WC 02040

Salt Creek School District 48,
Respondent.

15IWCC0257

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of penalties and attorneys' fees and accident, medical expenses and prospective medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof..

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 7, 2014, is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-04/01/15
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ESCOBEDO, HEATHER MARIE
Employee/Petitioner

Case# 10WC002040

SALK CREEK SCHOOL DISTRICT 48
Employer/Respondent

15IWCC0257

On 7/7/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0206 GAINES & GAINES
GEORGE L GAINES
PO BOX 6345
EVANSTON, IL 60202

0075 POWER & CRONIN LTD
MARTIN DEELY ESQ
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Heather Marie Escobedo
Employee/Petitioner

v.

Salt Creek School District 48
Employer/Respondent

Case # 10 WC 02040

Consolidated cases: ~~15 IWCC 0257~~

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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **November 5, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 13, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned **$23,400.00**; the average weekly wage was **$450.00**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **1** dependent children.

ORDER

The Petitioner failed to prove a compensable accident within the meaning of the Act. Benefits requested pursuant to Section 8 are therefore denied.

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

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

Deborah L. Simpson
Signature of Arbitrator

July 7, 2014
Date

JUL 7 - 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Heather Escobedo,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10 WC 02040
	)	
Salt Creek School District #48,	)	
	)	
Respondent.	)	15IWCC0257
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on November 13, 2009, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that the Petitioner gave the Respondent notice of the accident which is the subject matter of the dispute within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $23,400.00, and that her average weekly wage was $450.00.

At issue in this hearing is as follows: (1) Did the Petitioner sustain accidental injuries or was she last exposed to an occupational disease that arose out of and in the course of employment; (2) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (3) Is the Respondent liable for the unpaid medical bills contained in the list attached as part of Arbitrator's Exhibit 1; (4) Is Petitioner entitled to TTD from November 14, 2009 through April 27, 2010 and October 9, 2012 through November 12, 2012; and (5) What is the nature and extent of the injury.

STATEMENT OF FACTS

Petitioner testified that in October and November, 2009 she was working as a substitute school teacher for Salt Creek School District #48. Petitioner did not testify whether this was a five day per week position, or whether she was an on-call substitute teacher who worked only when needed. On November 13, 2009, it was her second date working at the Stella May Swartz Elementary School, one of the schools in the district, as a substitute teacher. She had worked at other locations in the district besides Stella May Swartz Elementary School. While working as a substitute teacher on November 13, 2009, she had no final period class and therefore was allowed to leave the school before the last period of the day ended. On that day Petitioner sustained injuries to her left leg when falling to the ground while carrying her purse and her "teaching bag" which was a canvas tote bag that contained various teaching supplies, including a

schedule, pens, pencils, a planner and a "chat pack" which contains questions to ask kids, which she used that day. Both carried items were of the "clutch" type. On that day she was substitute teaching for an aid position, going to different classrooms to help out. It was around 3 p.m. when she finished and fell as she left exiting the building.

Petitioner had worked as a substitute teacher for the Respondent on several occasions in the recent past. On the date of accident, and before exiting the building, she walked directly to the principal's office and spoke with a secretary to check out. The secretary told the Petitioner she could leave because she did not have a class last period and directed her to exit the building through the front door. Petitioner left the office and walked up the stairs to the front door to exit the building. She testified that the door was difficult to hold open as it automatically springs closed for security reasons. It is the main door, used by all who are allowed entry to the school. Other side doors require an electronic key card for use which Petitioner was not provided. Petitioner testified that it was a bright day and, as she stepped out, pushing the door and carrying the above described items in her hands, she had the sensation that there was nothing beneath the foot with which she stepped forward. Immediately thereafter, she fell, breaking both lower left leg bones. She testified that she immediately felt excruciating pain upon falling to the ground and she began calling for someone to help her.

Angeline Ross, the principal, saw Petitioner shortly after the accident lying on top of the landing just outside of the door. Paramedics, were called by the Respondent, and took Petitioner by ambulance to Elmhurst Memorial Hospital. The records of Elmhurst Memorial Hospital on the day of accident noted, variously, that Petitioner "slipped" and fell down one step just prior to arrival (PX2, p. 4), "states she was walking out and tripped on step and letting herself to the ground" (PX 2 p.6), "missed 1 step (PX 2 p.13) and lost her step and footing, twisting and falling." (PX 2 p.22)

Petitioner was admitted to the hospital after emergency room care with a diagnosis of distal third tibia and fibula shaft fractures of the left lower extremity. The injury required surgery to repair the breaks. The staged surgery, performed by Dr. Paul Papierski, was begun at the same hospital on November 14, 2009, when she underwent an open reduction internal fixation of the left fibula shaft fracture with closed reduction with a plate. (PX3, p.24)

On November 20, 2009 she underwent a similar procedure by the same doctor to the left distal tibia. (PX 3, p.50 & 51) Her pain was rated 5/10 a few days after discharge. It was also noted that she had no such injuries or symptoms previously. (PX 3, p.40)

Significant swelling was noted by Marianjoy Rehabilitation Services upon its initial evaluation and establishment of a home exercise plan on December 17, 2009, as ordered by the same doctor. Petitioner was using a walker at home at that time. (PX 3, p.49)

On December 29, 2009, the surgeon, Dr. Papierski, issued a Certificate for a Handicapped Parking Placard, noting a length of disability of four to six months. (PX 3, p.41 & 42)

Commencement of 'almost' partial weight bearing and physical therapy was ordered on January 5, 2010, (p.7) as was seated work only. Petitioner was to use crutches until February 1, 2010 according to the doctor's orders. (p.39)

On January 25, 2010, Petitioner was to begin weight bearing as tolerated. (PX 3, p.6 & 10) Work status was deemed "not applicable." (PX4, p.6) Sleep was difficult. (PX 4 p.3)

Little change was noted until April 19, 2010, when Dr. Papierski noted unrestricted work, but with weight bearing as tolerated and a home exercise program. (p.14 & 34) Petitioner resumed work as soon a possible thereafter, on April 28, 2010.

Symptoms continued. On August 27, 2010, Dr. Papierski noted Petitioner's complaint of difficulty walking down stairs. (p.19)

On December 3, 2010, he noted Petitioner complains of pain the more Petitioner was on the leg through the day. A stress fracture just a little above the plate was suspected. (p.21)

On January 5, 2011, the left leg felt longer than the right leg, with diminished sensation in it. (p.22)

On August 29, 2011, a prosthetics company provided a 5/8th inch heel lift to Petitioner at the prompting of Dr. Papierski to compensate for the leg length discrepancy. (Px11, p.4).

Petitioner experienced a great deal of pain in the leg from May 2012 through November 2012 which she attributed to the two plates and twenty-three screws comprising the internal fixations.

On May 23, 2012, Dr Papierski noted Petitioner complained of persistent pain and itchiness at the site of the plates which he also attributed to the hardware. (PX12, p.3)

On September 11, 2012, Dr. Papierski and Petitioner agreed to the need to remove the hardware. A sedentary duty restriction was imposed. (pp.3 & 6)

On October 10, 2012, both plates and twenty-three screws were removed. (PX13, p.3, 4 &9) Walking as tolerated and numerous medications were prescribed. (PX12, p.9)

By October 24, 2012, crutches were deemed unnecessary, but Petitioner was ordered to remain off work until November 11, 2012, at which time she was discharged to medium work. (p.11 & 14) The discharge was also characterized as "gradual resumption of normal activities." (PX12, p.15)

Respondent's Sec. 12 examiner, Dr. Anand Vora, M.D., made the following findings: "significant swelling;" "pain upon palpation on the entire tibia, fibula, and proximal end of the tibial shaft;" "5 degree limitation in plantar flexion of the ankle joint but cited no other particular deficits in range of motion; "she is able to perform a toe-toe gait but with discomfort along the anterior ankle and along the leg, and is able to perform a heel-heel gait without

difficulty;" strength, circulation and sensation were found to be normal; "she is able to walk with a circumducted slightly antalgic gait pattern today and reproduces this as secondary to pain along the proximal plate, by her description;" the fractures were healed, but soft tissue edema was noted along the plate medially; no stress fracture was noted, but the ankle joint showed "intact mortis without any evidence of degenerative changes other than some very mild medial gutter narrowing;" the diagnosis was status post tibial/fibular pilon fracture and painful retained hardware; the current condition is related to the retained hardware and likely soft tissue and/or bony irritation as relates to the plate and screws along the medial tibia; "this is related to the original injury and subsequent hardware placement;" "no distinct stress fracture is noted; however she certainly has swelling and inflammation along the medial plate;" "hardware removal would be deemed necessary in this scenario;" there is a small chance of refracture through a hole in the plate;" there appears to be solid good bridging bony union, and hardware removal would be considered appropriate; treatment to date has been reasonable and customary; the objective findings support the subjective complaints; her pain level also appears to be appropriate and as would be expected; there are no prior injuries; a pre-existing condition of increased body mass index may be contributory to the pain and possible discomfort; recommended Petitioner should consider an arthroscopy of the ankle to evaluate the articular surface, after which a protective boot, no work for one week, followed by light duty/sedentary work with elevation of the foot as needed for five weeks and a home exercise protocol of range of motion of the ankle; anticipated three months for full swelling subsidence after hardware removal; and "with regard to the current condition, this is indirectly related to the original injury and subsequent hardware placement, and the hardware removal procedure would be related to the original injury..." (RX #6)

Currently, Petitioner works as a kindergarten teacher. She has the following specific complaints: swelling and itching from the mid-calf to the ankle of the left leg, worse by end of the day; dull, aching pain along the incision site; cramping of the top of the left foot at night which awakens her periodically; stiffness, most notably when sitting on the floor with students; inability to extend the left foot so as to be able to kneel due to stiffness; and significant discomfort with jumping. Petitioner has found it necessary to modify her activities as follows: performs all tasks, especially walking, slower, so as to look down to the ground or floor for fear of falling; no longer rides horses; cannot emotionally tolerate aspects of employment-required first aid training which prompts her recalling the injury.

Respondent's witness, Angie Ross, Principal of the Stella May Swartz Elementary School, was called to testify. She testified that the accident involving the Petitioner occurred on November 13, 2009. Principal Ross testified that the location where the accident occurred was the main entrance to Stella May Swartz Elementary School which was open to the general public. The main entrance to the school is where parents and students, as well as members of the general public would access the school to go to the office. Principal Ross reviewed pictures of the main entrance and the stairs to the school and identified that they depicted the location where the accident occurred. Ms. Ross noted that a "watch your step" sign on the inside of the door in question was posted after this accident. (RX4) She described the concrete "landing" immediately outside the door as about five inches wide and five inches in height. These pictures were entered into evidence as Respondent's Exhibits 1, 2, 3 and 4.

Principal Ross also testified that there is a separate entrance for teachers. Substitute teachers would not normally use that entrance as they do not have a key to that entrance. It would be normal for a substitute teacher to use the main entrance that is open to the general public.

Principal Ross testified that Petitioner worked at Stella May Swartz Elementary School one-time prior in October, 2009. The date of the accident was the second time that the Petitioner had worked at the school.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987). This includes the nature and extent of the petitioner's injury.

An injury is accidental within the meaning of the Worker's Compensation Act when it is traceable to a definite time, place and cause and occurs in the course of the employment unexpectedly and without affirmative act or design of the employee. *Matthiessen & Hegeler Zinc Co. v Industrial Board,* 284 Ill. 378, 120 N.E. 2d 249, 251 (1918)

An injury arises out of one's employment if it has its' origin in a risk that is connected to or incidental to the employment so that there is a causal connection between the employment and the accidental injury. *Technical Tape Corp. vs Industrial Commission,* 58 Ill. 2d 226, 317 N.E.2d 515 (1974)

The burden of proving disablement and the right to temporary total disability benefits lies with the Petitioner who must show this entitlement by a preponderance of the evidence. *J.M. Jones Co. v. Industrial Commission,* 71 Ill.2d 368, 375 N.E.2d 1306 (1978)

For treatment of an employee's workplace injury to be compensable under workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other cause or condition. *Hansel & Gretel Day Care Center v Industrial Commission,* (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244.

The employer's premises is not limited to the exact moment when the employee starts to operate a machine at his work station but also includes a reasonable time before and after the employee's actual employment duties commences. *Chmelik v. Vana*, 31 Ill.2d 272, 201 N.E.2d 434 (1964).

In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course and scope of her employment with Respondent and the date of the accident, the Arbitrator makes the following conclusions of law:

To obtain compensation under the Act a Petitioner has the burden of establishing, by a preponderance of the evidence that he has suffered an injury which arose out of an in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill2d 193, 203-4, 278 Ill.Dec. 70, 797

N.E.2d 665 (2003). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill.2d 478, 483, 137 Ill.Dec. 658, 546 N.E. 2d 603 (1989).

"In the course of employment" refers to the time, place and circumstances surrounding the injury, meaning that, generally, the injury must occur within the time and space boundaries of the employment. *Sisbro*, 207 Ill.2d at 203. The employer's premises is not limited to the exact moment when the employee starts to operate a machine at his work station but also includes a reasonable time before and after the employee's actual employment duties commences. *Chmelik v. Vana*, 31 Ill.2d 272, 201 N.E.2d 434 (1964). In this case, the Petitioner had finished her substitute teaching for the day, had signed out in the office and was leaving the building through the entrance that everyone agreed she was supposed to use as a substitute teacher. She was carrying her purse and a canvas tote that contained the supplies she needed to perform her duties as a substitute teacher. Clearly, the accident occurred in the course of her employment.

Additionally, the Petitioner must show that the injury "arose out of the employment." To satisfy the arising out of requirement, "it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill.2d at 203. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. *Sisbro*, 207 Ill.2d at 204. (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52 (1989)).

There are three categories of risk an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.App.3d 149, 162, 247 Ill.Dec. 22, 731 N.E.2d 795 (2000). Falling while traversing stairs is a neutral risk, and the injuries resulting therefrom generally do not arise out of employment. *Illinois Consolidated Telephone Company v. Industrial Comm'n*, 314 Ill.App.3d at 353. [A]n exception to noncompensability under the Act exists where the requirements of the claimant's employment create a risk to which the general public is not exposed. *Illinois Consolidated Telephone Company v. Industrial Comm'n*, 314 Ill. App3d at 353. The increased risk may be qualitative . . . or quantitative, such as where the claimant is exposed to a common risk more frequently than the general public. *Illinois Consolidated Telephone Company v. Industrial Comm'n*, 314 Ill. App. 3d at 353.

In this case everyone agrees that the door the Petitioner was exiting is the main door of the school, the door that is used by the parents of the students that attend the school if they need to enter the building for some reason, and any other visitors that come to the school, which would be considered the general public, as well as the door used by substitute teachers and some students. The Petitioner testified that this was only the second time she had been assigned to be a substitute teacher by the Respondent at this particular school in the two months she had been employed. Two times in two months is not sufficient to qualify as being exposed to a common risk more frequently than the general public with respect to exiting the building by way of the main door and the stairs that the Petitioner fell down.

The photo's that were introduced as Respondent's exhibits one through four, show the door open so that the threshold is visible and a clear picture of the stairs. There is yellow paint at

the end of each step and along the top of the side of each step and the threshold, making the edges visible. The stairs appear to be in good repair, with no defects. There was no testimony that the stairs were wet or slippery or that an obstacle was on the stairs. Petitioner testified that the sun was shining and she could see the parents of the students waiting outside to pick up their children. Petitioner described the threshold of the door as a stair or concrete riser which is not bigger than her foot, so she guessed it was less than nine inches. She stated to stepped over the threshold. took a normal step and then did not feel anything under her foot and the next thing she was in excruciating pain and calling for help. She testified that the door was heavy to push open because it closes automatically for security purposes and her stride was how she typically moved, she did not extend her step to more than was comfortable for her. She did not testify that she tripped over anything.

The Arbitrator finds no increased risk was present to Petitioner that was not present to the general public and therefore, Petitioner's accident did not arise out of or in the course of Petitioner's employment with Respondent. No testimony was presented by the Petitioner that any hazard was present at the time of her fall that caused her to trip or fall. The Arbitrator has reviewed pictures submitted by both Petitioner and Respondent of the stairway and without qualified testimony can see no apparent defect regarding the construction, design, or mechanics of the stairs of the main entrance to the Stella May Swartz Elementary School. The Petitioner has failed to prove that she suffered and accidental injury that arose out of and in the course of her employment therefore, the Arbitrator finds Respondent is not liable to Petitioner for benefits under the Illinois Workers' Compensation Act.

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury;

Is the Respondent liable for the unpaid medical bills contained in the list attached as part of Arbitrator's Exhibit 1;

Is Petitioner entitled to TTD from November 14, 2009 through April 27, 2010 and October 9, 2012 through November 12, 2012; and

What is the nature and extent of the injury; the Arbitrator makes the following conclusions of law:

The Petitioner has failed to prove a compensable injury therefore these issues are moot, no benefits can be awarded under the Illinois Workers' Compensation Act.

ORDER OF THE ARBITRATOR

The Petitioner has failed to prove a compensable accident by a preponderance of the evidence, therefore benefits pursuant to Section 8 of the Act are denied.

Deborah L. Simpson
Signature of Arbitrator

July 7, 2014
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason McChurch,
Petitioner,

vs. NO. 13 WC 42020

Mainstream Home Improvement,
Respondent.

15IWCC0258

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses and prospective medical expenses and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 29, 2014 is hereby affirmed and adopted.

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

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

15IWCC0258

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-04/07/15
jdl/wj
68

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

McCHURCH, JASON
Employee/Petitioner

Case# **13WC042020**

MAINSTREAM HOME IMPROVEMENT
Employer/Respondent

15IWCC0258

On 4/29/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0568 WINSTEIN KAVENSKY & CUNNINGHAM LLC
JOHN MALVIK
224 18TH ST 4TH FL
ROCK ISLAND, IL 61201

1337 KNELL & KELLY LLC
STEPHEN P KELLY ESQ
504 FAYETTE ST
PEORIA, IL 61603

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jason McChurch
Employee/Petitioner

Case # 13 WC 42020

v.

15IWCC0258

Mainstream Home Improvement
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rock Island**, on **March 5, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 27, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$18,417.83**; the average weekly wage was **$613.93**.

On the date of accident, Petitioner was **30** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$1,473.44** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$1,473.44**.

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 **$409.29**/week for **13** weeks, commencing **December 4, 2013** through **March 5, 2014**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **December 4, 2013** through **March 5, 2014**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **$1,473.44** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$7.992.33**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay the reasonable and necessary expenses associated with the left shoulder MRI prescribed for the Petitioner by Dr. Dunbar, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Arbitrator Anthony C. Erbacci

April 22, 2014
Date

13 WC 42020
ICArbDec19(b)

APR 29 2014

15IWCC0258

FACTS:

In October of 2013 the Petitioner was employed by the Respondent as a roofer. The Petitioner testified that in October of 2013 he was working for the Respondent on a roofing job in Prophetstown and he fell from the roof. The Petitioner testified that he wasn't sure as to the exact date of the occurrence but he was sure that it happened on a Sunday and that it was the last day of the Prophetstown job. The Petitioner testified that he had hooked himself up to a rope which had not been secured and he started to slide off the roof. He testified that rather than fall, he jumped off the main roof to a porch roof 12 feet below. The Petitioner testified that when he landed on the porch roof, his feet went out from under him and he fell onto his left elbow. He testified that he then climbed down to the ground and called Aaron, a supervisor, and told him that he had fallen off the roof.

The Petitioner testified that he didn't notice any pain in his arm or shoulder immediately after the fall and that he continued to work the rest of the day. He testified that he began to notice some pain that evening and that the pain seemed to worsen over the next few days. The Petitioner described that the pain was in his mid back up into his left shoulder and arm and down into his left fingers. The Petitioner testified that although his left forearm had been hit by a piece of steel "years ago", he had no pain in his left arm above the elbow prior to the fall from the roof.

The Petitioner testified that he continued to work after the fall and he did not seek medical treatment right away thinking that the pain would go away. The Petitioner testified that at the end of November and the beginning of December he was working on a job in Moline and was required to carry a number of sheets of plywood. The Petitioner testified that he had difficulty carrying the plywood and he reported his difficulty to the supervisor, "Tim", who told him to go to Concentra.

The Petitioner's testimony was corroborated by the testimony of Charles Burkett and Curtis Peters, co-workers of the Petitioner who worked with him on the job in Prophetstown. Curtis Peters testified that he actually saw the Petitioner fall from the roof and both Charles Burkett and Curtis Peters testified that the Petitioner's fall occurred on the last day of the Prophetstown job which was a Sunday. Both Charles Burkett and Curtis Peters also testified that they saw the Petitioner talking to Aaron on the phone immediately after the fall.

Jeff Wroblewski, one of the Respondent's owners, testified that the Prophetstown job started on October 18, 2013 and that, according to the Respondent's time sheets, no crew was working on Sunday, October 20, 2013. Mr. Wroblewski acknowledged, however, that the Petitioner had talked to Aaron about falling off of the roof. Mr. Wroblewski also acknowledged that the Petitioner left the Respondent's employ because he could not physically perform all of the duties of his job.

The records of Concentra Medical Center demonstrate that the Petitioner was seen there by Dr. Patricia Dunbar on December 4, 2013. Dr. Dunbar noted the Petitioner's history of a fall off a roof onto the roof of a porch 12 feet below and an impact on the left elbow when

his feet slipped out from under him. The Petitioner reported that the pain in his back and his left elbow had resolved but he had continued complaints of discomfort over the left mid-back and the left shoulder. The assessment at that time was a thoracic sprain, rhomboid sprain, and left trapezius sprain and the Petitioner was prescribed work restrictions, physical therapy and medications.

The Petitioner followed up with Dr. Dunbar on December 9, 2013, and Dr. Dunbar noted that the Petitioner had been seen at the emergency room on December 6, 2013 because of persistent pain over the left shoulder and parasthesias into the left hand. Dr. Dunbar also noted that a CT scan of the Petitioner's neck and thoracic spine had been done and were negative. Dr. Dunbar further noted that the Petitioner was not working due to the limits of his work restrictions. Dr. Dunbar indicated that the Petitioner's persistent shoulder complaint was supported by abnormal physical findings and she ordered an MRI. Dr. Dunbar opined that "the mechanism of injury with trauma to the elbow and therefore to the shoulder would certainly cause internal derangement of the shoulder and/or AC joint." She continued his light duty restrictions and said that she wanted to see him again 3 days after the MRI. Dr. Dunbar also ordered continued physical therapy.

The Petitioner testified that his shoulder problems did not improve with the physical therapy and he terminated physical therapy in January. The Petitioner testified that he did not return to Dr. Dunbar after December 9, 2013 because he was unable to undergo the MRI she prescribed for him. With regard to the date of injury reflected in the medical records, the Petitioner explained that when he filled out paperwork at Concentra, he left the date of the accident blank but he was told that he had to have an accident date and was instructed to make his best guess.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

The Petitioner and his co-workers Curtis Peters and Charles Burkett all testified consistently and credibly that they were working for the Respondent as roofers on a job in Prophetstown, Illinois during October of 2013. The Petitioner and his co-workers testified that they were finishing the Prophetstown job on a Sunday in October of 2013, and that the Petitioner's accident occurred on the last day of the job in Prophetstown. The Petitioner and his co-workers described how the Petitioner's harness rope was disconnected from its anchor on the roof of the house and Curtis Peters testified that he saw the Petitioner "go down off the roof with a rope in his hand". Mr. Peters testified that he saw the Petitioner fall.

The Petitioner testified that when he landed on the porch roof, his feet went out from under him and he fell onto his left elbow. He testified that he then climbed down to the ground and called Aaron, a supervisor, and told him that he had fallen off the roof. Both Charles Burkett and Curtis Peters also testified that they saw the Petitioner talking to Aaron on the phone immediately after the fall and Jeff Wroblewski, one of the Respondent's owners, acknowledged that the Petitioner had talked to Aaron, one of the Respondent's supervisors, about falling off of the roof and that Aaron had told him about the incident.

The testimony of the Petitioner, Curtis Peters and Charles Burkett was consistent on the details of what job they were on, what day of the week it was, and that it was the last day on that job. Although they all testified that the accident occurred on October 20, 2013 Mr. Wroblewski testified that there was no roofing crew working on October 20, 2013. Mr. Wroblewski's testimony was disingenuous at best. The Petitioner's testimony, Respondent's Exhibit 8, Mr. Wroblewski's own testimony and the testimony of Marci Boswell demonstrate that the accident occurred on October 27, 2013. Based upon the testimony and evidence presented at hearing, the Petitioner's motion to amend his Application for Adjustment of Claim to allege an accident date of October 27, 2013 to conform to the proofs, was allowed.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that on October 27, 2013 an accident occurred which arose out of and in the course of Petitioner's employment by Respondent. The Arbitrator further finds that timely notice of the accident was given to Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Petitioner testified that he had no condition of ill-being related to his left shoulder prior to the date of his accident. That testimony was not contradicted or rebutted. Although he had a prior work-related injury to his left forearm and elbow, the Petitioner credibly explained the differences between the symptoms of the prior work injury from which he completely recovered and his current condition. The Petitioner's testimony about how the accident occurred described an event that was consistent with the injuries of which he complained after the accident. Although there was a period of time from the accident date on October 27, 2013 until the beginning of December, 2013 when the Petitioner continued to work and did not obtain medical treatment, the Petitioner explained that working as a roofer was physically demanding work, that he experienced frequent soreness, and that he thought he had suffered minor injuries from which he would recover with the passage of time. The Petitioner testified that during the time that he continued to work after the accident, he complained of pain in his left shoulder and he could not perform the full range of his duties as a roofer. The Petitioner's testimony in that regard was corroborated by the testimony of, Curtis Peters and Charles Burkett. The Petitioner testified that following an incident in early December where he almost lost control of some plywood while on a roof, he felt that it was too dangerous for him to continue to work. He testified that he discussed the matter with his supervisor who referred

him to Concentra Medical Center where he saw Dr. Patricia Dunbar.

The records of Concentra Medical Center demonstrate that the Petitioner was seen there by Dr. Dunbar on December 4, 2013 and gave a consistent history of injury. Dr. Dunbar's assessment at that time was a thoracic sprain, rhomboid sprain, and left trapezius sprain and the Petitioner was prescribed work restrictions, physical therapy and medications. The Petitioner followed up with Dr. Dunbar on December 9, 2013, and Dr. Dunbar noted that the Petitioner's persistent shoulder complaints were supported by abnormal physical findings and she ordered an MRI. Dr. Dunbar opined that "the mechanism of injury with trauma to the elbow and therefore to the shoulder would certainly cause internal derangement of the shoulder and/or AC joint."

The Arbitrator finds that the Petitioner suffered an injury to his left shoulder in the accident of October 27, 2013 and he has suffered consistent symptoms related to a left shoulder injury from that accident through the present time. The diagnosis and medical records of Dr. Dunbar are consistent with an injury from the October 27, 2013 accident. The Petitioner testified that he had no condition of ill-being related to his left shoulder prior to the date of his accident and that testimony was not contradicted or rebutted. Dr. Dunbar, the Petitioner's treating physician has prescribed an MRI of the left shoulder for the Petitioner and that prescribed treatment has not been authorized by the Respondent.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner's current condition of ill-being in his left shoulder is causally related to the injury of October 27, 2013. The Arbitrator further finds that the left shoulder MRI prescribed for the Petitioner by Dr. Dunbar is reasonable, necessary, and causally related medical treatment which the Respondent is required to provide.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

Based on the testimony of the Petitioner, and on the medical records of the Petitioner, the Arbitrator finds that following the accident of October 27, 2013 the Petitioner suffered a left shoulder injury and continued to work, tolerating his injury until the symptoms disabled him from work on December 4th of 2013. He commenced medical treatment for the injury on December 6, 2013 and continued to be treated until January 8, 2014 when he stopped physical therapy due to lack of progress. Petitioner initially treated with Dr. Patricia Dunbar at Concentra Medical Center by referral from Respondent. Except for an emergency room visit at Unity Point Trinity Medical Center, his care remained at Concentra. All of his medical services were for treatment of the injury to his left shoulder sustained in the work accident of October 27, 2013.

15IWCC0258

The providers and the charges for services are listed on the Summary of Medical Bills which is submitted as Petitioner's exhibit # 7. An examination of the medical records reveals that the charges and services billed by the providers, as shown in the summary, correspond to treatment for the left shoulder resulting from the injury suffered from the fall from the roof on October 27, 2013. No evidence was offered to show that the treatment received was not reasonable and necessary. The charges for the services were not challenged, and in any event would be subject to limitations of the applicable fee schedule.

Therefore, all of the bills incurred for medical services listed on the Summary of Medical Bills was, and is, the responsibility of the Respondent. Accordingly, the Arbitrator finds that the Respondent is liable in the sum of $7,992.33 for medical bills incurred as a result of Petitioner's accident of October 27, 2013.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner's testimony, the testimony of Respondent's owner, Jeff Wroblewski, and the medical records of the Petitioner show that the Petitioner was temporarily totally disabled from December 4, 2013 through the date of hearing on March 5, 2014, a period of 13 weeks. The disability was the direct result of the work related shoulder injury, and the work restrictions placed on the Petitioner by Dr. Dunbar as a result of that injury. Mr. Wroblewski testified that the Petitioner was terminated from his position because he was no longer able to perform the job due to his physical limitations. The medical records establish the Petitioner's restrictions which are clearly incompatible with the description of his work in his testimony. Since the date Dr. Dunbar imposed light duty restrictions on the Petitioner, the Respondent has refused to accommodate those restrictions and has provided no work to Petitioner within those restrictions.

The Arbitrator finds that Petitioner was entitled temporary total disability benefits at a rate of $409.29 per week from December 4, 2013 through the date of hearing on March 5, 2014, a period of 13 weeks. Respondent is entitled to a credit of $1,473.44 for payments to Petitioner for temporary total disability benefits.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dennis Weaver,
Petitioner,

vs.

NO. 13 WC 07373

15IWCC0259

Quaker Oats,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 30, 2014 is hereby affirmed and adopted.

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

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

15IWCC0259

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-04/08/15
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WEAVER, DENNIS
Employee/Petitioner

Case# **13WC007373**

QUAKER OATS/PEPSI CO
Employer/Respondent

15IWCC0259

On 6/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
RICHARD K JOHNSON
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0522 THOMAS MAMER & HAUGHEY LLP
BRUCE E WARREN
30 MAIN ST SUITE 500
CHAMPAIGN, IL 61820

+
STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

☐ 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

DENNIS WEAVER,
Employee/Petitioner

v.

QUAKER OATS/PEPSI CO,
Employer/Respondent

Case # 13 WC 7373

Consolidated cases: ____

15IWCC0259

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Champaign**, on **5/29/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/6/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$104,988.52**; the average weekly wage was **$2,019.01**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$1,775.20** for other benefits, for a total credit of **$1,775.20**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $638.27/week for 15-3/7 weeks, commencing 1/7/13 through 4/24/13, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,295.47/week for 5 weeks, commencing 4/25/13 through 5/29/13, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for 43 weeks, because the injuries sustained caused the 20% loss of the right leg, as provided in Section 8(e) of the Act.

Respondent shall pay reasonable and necessary medical services for petitioner's right knee from 1/6/13 through 6/10/13, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

6/17/14
Date

ICArbDec p. 2

JUN 30 2014

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

On 6/1/13 petitioner, a 44 year old maintenance technician, sustained an accidental injury to his right leg that arose out of and in the course of his employment by respondent. Petitioner's duties include providing maintenance of the machines for respondent. Petitioner normally works the 2nd and 3rd shift for respondent each day. Petitioner works 80 hours a week, 16 hours a day. Prior to 1/6/13 petitioner denied that he had any problems with his right knee, or received any treatment for his right knee.

On 1/6/13 petitioner was performing preventative maintenance of the machines. This included crawling under the machines on his hands and knees to check parts, and change parts if necessary. Petitioner performed this task for 6 hours that day. While doing this task, petitioner got a call to go to another department to perform work on the Chewy Granola machine. Petitioner testified that this department is about a mile away and he must go up a set of stairs to get there. Petitioner carries a 30 pound tool bag with him at all times on his right shoulder.

After petitioner had completed his work on the Chewy Granola machine he began his trip back to the department where he was doing preventative maintenance. As he was walking down the stairs his tool bag slipped off his shoulder to his forearm. When it hit his forearm it spun him around to the right. Petitioner tried to grab the tool bag so that the tools would not fall down the stairs. As he tried to grab it he twisted his right knee and felt a pop in the knee. Petitioner did not fall down the stairs, but felt a sharp stabbing pain in his right knee.

Since petitioner was unable to summon a 1st responder on his radio, he went to the cafe to look for a 1st responder. There he found Dwayne who took him to the nurses office. He was given an ice pack, biofreeze and an ACE bandage. Petitioner remained at work for the remainder of his shift, but did not do his regular job.

On 1/7/13 petitioner completed and Injured Employee Statement. He reported "tool bag fell from shoulder to forearm went to catch and put back on shoulder bag threw me off balance and twisted knee." Petitioner did not complete the ERT Report of Injury/Illness. This was completed by Katrina Shields. The Worker's Compensation Report (RX3) was also not completed by petitioner. It states "EE was walking down the stairs from the 2nd floor to the 1st floor with his tool bag on his left should. EE's tool bag fell off EE's left shoulder onto his forearm, EE put the tool bag back on his left shoulder and EE lost his balance. EE's right knee twisted and EE felt a pop in his right knee."

On 1/7/13 petitioner presented to Dr. Dwyer, his primary care physician. He complained of right knee pain and stated that he twisted it at work. Dr. Dwyer's notes are somewhat illegible. It is noted that "foot

planted and body int. rotation, most pain medial meniscus." He reported that he was using ice packs and taking Naproxen. His right leg was swollen. Following an examination Dr. Dwyer's assessment was clinical torn medial meniscus and joint swelling. The other part of his assessment is illegible. Dr. Dwyer ordered an MRI of the right knee.

After seeing Dr. Dwyer, petitioner presented to the Carle Convenient Care on 1/7/13 for a second opinion. He reported a right knee injury that happened at work two days ago. He gave a history of carrying something while going down the stairs. It was noted that he fell (petitioner denies he fell) twisted his right knee joint. Petitioner complained of sharp pain in the right knee joint. He rated his pain at a 10/10, worse on the medial side. Petitioner reported that he could not walk or drive due to the pain. Dr. Ye released petitioner to work with a restriction of sit mostly until further evaluation.

On 1/8/13 petitioner presented to the Department of Occupational Medicine for evaluation. He gave a history of going down stairs and his bag slipped. He then twisted his right knee and had immediate pain in his right knee. He complained of swelling and pain. An MRI was recommended. He was restricted to a sitting job only. He was to avoid kneeling, squatting and climbing. He was given a knee brace.

On 1/10/13 petitioner underwent an MRI of his right knee. The impression was bone contusion medial aspect medial tibial plateau; tear of the posterior horn of the medial meniscus; joint effusion; Baker's cyst; and degenerative changes to the medial facet patellofemoral joint.

On 1/15/13 petitioner presented to Dr. Sutter, DO, MPH, for reevaluation of right knee. He gave a history of injuring it when he twisted it on the stairs. He said he might have struck the wall with his knee. (At trial, petitioner testified that he did not hit the wall with his knee). Petitioner was examined and assessed with a right knee meniscal tear. He was referred to an orthopedic doctor. His "sitting only" restrictions were continued.

On 1/18/13 petitioner presented to Dr. Bane for an orthopedic consultation. He reported that he twisted his knee going down the stairs. Dr. Bane recommended an arthroscopy and a partial meniscectomy.

On 2/19/13 petitioner underwent a Section 12 examination performed by Dr. Richard Lehman, at the request of the respondent. Dr. Lehman performed a record review and examination. He believed the petitioner had a degenerative medial meniscus tear, and mild arthritis in the medial aspect of his knee in the patellofemoral joint. He found the petitioner's history confusing. He noted that petitioner had a contusion on his knee when he was evaluated on 1/7/13, and moderate tenderness to palpation over the medial joint line. He noted that he saw no swelling in the records. He noted that when petitioner was seen on 1/15/13 he stated that he may have struck the wall with his knee, but was not sure. Dr. Lehman was of the opinion that the MRI showed a subcutaneous

soft tissue edema anterolaterally, consistent with a contusion. Dr. Lehman did not find the petitioner's mechanism of injury consistent with the MRI findings. He believed that since petitioner had a contusion it would be unlikely that his trauma was a rotational trauma. He believed it would be a direct trauma. He was of the opinion that a direct trauma to the knee causing a contusion in the anterior aspect of the knee would not be consistent with a meniscal tear. Dr. Lehman believed the petitioner had preexisting degenerative changes in the patellofemoral joint, the medial meniscus, and in the medial joint line.

On 3/21/13 Dr. Dwyer referred petitioner to Dr. Prather, an orthopedic surgeon. On 4/1/13 petitioner presented to Dr. Prather. He gave a history that on 1/6/13 he was at work coming down the stairs and his tool bag fell off his shoulder and he twisted to stop the bag from falling and heard a pop in his right knee. Dr. Prather noted that petitioner had internal derangement which had been treated nonoperatively to date. He noted that it continued to be significantly symptomatic and interferes with his daily activities. Dr. Prather performed an intraarticular injection through the lateral suprapatellar.

Petitioner testified that from 1/7/13 through 4/25/13 he worked light duty and his hours were limited to 40 hours a week. He was unable to work his regular double shift.

On 4/25/13 petitioner underwent a right knee partial medial meniscectomy with chondroplasty of the undersurface of the patella, performed by Dr. Prather. His post-operative diagnosis was right knee medial meniscus tear, and radial type tear of the posterior horn of the medial meniscus with chondromalacia of the patella. Petitioner followed-up post-operatively with Dr. Prather on 5/6/13 and 6/10/13. On 5/6/13 Dr. Prather was of the opinion petitioner should be able to return to work in a few weeks.

On 5/30/13 petitioner resumed full duty work for respondent.

On 6/10/13 Dr. Prather noted that petitioner was doing well, and his pain was controlled. He noted that he was not using any assistance devices.

On 2/16/14 petitioner underwent a Section 12 examination performed by Dr. Thomas Cronin, at the request of his attorney. Dr. Cronin examined petitioner and performed a record review. Following an examination and record review Dr. Cronin assessed right knee internal derangement with meniscectomy and debridement. He opined that the petitioner's mechanism of injury and resultant condition is directly and causally related based on his history of coming down stairs with a bag of tools weighing 30 pounds, and losing his balance when the bag slipped off of his shoulder. He was of the opinion that this resulted in a rotational type motion that created the pathologic process in his knee. Dr. Cronin was of the opinion that 30 pounds is a significant weight and when it slipped off his shoulder, it upset his normal balance. He was of the opinion that

this resulted in more than just a simple bone contusion. He was of the opinion it resulted in a significant injury to his meniscus. He was further of the opinion that the arthroscopy and meniscectomy were the appropriate and necessary treatment. His impairment rating was 7.

Petitioner denied that he reinjured his right knee after 1/6/13. Currently, petitioner has complaints of pain in his right knee every day. He testified that it is stiff and wobbly when walking up stairs. He testified that he cannot squat to pick things up due to range of motion and pain. He noted that in the morning, it is difficult for him to walk for awhile. He stated that his knee still swells and when it does he puts ice on it and takes ibuprofen. He stated that he ran out of prescription pain medication. Petitioner stated that he ices the right knee every day and takes ibuprofen every day.

Petitioner testified that before the injury he was a weight lifter and worked out using the Smith machines. He testified that he did this 3 days a week before the accident.

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

Petitioner denied any problems, injuries, or treatment for his right knee prior to 1/6/13. Petitioner was also able to work 80 hours a week before 1/6/13 without any difficulty. Petitioner testified that on 1/6/13 while carrying his 30 pound tool bag on his shoulder while descending stairs, the tool bag slipped off his shoulder and as he went to grab it so that the tools would not fall down the stairs, he twisted his right knee and felt an immediate pop in his knees followed by a sharp stabbing pain in his right knee. Petitioner did not fall down the stairs.

Immediately after accident petitioner reported the injury. The next day he completed an accident report. On that report he documented a consistent history of trying to grab his tool bag after it fell off his shoulder while he was walking down the stairs and twisting his right knee. The ERT Report of Injury/Illness completed by Shields contained the same accident history of petitioner twisting his right knee.

On 1/7/13 petitioner again gave a consistent history to Dr. Dwyer of twisting his right knee at work. Dr. Dwyer noted that petitioner's foot was planted and his body rotated internally and he had pain in his medial meniscus. That same day, petitioner presented to Carle Convenient Care for a second opinion. He again provided a consistent history of twisting his right knee while carrying his tool bag down the stairs. Although the notes indicate that petitioner fell, petitioner denied that he fell down the stairs. Petitioner complained of sharp pain in the right knee joint.

The next day petitioner presented to the Department of Occupational Medicine for evaluation. He again gave a consistent history of the accident. He stated that as he was going down the stairs his bag slipped and he twisted his right knee and had immediate pain in his right knee. Petitioner complained of pain and swelling.

An MRI of petitioner's right knee was performed 1/10/13. The impression was a bone contusion medial aspect of the medial tibial plateau; a tear of the posterior horn of the medial meniscus; joint effusion; Baker's cyst; and, degenerative changes to the medial facet patellofemoral joint.

On 1/15/13 petitioner presented to Dr. Sutter and gave yet another consistent history of the accident wherein his tool bag slipped as he was going the stairs and he twisted his right knee. Petitioner testified that he may have struck the wall with his knee, but was not sure. Petitioner was assessed with a right knee meniscal tear. On 1/18/13 petitioner gave Dr. Bane the same history of twisting his right knee while going down the stairs. Dr. Bane recommended an arthroscopy and a partial meniscectomy.

On 2/19/13 Dr. Lehman examined petitioner on behalf of respondent. Dr. Lehman also performed a record review. Dr. Lehman was of the opinion that petitioner had a degenerative medial meniscus tear, and mild arthritis in the medial aspect of his knee in the patellofemoral joint. Dr. Lehman believed petitioner had a contusion when he was evaluated on 1/7/13. He also noted that he saw no swelling in the records, which is inconsistent with Dr. Dwyer's examination on 1/7/13 that indicated swelling. Dr. Lehman claims petitioner stated that he struck his right knee on the wall when he was seen on 1/15/13, when in fact what petitioner stated was that he might have struck his knee on the wall. Dr. Lehman also states that there is nothing in the records to support a rotational injury, which again is incorrect if you simply looks at the records of Dr. Dwyer on 1/7/13. Based on these incorrect readings of petitioner's medical records, Dr. Lehman did not find the petitioner's mechanism of injury consistent with the MRI findings. Dr. Lehman was of the opinion that petitioner had a direct trauma and not a rotational trauma as is recorded in the history petitioner gave to every treating physician and accident report that was completed.

On 3/21/13petitioner gave Dr. Prather another consistent history of the accident. He stated that he twisted his knee when his tool bag fell off his shoulder while he was walking down the stairs. Dr. Prather performed a right knee partial medial meniscectomy with chondroplasty of the undersurface of the patella on 4/25/13.

On 2/16/14 petitioner was examined by Dr. Cronin at the request of his attorney. Dr. Cronin opined that petitioner's mechanism of injury and resultant condition is directly and causally related based on petitioner's history of coming down the stairs with a bag of tools weighing 30 pounds, and losing his balance when the bag

slipped off his shoulder. He opined that this resulted in a rotational motion that created the pathologic process in his knee.

Based on the above, as well as the credible evidence, the arbitrator finds the history petitioner provided to every healthcare provider, and in his accident report, was consistent and supports a finding that as petitioner was going down the stairs his tool bag fell off his right shoulder, he lost his balance and twisted his right knee. The arbitrator finds this history is consistent with petitioner's injuries as noted on the MRI. The arbitrator adopts the opinions of Dr. Cronin and finds petitioner's current condition of ill-being as it relates to his right knee is directly related to the rotational injury he sustained to his right knee on 1/6/13. The arbitrator gives no weight to the opinions of Dr. Lehman, finding that they are not based on the credible medical record.

J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?

Having found the petitioner's current condition of ill-being as it relates to his right knee causally related to the accident he sustained on 1/6/13, the arbitrator finds all treatment petitioner received for his right knee from 1/6/13 through 6/10/13 was reasonable and necessary to cure or relieve petitioner from the effects of the injury he sustained on 1/6/13.

Based on the above, as well as the credible evidence, the arbitrator finds the respondent shall pay all reasonable and necessary medical services related to petitioner's right knee from 1/6/13 through 6/10/13 pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

K. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims he is entitled to temporary total disability benefits from 4/24/13 through 5/29/13, and temporary partial disability benefits for the period 1/7/13 through 4/23/13. Respondent disputes petitioner is entitled to these benefits. Respondent has paid $1,775.20 in nonoccupational indemnity disability benefits.

Having found the petitioner has proven by a preponderance of the credible evidence that his current condition of ill-being is causally related to the injury he sustained on 1/6/13, the arbitrator finds the petitioner is entitled to temporary disability benefits for the period he was off work and was on light duty and could not perform the full duty job he was performing on the date of injury.

On 1/7/13 petitioner was restricted to "sitting only" work which petitioner was only able to perform for one shift, or 40 hours a week. These restrictions remained in place until petitioner underwent surgery on

4/25/13. During this period petitioner worked light duty, or 40 hours a week. Petitioner testified that he was unable to work his double shift during this period. Respondent offered no evidence to rebut this testimony. Petitioner testified that he earned $26.54 per hour during this period. Respondent offered no evidence to rebut this testimony. The parties stipulated that petitioner's average weekly wage was $2,019.01 in the 52 week period preceding the injury. As a result, the arbitrator finds that from 1/7/13 through 4/24/13 petitioner earned $1,061.60 per week. Therefore, the petitioner's temporary partial disability benefits for this period is $638.27 a week.

On 4/25/13 petitioner underwent surgery to his right knee. As a result of this surgery petitioner was authorized off work from 4/25/13 through 5/29/13. On 5/30/13 petitioner resumed his full duty job without restrictions.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner was temporarily partially disabled from 1/7/13 through 4/24/13, a period of 15-3/7 weeks in the amount of $638.27 per week pursuant to Section 8(a) of the Act. Additionally, the arbitrator finds the petitioner is entitled to temporary total disability benefits from 4/25/13 through 5/29/13, a period of 5 weeks, in the amount of $1,295.47 per week pursuant to Section 8(b) of the Act.

Respondent shall receive credit for the $1,775.20 it paid in nonoccupational indemnity disability benefits.

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

As a result of the accident on 1/6/13 petitioner underwent an unsuccessful course of conservative treatment. Thereafter, petitioner underwent a right knee partial medial meniscectomy with chondroplasty of the undersurface of the patella, performed by Dr. Prather. His post-operative diagnosis was right knee medial meniscus tear radial type tear of the posterior horn of the medial meniscus with chondromalacia of the patella.

On 6/10/13 Dr. Prather noted that petitioner was doing well, and his pain was controlled. He noted that he was not using any assistance devices.

On 2/16/14 Dr. Cronin assessed right knee internal derangement with meniscectomy and debridement.

As a result of the accident on 1/6/13 the arbitrator finds the petitioner sustained a 20% loss of his right leg pursuant to Section 8(e) of the Act. Pursuant to Section 8.1b of the Act the arbitrator, in determining the level of permanent partial disability, bases her decision on the following factors:

(i) The reported level of impairment pursuant to subsection (a);

(ii) The occupation of the injured employee;

(iii) The age of the employee at the time of the injury;

(iv) The employee's future earning capacity; and

(v) Evidence of disability corroborated by the treating medical records.

In the case at bar Dr. Cronin offered an impairment rating of 7 pursuant to subsection (a). At the time of the injury petitioner was a 44 year old maintenance technician. Since being returned to full duty work petitioner has resumed his 80 hour work week and the petitioner presented no evidence that his future earnings capacity has been impaired in any way. When petitioner last followed up with Dr. Prather on 6/10/13 Dr. Prather noted that petitioner was doing well, and his pain was controlled. He noted that he was not using any assistance devices. When petitioner was examined by Dr. Cronin on 2/16/14 he had complaints of pain in his right knee going up and down stairs; weather changes caused pain in his right knee; difficulty picking up items from the floor due to knee stiffness and pain; and knee stiffness in the morning after sleeping. Dr. Cronin opined that petitioner's status was "Guarded" based on the requirements of his job, which requires constant kneeling and squatting underneath machines, and that this is difficult for him to do.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner sustained a 20% loss of use of his right leg pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Leyden,
Petitioner,

vs.

NO: 11 WC 37252

15IWCC0260

Hoffman Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 2014, is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-04/08/15
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEYDEN, ROBERT
Employee/Petitioner

Case# **11WC037252**

15IWCC0260

HOFFMAN TRANSPORTATION
Employer/Respondent

On 6/25/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

BROWN & BROWN
DAVID JEROME
5440 N ILLINOIS SUITE 101
FAIRVIEW HEIGHT, IL 62208

1723 McBREARTY HEART & KELLY
BRIAN K McBREARTY
222 S CENTRAL AVE SUITE 200
CLAYTON, MO 63105-3509

STATE OF ILLINOIS)
)SS.
COUNTY OF St Clair)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Leyden
Employee/Petitioner

v.

Hoffman Transportation
Employer/Respondent

Case # 11 WC 37252

Consolidated cases: _____

15IWCC0260

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lee**, Arbitrator of the Commission, in the city of **Belleville**, on **Mrch 21st,2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$67,548.19**; the average weekly wage was **$1,299.58**.

On the date of accident, Petitioner was **68** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Benefits are denied because the Arbitator finds the accident did not arise out of or in the course of Petitioner's employment.

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

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

Signature of Arbitrator

6/23/14
Date

JUN 25 2014

1STATE OF ILLINOIS)
)SS
COUNTY OF ST. CLAIR)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROBERT LEYDEN
Employee/Petitioner

v. **Case # 11-WC-37252**

HOFFMAN TRANSPORTATION
Employer/Respondent

15IWCC0260

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

PETITIONER'S TESTIMONY

Petitioner testified that his name is Robert L. Leyden, born September 2, 1943. At the time of the hearing, he was 70 years old.

Petitioner testified that he had been treated previously for throat cancer, which causes him current problems with speaking.

Petitioner has been married for 37 years to his wife Darlene. He has two children who he claim are partially dependent upon him, they both live with him.

Petitioner testified on August 23, 2011, he was working for Hoffman Transportation in Channahon, Illinois. He began working for them 1997. He worked full time as a bulk driver. Hoffman Transportation is in the business of hauling dry and liquid products in bulk trailers.

Petitioner testified that his job duties were to load the trailer, drive to a destination, and unload the trailer and then usually return to the company terminal. Some of the trailers they would haul were loaded with plastic pellets.

He recalls the date of the accident as August 23, 2011 as a Tuesday. He testified he worked that previous week leading up to August 23. He normally works Monday through

Friday. He testified the week prior he worked the 15th – 18th but did not work on Friday. On Thursday the 18th, he had a load that was to be delivered on Monday the 22nd to Fort Smith, Arkansas. He, therefore, came home for the weekend on the 18th.

He testified it is not unusual that there would be a delay in the delivery date. He stayed at the company facility. On Friday morning, he drove home. He stopped at Alorton, Illinois. He parked his vehicle at the Flying J truck stop there. His wife would come to the truck stop and pick him up.

He did state that when he took that Friday off, he did discuss with individuals at Hoffman about the activities he was going to do that weekend. He told Tom Oswald, the dispatcher, he would probably use the time to finish up moving. He testified that he had moved to a new house on August 11. When he moved on August 11, he testified that they hired a company called Two Men and a Truck. He admitted that prior to August 11, he had boxed up items for the movers. He admitted that he took August 8 – Friday the 12th off in order to prepare for the move.

He denied it when it came to the move itself, that he moved any of the furniture. He denied moving any of the boxes that he had packed up. He did admit that there were some items that he moved himself that he did not want the movers to move.

According to the Petitioner, the movers loaded and unloaded all of the items into their new house. He denied that by August 11 he had injured his right shoulder. He testified that after August 11, he did return to work the following week. He may have taken Monday off and returned on the 16th.

He denied having any problems working with his right shoulder.

He testified that when he took the 19th off, the furniture had already been moved and placed. The majority of the boxes had been unpacked. He testified there might have been some pictures to hang or dishes to be put in the cupboards. He denied moving any furniture again.

He denied on the weekend of the 19th doing any heavy lifting. He denied injuring his shoulder.

He testified that he left home Sunday evening probably about 7:30 p.m. He traveled to Cuba, Missouri. He believed he got to Cuba, Missouri about 9:30 p.m.

Petitioner testified that his truck has a system called Qualcomm. It is a communication and tracking device installed on the truck. It shows where his truck is at all times.

Petitioner identified the Qualcomm report, marked as Exhibit 9.

Petitioner admitted his log book was not consistent with the Qualcomm report. His log book did not indicate that he stopped in Cuba, Missouri. He wrote in his log book that he stopped at Bois D'arc. He specified that this is 100 miles further down the road from Cuba.

According to the Petitioner, he put this incorrect or false entry because by DOT regulations he is limited to how much he can drive on a given day. If he had logged it correctly, he testified he would have used up a majority of his driving time and be limited in his driving after he delivered in Fort Smith on Monday.

According to the Petitioner, he notes that other drivers at Hoffman do the same thing. Petitioner testified that the dispatcher, Tom Oswald, and Jerry Curl, the Operations Manager, were aware of these false entries. He denied ever being reprimanded for this.

He did state that "some paperwork was set aside" because of the discrepancies between Qualcomm versus log book. However, he denied ever being reprimanded by going over his hours. He testified that according to the Qualcomm report, he arrived at Ft. Smith about 10:30 a.m. in the morning. He delivered his load there. He testified that he then went to a satellite terminal in Ft. Smith and switched trailers. This trailer contained plastic pellets. Petitioner then identified Exhibit 8, which is a photograph showing a trailer similar to the one that he drove that day. The load that he picked up was destined for Perry, Missouri.

He stopped at Conway, Missouri. He denied having any problems with his right shoulder.

The next day he drove to Perry, Missouri. He believes he got there at 8:30 a.m. in the morning. The pellets are to be unloaded with air pressure. He takes a 4 in. hose and hooks one end to the bottom of the trailer and the other end up to the silo. He then takes another hose from the blower on the rear of the tractor to connect it onto the trailer that uses air pressure to push the plastic pellets out.

After he attached the hoses, he turns the blower on to pressurize the tank. He noted that he had a problem doing this. According to Petitioner, he could not get pressure to build in the tank. He testified that he walked around the trailer to make he had not forgotten to close some valves. He then went up onto the top of the trailer to inspect the hatches. There were four hatches on the top of the trailer.

Petitioner testified the lids on the top of the trailers are hinged. There are six clamps and all the lids shut.

When he got up on top on the trailer, one of the clamps on the front hatch was not clamped down. He testified that he put it over and positioned it and attempted to close it. He testified that he closed it but it popped right back out. He attempted to do this twice. He testified that on the third occasion he was going to make sure that it was closed. He testified that he put the heel of his hand on the clamp and leaned on it hard to get it to stay closed. At that time, he testified that he felt a pain in his right shoulder. He testified it felt like somebody ran a spear through his shoulder.

Petitioner testified there were no witnesses to this occurrence. He testified he started to have tunnel vision. He thought he was going to black out. He sat down on the trailer to gather

himself. He was then able to climb down the side of the truck, he was able to finish unloading the pellets. He was able to put the hose back. He denied talking with anyone at the facility about the incident. He was able to get in the trailer with what he described as difficulty and returned to the facility in Channahon. This is about 260 miles away. He testified that he had difficulty driving. He did not have as much mobility in his arm. He had to lean over to push the gear shift over to get it into gear. While he was driving back, he called his wife.

After that, he called Tom Owald, the dispatcher. He testified that he told the dispatcher how he hurt his shoulder and was advised to come in and arrange to get him in to see a physician.

When he got back to the terminal, he talked to Tom Owald and Jerry Curl.

He testified that he did tell them about his work injury, they then sent him to Morris Hospital Urgent Care.

When he got to the Urgent Care, he saw a nurse practitioner. Petitioner testified he told her the shoulder problem began when closing the lid. He denied telling her about lifting any furniture at home. He denied injuring his shoulder while lifting furniture. He does not know where the history contained in medical records came from.

After being seen at the Urgent Care, he did return to the plant. He did fill out an injury report the next morning.

That night he called his wife to come pick him up.

The next morning, he discussed the incident again with Jerry Curl and Mike Tallaksen. Mike filled out a Report of Injury.

He identified the Report of Injury as Exhibit 3. The history there is consistent with what he testified to.

Later that morning, his wife came to pick him up and took him home. He went to see his own physician, Dr. Markenson. He had treated with Dr. Markenson previously. He testified that when he saw Dr. Markenson, he gave him a history of involving working with the lid. He denied telling him about moving any furniture at home.

Dr. Markenson gave him an MRI, and he was diagnosed with a rotator cuff tear. Dr. Markenson did get him into surgery on November 16. He followed up with Dr. Markenson and had physical therapy. He was released by Dr. Markenson on April 16, 2012.

Petitioner testified that Dr. Markenson told him he was disabled from truck driving. He testified that Dr. Markenson told him that he should not do any overhead lifting with the shoulder or lifting when it is out in front of him.

He testified that he did go to see Respondent's physician, Dr. Milne. He testified he gave Dr. Milne the same history of closing the latch.

He testified that Dr. Milne gave him restrictions of no lifting of over 10 lbs. overhead, that he was not capable of returning to work as a truck driver.

He did testify that while he was undergoing treatment, he was given light duty restrictions by Dr. Markenson which the Respondent was unable to accommodate.

Petitioner did testify that he did draw long term and short term disability benefits.

He is no longer employed by the Respondent. He was terminated six months ago. Apparently, because it had been such a long time that they filled his position.

Petitioner testified that while he was working for Hoffman, he was drawing Social Security retirement. Petitioner testified that he was not planning on retiring leading up to the accident. He wanted to drive as long as he could.

He admitted that after this incident, he stopped working. He believed there was nothing that he could do.

Petitioner testified that he was seen by his own vocational rehabilitation counsel as well as the one from Respondent.

Petitioner testified he does not believe he is employable. Because of his age and his restrictions and his alleged lack of skills, he does not see what he would be able to do.

He testified he is unable to lift his arm overhead.

He continues to abide by Dr. Markenson's restrictions. He is taking some over the counter Ibuprofen. He takes it about 3-4 times per week. He still complains of pain in his shoulder.

He would estimate his pain as between a 4-5 on a scale of 10. Sometimes he feels like it is a 7. When that happens, he takes Ibuprofen.

He denied ability to lift any weights over his head. He denied being able to lift any weights in front him. He can lift weights from the floor, like a laundry basket if he keeps it close to his body.

He testified he recently seen Dr. Markenson for a lump in his shoulder. Apparently, that lump has since gone away.

He denied being able to do any lawn maintenance. He cannot use a weed eater or push a lawn mower. He does not feel safe climbing the ladder. He does not believe he can hang pictures.

He is able to pick up groceries if he keeps them close to him.

He denies being able to pick up his grandchildren. His shoulder wakes him up at night at times.

Petitioner identified Petitioner's Exhibit 10 the listing of medical bills. These are the bills that were paid through group health insurance medical or by him.

On cross examination Petitioner admitted that he had two years of college education at SIU Edwardsville, as a double major. He admitted that he had done "pretty well academically". He admitted he was a high school graduate. He also admitted that he did five and a half years in the military, rising to the level of an E5 as office specialist for full colonels and above. He did all their clerical work, dictation, appointments, scheduling, etc.

He admitted that he had a fair number of jobs. His first job when he returned to civilian life was managing a bar in Washington, D.C. He did the payroll, the scheduling, etc. He admitted that was a management position. He admitted also that he had been in the air freight business, starting off as clerical and ended up running an office. He managed an office in Kansas City and handled management duties at a freight business in Los Angeles. He admitted that his job at Olin was varied, running a forklift, running a slitter and getting into a job as a lab technician.

He also worked as a drill stem tester. He agreed that it required a bit of sophistication.

He admitted that he had a history of being able to be taught to do things.

With regard to the date of the incident, August 23rd, when he drove to Cuba, he admitted that he could have driven 7 or 8 hours on Sunday, getting closer to Fort Smith, which would not have counted against his time on Monday. He did not agree that there was no point in fudging his driver's logs, stating there was a Bois D's arc instead of Cuba, as long as he took 10 hours rest in between Sunday and Monday.

He admitted that he when he was in Perry to unload the tank and went up to the tank hatch, it was not pressurized. He admitted that there was not any resistance when he pushed down on the latch the initial time. He stated that it pushed down just fine. His testimony was that it flipped down fine, but when he moved his hand, it just popped up, even though there was no pressure underneath it to pop back up.

He disagreed with the statement that there was almost no resistance, but after discussion of his prior deposition, he admitted that at the time of his deposition, that he said that there was almost no resistance.

He admitted that there was nothing unusual about the latch, it did not look like there was anything unusual to the Petitioner. He did not have to use two hands.

With regard to the history at Morris Urgent Care, he admits the records states that the chief complaint was pain in right shoulder, moving four days ago. He admitted that the nurse practitioner that he saw would not have known that he moved on August 11th. He admitted that he was alone with the nurse practitioner at Morris Urgent Care when he gave the history. He admitted that the individual who took the history would have not have known the Petitioner before that date. He admitted that the records indicated that he was on 800 milligrams of ibuprofen at the time of the evaluation.

He admits that they got his address correct, his social security number, date of birth and his name correct. He admitted that he cannot explain that history. He admits that there is nothing in that history that discusses, latches, lids or hatches.

He admits that he has not looked for any work since April 2012. He admits the medical bills were paid partially by insurance, provided through Hoffman Transpiration. He admitted that the long term and short term disability that he was paid was also through Hoffman Transportation.

He admits that he told Dr. Markenson on April 16th that he was doing about the same, still had some discomfort and soreness in his right shoulder, but better than he was before the surgery. He stated he was doing relatively well. He admitted that he told Dr. Markenson that he could do day to day activities reasonably easily.

He admitted that Dr. Markenson did not tell him that he could not work at all, just that he cannot do over the road driving.

When discussing the move, he did admit that he had to pack up the boxes in his house before the movers got there. He admitted he had to unpack them all. He admitted that he may have moved a table or two once things got set. He admitted that he did do some moving.

On re-direct, the Petitioner stated that he was in college at SIU Edwardsville in 1970 to 1979. He stated he has very basic computer skills. As a typist, he does "hunt and peck". On re-direct when asked about dogging the latches, he stated that he did exert a lot of pressure on the third time on the latch because he meant for it to stay closed. He testified that he pushed the latch down real hard.

He testified that after the injury he called his wife and he called Tom Oswald. When he got back to the facility, he talked to Tom and Jerry Curl. When he went over to Morris Urgent Care, he wasn't aware that they knew he was on the way. He did give them a form that he had received from Jerry Curl.

He was not aware whether anyone from Hoffman Transportation had called over to Morris Hospital before he got there. He stated that at Morris Hospital he talked about an event occurring four days prior, which would have been on a Saturday. He testified that he wasn't moving anything on Saturday. He denied moving anything on Friday as far as furniture. He denied any injury to his shoulder on Friday or Saturday.

DEPOSITION TESTIMONY OF DARLENE LEYDEN

Petitioner's wife testified. Her name is Darlene Leyden. She has been married to the Petitioner for 37 years. She testified that she was present on August 11, 2011 when she and her husband moved to the new home. She testified that she and her husband hired a company to do their moving for this. She testified that they moved the boxes. She testified that she did not see her husband do any lifting of furniture or heavy boxes during that move. She testified that the Petitioner never complained about problems with his right shoulder during the move. She testified that she is a nurse.

She recalls August 19th because Petitioner had taken a half day off from work. She was also off work that day. She went to pick him up where he parked his truck. She testified that day, they were trying to get everything in its place, Petitioner's glasses, get the house together. She denied that any furniture had to re-positioned. She denied that any boxes had to manipulated by the Petitioner. She testified that she drove Petitioner to his truck on Sunday. She testified that he did not complain to her about any problems with his right shoulder.

On cross examination, she stated that she did not have any reason to believe the doctors in Morris, Illinois would know anything about Petitioner moving. She could not imagine why anyone in Morris, Illinois would know about Petitioner moving. In terms of the packing, she initially stated that she did all the packing. She then stated that she did not witness her husband packing boxes. She was upstairs and he was downstairs. So she would not know if he lifted boxes or not. She would not have been able to see him. She would not know if he had moved them or not. She would not know whether or not he had to move them. She does know that he packed the boxes downstairs. She does not have any reason to disagree on direct that he did move some end tables and things.

TESTIMONY OF GERALD CURL ON BEHALF OF RESPONDENT

Mr. Curl testified that he is 50 years old and has worked at Hoffman Transportation for 18 years. His current job title is Director of Operations. He oversees the daily functions of all areas of the company including risk management.

He has known the claimant for a long time, probably 15 to 20 years. He described his job as a driver.

He testified that prior to April 23, 2011, he was aware that the Petitioner had taken some time off work from the move. It was general knowledge that Petitioner was taking some time off to move his household.

He first became aware that the Petitioner said he hurt himself on the job when he came into his office in the afternoon of August 23. Petitioner told him the Petitioner was pushing on a latch and would not stay down and he pushed on it harder and he felt pain. At that point, the witness had one of Petitioner's co-workers take him to Morris Urgent Care, an extension of Morris Hospital for Occupational Health. He did not call over to Morris Hospital. He did not tell anyone at Morris Hospital what had allegedly happened. He is unaware that anyone from Hoffman would have told Morris Hospital about what had allegedly happened.

He did have a co-worker, Ron Busby, take Petitioner over to Morris Hospital. At that point, the witness had no reason to question the Petitioner's version of events.

With Petitioner telling him about the latch on the trailer, the witness testified that they brought the trailer in for inspection. He had the shop bring it in. The purpose is to inspect the latch and to make sure it is operating properly or if it needed a repair. The standard operating procedure is when something is broken, it needs to get fixed.

Mr. Curl testified it is standard procedure to perform the inspection. The trailer was inspected and there was nothing wrong with the latch. This inspection happened almost immediately.

Mr. Curl testified that later he got information through his insurance carrier, about the history Petitioner had given at Morris Hospital. Subsequent to that history, they inspected the latch again. They videotaped it to show what it takes to operate the latches. It was the exact same trailer the Petitioner had used that day. He identified the video which is contained in Respondent's Exhibit 4.

There were never any problems subsequently with the latch after the inspection. He testified if the tank is not pressurized, he cannot think of any reason why the latch would not stay down.

With respect to the Petitioner's testimony regarding the falsifying of logs, he stated that nobody at Hoffman approved of driver's fudging the location of the driver logs. He testified that the hours that Petitioner would have had would have been more than enough hours to get to Ft. Smith leaving on Sunday at 7:30 p.m. at night. He had more than enough hours to get to Ft. Smith when leaving on Sunday.

Mr. Curl testified that the rule at the time is you could drive 10 hours, work a total of 14 through the whole day. He would then have to take a consecutive 10 hour break and then start your day again. Therefore, driving 2 hours to Cuba would have not benefited Hoffman at all. He said that it is a constant battle with the drivers with regard to the logs and tracking their hours. They have had to hire somebody and bought a program to monitor the logs, because it is a battle with the drivers. In other words, the falsification of log was not to Hoffman's advantage, it is something they have had to spend money to correct.

He testified he did not approve of Mr. Leyden's practice. Nobody at Hoffman would have approved it. There would have been no benefit to Hoffman Transportation in doing so.

Mr. Curl further testified regarding the latches. They are called dog ears. There are six to eight depending upon the manufacturer. The dog ears are adjustable to match a dump trailer hatch.

On cross-examination, on the date of the accident, he was Director of Operations, not the Safety Director. The Safety Director was Mike Tallakesen.

He did review the Report of Injury that Mike Tallakesen completed and it did state the Petitioner stated that he hurt his shoulder closing a latch. He agreed that when an individual comes to the Safety Director to report a work injury, filling out the report would be one of the requirements of the Safety Director.

Usually the Safety Director would send him over to Morris Hospital. He admitted they sent all of their injured workers to Morris Hospital.

He did state, in his deposition, he said that he would call over to the hospital and give a brief description of what had happened. He stated someone would call over and let Morris Hospital know someone is on their way.

He testified that he was the one who sent Petitioner to Morris Hospital. He is unaware of who may have called over there. He does not know if anyone actually did that. It could have been Mike Tallakesen. Mike Tallakesen no longer works for Hoffman Transportation. He does not know what Mike would have told Morris Hospital even if he did call. He admitted that Mike could have known that Petitioner moved to a new house. He does not know what Mike may or may not have said. They do use Morris Hospital for occupational injuries, drug tests, and DOT physicals. If it was a non-occupational injury, they would not direct medical treatment. When he sent the Petitioner over to Morris Hospital, he had no reason to doubt Petitioner's story. He came in and told them what had happened and the witness sent him to be checked out. He admitted that the Petitioner said nothing about injuring his shoulder moving furniture or moving household items.

He admitted that the Report of Injury does not mention moving furniture.

Prior to August 23rd, Petitioner had never complained of any problems with his shoulder. He did not mention any problems with his shoulder between August 11 and August 23. Petitioner would have been at the offices in between August 11 and August 23. During that period of time, he never mentioned any problem with his shoulder. He did not notice Petitioner holding his shoulder in an awkward manner or having any grimace and pain problems with the shoulder.

On redirect, Mr. Curl testified the report from Morris Hospital said Petitioner hurt himself four days prior to the visit. That was on Tuesday. Four days prior to Tuesday would have been

Saturday. He admitted that he did not see the Petitioner on Saturday or Sunday. If he had hurt himself on Saturday or Sunday, he would have no reason to see him complaining or favoring his shoulder.

Petitioner testified on rebuttal. On rebuttal, Petitioner testified that he disagreed with Mr. Curl's testimony regarding repair orders or repairs to the hatch. He testified he was sitting in Jerry Curl's office the morning of the 24th and he looked into the shop and noticed they had pulled the trailer in. He testified he was sitting there and they pulled the trailer in and changed the dogs on top of the trailer. That was on August 24th.

Respondent then called Jerry Curl as rebuttal. He testified he disagreed with Petitioner's testimony regarding changing the dogs. He stated it never happened. To do that, they would have to do paperwork and work order. He testified that in the time that the Petitioner was there, there would not have been time to get a work order and get the hatch fixed. He did state that the latch was inspected that day and the Petitioner saw them inspecting the hatch and thought they were working on it.

DEPOSITION OF TESTIMONY OF TOM OSWALD ON BEHALF OF RESPONDENT

Respondent introduced the deposition testimony of Thomas Oswald. He testified that he is currently employed with Hoffman Transportation and has been for the last 24 years. The last ten years of that, he has been a dispatcher. His job is to line up loads and put drivers on those loads.

He testified that currently communications with drivers are through Qualcomm. This is a satellite transmitted message to the drivers. They also talk to drivers by cell phone.

He testified that if a driver calls in and reports an injury at work, he contacts Jerry Curl. He does not do any paperwork in that instance. All he does is ask the driver to contact Jerry Curl. (R3, P. 7).

Hoffman Transportation sends their injured workers to Morris Hospital. (R3, P. 8). He has known the Petitioner as long as the witness has worked at Hoffman Transportation. The witness first became aware that Petitioner reported an injury when Petitioner called into dispatch. (R3, P. 10).

When the Petitioner called in, Petitioner did not tell the witness what happened. When Petitioner called in, he complained about his arm, he said he could not use his arm. (R3, P. 12). The witness did not remember the exact time that he called in, but it was in the afternoon. The Petitioner called by cell phone. According to the witness, the Petitioner said I don't know what's going on, but I can't raise my arm. (R3, P. 13-14). Petitioner did not discuss how he had injured his arm. (R3, P. 14). This is the first time the Petitioner had ever complained of problems with his arm. (R3, P. 15). Petitioner did not tell the witness that he had hurt himself moving furniture. (R3, P. 15).

The witness admitted that when unloading, the tank has to be pressurized. If a cap or lid on top of the tank is loose, it can cause problems with pressurization. (R3, P. 16). In order to check on the lid, Petitioner would have to climb to the top of the trailer. (R3, P. 17).

Prior to this incident, he recalls that the Petitioner took a load and went home on a Thursday and did not deliver the load until Monday. (R3, P. 18). The witness testified that DOT does have special rules, limiting the period of time that you can drive in a day. He was unaware that there were drivers that would alter the load and unload time in order to keep their books in compliance with DOT. (R3, P. 20). He did talk to Petitioner on Monday, August 22, 2011. (R3, P. 21). The Petitioner did not complain of problems with his arm on Monday. The witness testified that the Petitioner would have unloaded on Monday. That would require hooking up hoses, and they weigh between 50 to 60 pounds. You could do this one-handed. (R3, P. 22). The witness testified that the Petitioner did not tell him that he injured his arm, the Petitioner said I've got something wrong, I can't raise my arm. (R3, P. 23). This was in the afternoon. The witness told the Petitioner to contact Jerry Curl. The witness was more concerned that the Petitioner might be having a heart attack because the Petitioner said his arm was really strange. (R3, P. 24). It did not cross the witness' mind at this point that it was a work injury. (R3, P. 24). When the Petitioner called in, the Petitioner was at the terminal. (R3, P. 25). When someone calls in reporting an injury, the witness does not, in any way, investigate whether or not it is work related. (R3, P. 25). When a driver is having problems, the witness does not report it or record it. (R3, P. 27). He is unaware of the Petitioner telling him, or anyone else that Petitioner had injured his arm moving furniture at home. (R3, P. 27). The witness has not spoken with any other co-workers who talked with the Petitioner about problems with his right arm. (R3, P. 28).

The witness has no idea whether the Petitioner moved furniture himself or had movers do it. (R3, P. 29). The witness is unaware of any policy of the owners advising the employees to put work injuries under their group health insurance. (R3, P. 30).

On cross examination the witness stated that the Petitioner did not work on Friday or Saturday prior to August 23, 2011. (R3, P. 30). The witness was told by the Petitioner that the Petitioner was doing something with his house that weekend. The witness did not remember if the Petitioner had requested extra time for that weekend. (R3, P. 31). Petitioner did tell the witness when he went home that Thursday night, that the Petitioner was going to be engaged in some activities involving Petitioner's house. (R3, P. 32-33).

REVIEW OF PETITIONER'S MEDICAL TREATMENT

The first treatment Petitioner received was at Morris Hospital. (P4). It indicates Petitioner was first seen at 1800 hours or 6 p.m. In the handwritten note, under chief complaint, it stated pain in the right shoulder, moving 4 days ago. The onset was 4 days ago.

X-rays were taken of the right shoulder was negative.

On another handwritten note on (P4, P.7) it notes a history taken by a nurse and signed by a physician. He listed his home medications as among others Glucosamine and Ibuprofen, 800 milligram and last dose at noon today.

He was referred to an orthopedic surgeon. A more detailed history is taken where he complained of right shoulder pain. It lists his primary care physician and under chief complaints states right shoulder pain moving household items over the weekend. Thinks he pulled something. Onset 4 days before.

There is no discussion of any work related activities. There is further history from the Petitioner regarding his throat cancer occurring in November of 2004. Petitioner's signature appears on multiple locations on Exhibit 4.

Petitioner's next treatment was with his orthopedic surgeon, Dr. Markenson. The records of Dr. Markenson's treatment are contained both in Petitioner's Exhibit 1, the deposition of Dr. Markenson and to some extent in Petitioner's Exhibit 5, the records from St. Anthony's Medical Center.

Petitioner was first seen by Dr. Markenson on August 26, 2011. In the handwritten history, he noted complaint of a sore shoulder times 2 days. The handwritten note asked whether this was a work-related injury and that was not answered.

Dr. Markenson's report from August 26th took a history that Petitioner injured his shoulder when he was at work. It noted he was trying to push down on some type of latch and had difficulty getting the lock in place and was able to push it down and felt immediate pain in his right shoulder and difficulty in moving it. "This occurred 3-4 days ago".

Dr. Markenson examined Petitioner and noted limitation in range of motion. He noted prior history of surgery to his right wrist which left him with some slight stiffness in rotation and otherwise the forearm and elbow were fine. Dr. Markenson suspected a rotator cuff tear and ordered an MRI. The MRI was performed at South County MRI on August 29, 2011. The impression was massive rotator cuff tear involving the right supraspinatus and infraspinatus with associated tendon retraction. Atrophy of the infraspinatus muscle was also noted.

Dr. Markenson recommended surgery. He was seen again October 11, 2011 complaining of symptoms in his shoulder and Petitioner thought they were getting a little worse. They were still waiting to hear from Workers' Compensation.

He was seen again on October 27, 2011 and was still waiting for approval for surgery. There was also an indication of some cardiac issues and Petitioner had to get a referral for cardiac clearance prior to surgery.

Dr. Markenson performed surgery on November 16, 2011 at St. Anthony's Medical Center. He performed an open right rotator cuff repair with acromioplasty. Dr. Markenson

noted in the Operative Note that he thought this would be an acute tear no more than 3-4 months old.

He was seen again for a follow-up on 11/22/11, one week after the surgery. Dr. Markenson noted it was a massive tear with significant retraction. Petitioner stated he had been doing well. He was referred for general physical therapy at that time.

He was seen for follow-up on 4/16/12 noting still was in discomfort, soreness in the right shoulder, and better than he was pre-operatively. He still maintained some weakness due to inability to completely repair the rotator cuff.

Petitioner was noted to have range of motion to 130 degrees of flexion with some weakness and no red range of motion. Dr. Markenson noted some loss of slight external rotation. Dr. Markenson noted overall that the Petitioner was doing relatively well.

Dr. Markenson stated in final his note that Petitioner was not able to go back to doing strenuous work, such as driving an 18-wheeler. He is not going to be able to reach overhead to climb and grab ahold of the bars. He suspected it would be difficult for him to do any type of lifting of equipment or driving a truck itself. He was released PRN on April 16, 2012.

Petitioner's Exhibit 6 is the records from Pre-Rehab. The progress note dated December 30 2011, 6 weeks after the surgery, noted that his complaints of pain were intermittent ache, severity from 0 to 10 at the best, and 4 to 5 out of 10 at the worst.

It noted his sleep was disturbed but not because of his shoulder symptoms.

Progress note of January 27, 2012, 10 weeks post-surgery, noted Petitioner's pain continued to improve and symptoms now usually occurs when he forgets about the arm and reaches quickly for something. He complained of intermittent ache with severity of 0 to 10 to 3 to 4 out of 10 at work. He noted his sleep has been much better and minimally affected by the arm.

DEPOSITION TESTIMONY OF DR. MARKENSON

Petitioner introduced the deposition testimony of Dr. Markenson as Exhibit 1. Dr. Markenson testified he is a board-certified orthopedic surgeon. Approximately 10% to 15% of his patients involve shoulder injuries. He does not do a lot of Workers' Compensation patients.

Dr. Markenson testified he first saw Petitioner on November 16, 1998 for right elbow problems when he drained his right elbow.

He saw him again in December 2000 when he broke his wrist which required surgery.

He testified he saw him later in August 2006 for pain in his left knee or degenerative arthritis in that knee.

He never complained about his right shoulder before.

Dr. Markenson testified that Petitioner had given a history he hurt his shoulder at work when trying to push on a latch. He was having difficulty with it and he pushed down on it and felt some pain in his shoulder. (P1, P. 10-11). According to his note, Petitioner said this occurred 3-4 days before he saw them so the 23rd or 24th. (P1, P. 11). Petitioner did not mention moving furniture. He did review the Report of Injury and that history is consistent with what he was told. (P1, P. 11). Dr. Markenson noted Petitioner had some severe loss of range of motion in his arm as far as ability to move his arm up away from his body. It was a difficult examination because it was hurting him so badly. (P1, P. 12).

He testified that it was his impression Petitioner had a torn rotator cuff tear. (P1, P. 13). He ordered an MRI, which revealed that he had a large rotator cuff tear. (P1, P. 14). He testified that you can get a fairly good idea about how old the tear was. He testified that the supraspinatus muscle showed no fatty infiltrate of the infraspinatus did show some mild fatty atrophy. At the end, it looked like he had an acute process to the rotator cuff tear. He would have said at least within 3-6 months would be a reasonable time to consider it was an acute tear. (P1, P. 16).

He recommended surgery. (P1, P. 17).

In surgery, he could not quite approximate the tendon. He was able to get it fixed but it was not ideal. (P1, P. 21). From his observation, he believed that the tear was relatively fresh within a couple months. (P1, P.23).

He was seen in follow-up by his physician's assistant. He was started on some passive exercises. (P1, P. 25). He kept the Petitioner off of work. He saw him again on December 13 continuing with easy physical therapy. He did not want to push it too much. (P1, P. 25).

By February 2nd, he was making progress. He was a little sore as expected starting a little bit more active range of motion. (P1, P. 26).

He saw him again on March 19 and he was still a little sore in his shoulder. He was concerned whether he was going to be able to go back to driving a truck. (P1, P. 26).

The last time he saw him was April 16, 2012. He was a little bit sore which was not particularly uncommon with a rotator cuff tear. His active range of motion was better, 130 degrees of flexion not quite overhead but getting there. He was still weak. He lost a little bit of motion but doing reasonably well. His daily activities seem to be okay as long as it is not anything too strenuous. (P1, P. 27). He kept him off of work up until April 16, 2012. He told Petitioner that he was not going to be able to go back to doing that type of work again. (P1, P. 27).

With regard to restrictions, he told him he was not going to be able to drive a big truck. The claimant told him that he had to hook up trailers doing pin removal and he did not think he was going to be able to do that. He was concerned he would re-tear the rotator cuff. He also had concerns with him reaching overhead. (P1, P. 28).

He did not believe he would be able to do a job that would require overhead lifting. He did not believe he would be able to perform a job that would require lifting out in front of him. He did believe that as of April 16 he had reached maximum medical improvement. (P1, P. 29). He has not seen Petitioner since that date. (P1, P. 30).

Dr. Markenson testified that he believed that the history that Petitioner had given him was consistent with the nature of the tear that he saw. He testified that if the history was incorrect, it may change his opinion about what caused it but it would not change his opinion from a standpoint of treatment. (P1, P. 31).

When asked if he thought if Petitioner could have worked after August 11, 2011, given the tear that was seen the MRI, he testified that he assumed it would have to do with "with this pin". It is his understanding it was a strenuous thing to do. He did not believe he would be able to do that personally. (P1, P. 32). He testified the Petitioner would have difficulty moving his shoulder. (P1, P. 33). It would have been extremely difficult for him to do overhead work. (P1, P. 33). Based upon the history, he did believe Petitioner's injury and treatment was related to the incident he described. (P1, P. 33-34).

On cross-examination, Dr. Markenson indicated he had never seen the Morris Hospital records until just prior to the deposition. He admitted that in the report from Morris Hospital there is no type of history regarding pushing a pin involving his truck. (P1, P. 36). Dr. Markenson admitted that if he was lifting something heavy enough and started to fall, if he was lifting some large objects overhead and got away from and started to drop, it is possible to tear a rotator cuff that way. (P1, P. 37). He noted the history in the Morris Hospital records was inconsistent with the history that was given to him 3 days later. (P1, P. 37). If Petitioner was not being truthful in his history, that would change his opinion about causation. (P1, P. 37). Dr. Markenson stated that the age of the individual is not as important to rotator cuff repairs and quality of the tendon. (P1, P. 38). Further stating on cross-examination, when he said Petitioner cannot drive an 18 wheeler, it does not mean he cannot do any type of work. He said Petitioner did tell him about retirement but he could not remember if it was because of his age or because of his shoulder.

On redirect, he was asked whether or not medical records from emergency rooms can be inaccurate. He does not remember. Sometimes it will happen. He can occasionally get a patient mixed up with someone else, so it is possible. (P1, P. 41). As a lay person, it seemed unusual that Petitioner would tell the employer one thing and his physician another. (P1, P. 42). He admitted that the histories contained in Morris Hospital and the history given to him was two different histories.

DEPOSITION TESTIMONY OF DR. MILNE

Dr. Milne testified that he is an orthopedic surgeon. He testified that he prepared two reports on the Petitioner. The first report was January 16, 2012. He testified that based on the history that he had been provided by the Petitioner, he concluded that the Petitioner had sustained a work related accident. (R2, P. 7). He testified that subsequent to the report, he received additional medical records, and prepared a second report dated April 2, 2012. These records included the records from Morris Hospital dated August 23, 2011. He testified that this changed his opinion regarding the cause of his injury. (P2, P. 8).

Dr. Milne testified that moving heavy furniture or moving any furniture, something that could cause a rotator cuff tear, that Petitioner experienced. (P2, P. 9). The initial injury he described, pushing a lid closed, that could also cause a rotator cuff tear. (P2, P. 9).

Dr. Milne testified that there is no way by reviewing the MRI of the operative report which event would have caused a rotator cuff tear. (R2, P. 10). He testified that a massive rotator cuff tear is usually associated with a more chronic type of long standing tear. There can be an acute massive tear, but it usually requires a large amount of trauma. This would include like someone falling from a height, off scaffolding. (R2, P. 10). In his opinion, with the retraction and the mild infiltrate of the infraspinatus, he felt there was some longer term chronicity of this tear. (R 2, P. 11). In his opinion, based on what he has seen, it is his belief that he had some rotator cuff damage prior to whatever incident occurred in August and either the work or the home injury aggravated or accelerated a previously asymptomatic rotator cuff tear to become symptomatic. (R 2, P. 12).

Dr. Milne did look at the hatch video. It did not appear to be an event, even if you were pushing hard, that would cause a massive rotator cuff tear. (R. 2, P. 12). It appeared to him that the force needed to close the lid would be about the same force needed to do a push-up and he did not believe that would cause a massive rotator cuff tear. (R2, P. 13).

Dr. Milne did not believe that if someone were to push the lid closed, even using all their body weight, would be enough, "massive trauma" to cause to a massive rotator cuff tear. (R 2, P. 13). He saw the Petitioner again on July 23, 2012 after being released by Dr. Markenson. He testified that he did not believe that the Petitioner could return to full, unrestricted duties as an over the road truck driver. (R2, P. 16).

On cross examination he stated that he talked to Petitioner two times. (R2, P. 16). He did this at the request of the insurer. He noted he has done IMEs for CCMSI in the past year. In the last year he said he probably did more than 10 and less than 30.

He admitted that when he saw the Petitioner on January 16, 2012, he was told that the Petitioner was pushing down on the hatch and took several attempts at closing the hatch when he felt pain in his right shoulder. He did admit that at that time he concluded that the right rotator cuff had been repaired but the Petitioner continued to have right shoulder adhesive capsulitis. He did recommend further physical therapy. (R2, P. 17). He did also state that if physical

therapy did not work, he recommended manipulation under anesthesia. (R2, P. 17). This was to help the Petitioner regain his range of motion. Secondarily to regain some strength.

At the time he saw the Petitioner in January 2012, he had the reports of Dr. Markenson, MRI of the right shoulder and his report of September 1, 2011, when Dr. Markenson recommended surgery. He stated the history given to him was the same as given to Dr. Markenson. Based on that history, he did conclude that the work injury described was the primary cause of his current complaints. (R2, P. 18). He has seen history from other doctors that are wrong.

He admitted that the correspondence to him indicated that the Petitioner had been immediately sent to Morris Urgent Care. He does note the employer sent him to Morris Hospital. (R 2, P. 21). He did admit that the first report of injury indicated Petitioner hurt himself closing a dome lid. (R1, P. 23). He admitted that it makes sense that the employer sent Petitioner to Morris Hospital. He stated that the employer's report of injury was dated September 2, 2011, which is 8 days after the treatment at Morris Hospital. He admitted that if Petitioner had told his employer that he felt the rotator cuff was caused by moving furniture. That would be inconsistent with the first report of injury. (R2, P. 25). He admitted that the only inconsistent history is the one that Morris Hospital has. (R2, P. 26). It's possible that the physician's got the history wrong. (R2, P. 27). If the history from Morris Hospital is wrong, for the most part it would change his opinion, however he did see the videotape with someone demonstrating the lid. (R2, P. 27).

He has not seen any information that Petitioner had a problem before August 23rd. He is not aware of any work restrictions prior to that date. When asked about being able to move a hose and move up a ladder, Dr. Milne stated it was possible that the Petitioner could have done that. (R2, P. 29). He agreed that it was possible that he would have problem shifting his truck. He agreed that it would have been difficult for him to perform overhead work. (R2, P. 30). That would include having to grab the ladder rung to help him up the ladder. (R2, P. 30). He agreed with Dr. Markenson's statement that given the shoulder injury, you would expect that his symptoms and problems would have been visible to others. (R2, P. 30). If his injury occurred on the 19th, he would have had problems working overhead, shifting his truck and lifting himself up after August 19th. (R2, P. 31). Petitioner did not tell Dr. Milne that he had any problems with his shoulder prior to August 23rd. (R2, P. 33). Dr. Milne testified that he did could not just disbelieve the medical records from Morris Hospital and come to his conclusions. (R2, P. 35). He did not agree that he found Dr. Markenson's conclusions to be not credible. That's because Dr. Markenson's conclusions could also be based on false information. (R2, P. 36). He agreed that he limited the Petitioner to lifting no more than 10 pounds at or above shoulder level. He agreed that the Petitioner should not go back to work as an over the road truck driver.

On re-direct, Dr. Milne testified that he has no idea if the Petitioner moved any furniture after March 11th. (R2, P. 38). It is possible that the Petitioner provided him with incorrect history of the work injury. It is possible that he was not truthful when he saw Dr. Markenson. Dr. Milne also believes it was possible for him to work those four days, with a torn rotator cuff, and perform the duty of shifting his truck for those three days. (R2, P. 38). He reiterated that

he did not believe, based on the video he saw, that there was enough force necessary to cause a massive rotator cuff tear. (R2, P. 39).

DEPOSITION TESTIMONY OF PETITIONER'S VOCATIONAL EXPERT DELORES GONZALES

Petitioner introduced the deposition testimony of its vocational expert, Delores Gonzales. (P2).

Ms. Gonzales testified that she is a certified vocational rehabilitation counselor, licensed in Illinois and Missouri. (P2, P. 7).

She does approximately half of her consultations for plaintiff's attorney and according to her, approximately half from defense counsel. (P2, P. 10).

She testified that she meet with the Petitioner on August 30, 2012 (P2, P. 11). She testified that when she met with the Petitioner, he presented well, except for his voice. She stated it was hard to understand him because his voice was deep and something wrong with it. (P2, P. 13).

When she met with Petitioner, he was 69 years old. At 69 years old, he is at what is considered retirement age. That can be a complication because he may be in competition with people that are younger, more educated and with higher computer skills. (P2, P. 14-15).

She testified that in terms of employment, Illinois is the third worse state in which to be unemployed. (P2, P. 15).

She testified that based upon various studies that have been performed, workers who are older, especially over 50 years old, are less likely than younger workers to become re-employed. (P2, P. 15). Her understanding of his medical condition was that he had a right rotator cuff tear which was subsequently repaired. He had a history of "cardiac issues" and cancer, depression and anxiety related to that. He also had cataracts and bilateral hearing loss. He was on several medications. She noted he had a cardiac stent and a laryngectomy from his cancer. (P2, P. 20).

She also went over his background information. She noted he had a valid CDL. She noted he had a felony in the past which could cause a person not to fonded. It could put into question the veracity. She believed it could cause further hindrance in his rehabilitation efforts. (P2, P. 21).

She noted his educational history. He graduated from high school in 1961, took algebra, biology, geometry and college prep classes. He had never been diagnosed with a learning disability. He attended SIU Edwardsville and studied psychology and social work from 1977 to 1978. He was self-described as an average student in college and above average student in college but not so in high school. He did not attend any other colleges or universities. He had

served in the Army from 1961 to 1966 and was honorably discharged. He performed clerical work and had infantry training. He had a 30% service connected disability. (P2, P. 22-23).

She understood his clerical work to just be basic writing. No computer work, he worked on the typewriter. (P2, P. 23).

She did not consider this work as vocationally significant because, according to her, he never really used it. (P2, P. 24).

She discussed with him his medications. She discussed blood pressure medication but there was no narcotic medication or anything else that alarmed her. (P2, P. 24).

She discussed with him his perceived limitations and activities of daily living, she noted that he had complained of problems in his right shoulder and left knee. He stated that he could sit without discomfort but could not walk more than 30 minutes or stand for more than an hour, before needing to sit and rest. He did not lift anything or reach overhead with his right arm. He had occasional difficulty bending and rising. He had no problem with balance or stooping. Kneeling caused increased pain in his left knee, climbing the stairs caused increase bilateral knee pain. (P2, P. 25).

He complained of bilateral hearing loss and he wore glasses. He complained of difficulty talking due to hoarseness. He said he slept well at night but still woke up two to three times a night. (P2, P. 26).

He occasionally took 30 minute naps during the day. He told her that he could cook and occasionally did the dishes, by putting the dishes in the dishwasher. He could sort the laundry, do a little bit of cleaning in the kitchen, bathroom and bedrooms. He shopped for groceries. He does not mow the lawn. He does not vacuum, mop or sweep. He has not complained of problems with the hot and cold weather, humidity or weather changes. He is not afraid of heights. (P2, P. 27).

With regard to his limitations, she said not being able to walk for more than 30 minutes or stand for more than one hour could limit him to a narrow range of light, possibly sedentary work. With regard to not being able to lift anything or reach overhead with his right arm, she testified that would limit him from sedentary work. (P4, P. 27).

She stated that because sedentary work requires bi-manual use for the most part. If he only had use of one extremity, it would be difficult for him to do sedentary work. With regard to his hoarseness, she testified that he may come across as not being able to work with customers, use the telephone or being used on the telephone. (P4, P. 27-28).

With regard to vocational history, she only went back 15 years. She did not consider anything beyond that as relevant. She did not explain this limitation. Therefore, all of her analysis is with regard to his work as a tractor trailer driver. (P4, P. 28-29).

She did not see anywhere while working as a driving a tractor trailer, that he had any management skills associated with it. She did not consider that he had any transferrable skills, as she limited herself just to his prior work as a truck driver. Being a truck driver, the long transferable skill is being a truck driver, if you assumed that's all he ever did. (P4, P. 30).

She could not indicate where she got that analysis on transferable skills but maybe the Department of Labor. (P4, P. 30).

According to her, the Petitioner only had limited computer skills and typed with two fingers. She did not consider these transferable skills because she only, again, went back 15 years. (P4, P. 31).

She stated his computer skills limited him because he would be in competition with people that are more computer literate and able to use computers. She testified that he would have difficulty working as a telemarketer or in clerical work. (P4, P. 31-32).

With regard to aptitude, she noted he worked with construction or transportation for 35 years and had been a supervisor in the late 70s and had some experience with hand tools. She did not consider this significant because again, she only goes back 15 years, noting somewhat surprisingly that he could have been a brain surgeon in the 70s and it would not have any bearing today, according to her. (P4, P. 32).

She noted his work restrictions again to light duty, no bending, stooping, kneeling, squatting or climbing. No driving an 18 wheeler, not being able to reach overhead to climb or grab and it would be difficult for him to do any type of lifting of equipment or driving the truck itself. (P4, P. 35).

She did not believe he was physically capable of returning to work as a truck driver. (P4, P. 40). She tested his basic academic skills, he was above the 12th grade, and nine month level in reading, sentence comprehension, spelling above high school level, his math comprehension was at the 10th grade level. (P4, P. 37).

She said he would be expected to assimilate to a new work environment or learning situation that is academically based. She did not believe further schooling was something that she would recommend because he is 69 years old. If he got a degree, chances of him finding employment would be very slim. (P4, P. 38).

She felt that as he was 69 years old, which is past retirement age, the 12th education and some college courses, his residual functional capacity prevented him from performing his past job or any job in the open labor market. She did not believe that he would be employable in the open labor market. She did not believe he was capable of competing in the open labor market. She did not believe an employer would hire him given his physical disabilities. (P4, P. 39).

She did not see any jobs in Southern Illinois that would match up to his skills. (P4, P. 40).

She testified that she would put him in the sedentary and light categories. She testified that Petitioner was not supposed to bend, stoop, squat nor climb.

When she assessed his reasoning development, she did not use a wide range achievement test to make sure it was above high school level achievement, she used his job description. The same for mathematics and language development. For instance she looked at metal allergic technician. She stated that this was under the DOT, that Petitioner was not capable, from a mental standpoint, of returning to work as a metal allergic technician, based upon his reasoning and language levels, since the requirements are higher than a tractor truck driver, even though he engaged in this occupation previously. (P4, P. 47). She also testified that he would not be capable of being a bar manager anymore because of his reasoning abilities as a truck driver, even though he had performed this job previously. She testified that he would not have the management skills. She did not consider his past job experience because it was more than 15 years previously. (P4, P. 49).

She did not believe he would be able to work as a blood donor assistant because he had difficulty scheduling appointments because of vocal problems. She did not believe he would be able to be an apartment house manager because of his reasoning and language skills, which were above high school level, were too low. She noted, incredibly, that he did not have any management skills even though he had managed a bar, and two different forwarding offices. (P4, P. 50).

On cross examination, she admitted that income from other sources can affect one's motivation in seeking other employment. She stated on cross examination that the Petitioner wanted to work. She admitted that he had not done anything to try and find work. He has not applied for any jobs. She asked him if he had been looking for work and he said no. She stated that could tell someone about their motivation for work, except for the fact that he is 70 years old and sometimes they say, "I think I've worked long enough". She admitted that she thinks that's what happened in this case. (P4, P. 64).

She admitted the limiting factor with regard to the rotator cuff tear, his voice, etc., all would put him within the light duty category of work. She believes because of the change of work process computerization, you cannot go back further than 15 years. She did not believe the things that were performed in the 60s, 70s, 80s and part of the 90s are vocationally relevant. She insisted that there were authoritative texts that support that, but she could not identify any. (P4, P. 66). She believed that respondent's vocational expert does not understand age levels for social security disability. She did not believe she performed transferable skills analysis correctly. She stated you are only supposed to go back 15 years. However she could not point to anything on which to base that assertion. (P4, P. 68). She did not try to identify her work in returning the Petitioner to work in this case. (R4, P. 69). This was not a sustained injured worker returning to work in this case.

She further stated that she testifies 25 to 30 times a week in social security disability cases. She does 3 to 7 depositions a week.

Currently she doesn't actually teach vocational rehabilitation counselors, they follow her around. (P4, P. 71). It has been a couple of years since she actually taught a class. The last time she taught a class was probably in the 70s. Therefore it would not be vocationally relevant today. (P4, P. 72). She did not perform any testing of the Petitioner's computer skills or typing skills. She did not perform any labor market surveys in connection with the Petitioner. (P4, P. 74). She admitted that she is basing her conclusion that he is not able to do those various jobs based on the last job he had. (P4, P. 75). She did not consider, in any way, how he tested on the test she performed. (P4, P. 75). She admitted that he tested well. She stated the testing she performed did not really have anything to do with job skills, it had to aptitude, at academic levels. (P4, P. 76). She could have done that testing, but she did not, and she concluded that he was unable to do it, so she did not perform the test.

She admitted that it is difficult to find a job if you do not look for one.

She was unaware whether deposition exhibit 5, an article from the Urban Institute, was peer reviewed. She admitted that Exhibit 6, the Wall Street Journal article, came out several months after she prepared her report. (P4, P. 61).

The article that she referenced in P5, P. 6, and 7 would be relevant if the Petitioner ever went to look for work. (P4, P. 94). She admitted that it is hard to get work if you do not look for work.

On redirect she testified the Petitioner stated he really wanted to return to truck driving. She then recommended he initiate a job search. She stated he is almost 70 years old and several problems physically a history of depression and anxiety (which nowhere is indicated in the medical records).

DEPOSITION TESTIMONY OF RESPONDENT'S VOCATIONAL EXPERT DONNA ABRAM

Respondent introduced the vocational testimony of Donna Abram, Respondent's Exhibit 2. Ms. Abram testified that she is a vocational counselor and consultant. She has been a vocational counselor for 32 years. She only worked as a vocational counselor for the past 32 years. She is licensed by the state of Missouri and Illinois.

She testified she met with the Petitioner June 24, 2013 at Petitioner's attorney's office. (R2, P. 8). She testified she took a history of his background experience, work history and education.

After reviewing his medical information and limitations, she reviewed the vocational information to create a residual profile. She reviewed his skills, abilities and aptitudes based on his background. She then performed a transferable skills analysis and then addressed whether he was employable and place able. Employability asks whether a person has skills, knowledge and aptitude to do jobs that exist. (R2, P. 11). Place ability addresses whether the labor market has

those jobs and whether or not it is realistic Petitioner would be offered a job in the open labor market.

According to Ms. Abrams, Petitioner had solid vocational assets. He graduated high school, plus 2 years of college. He did not complete college not because he was incapable of doing the work, but because he was working full time. The fact that he is able to complete college courses she said was vocationally significant and considered an asset in a resume. (R2, P. 13). He has a very solid work history. She noted he worked over seas on several occasions. He has a background doing clerical and basic record keeping. She noted he had been a manager and a supervisor in a number of settings. He is knowledgeable from managing and this is considered an asset. (R2, P. 13). She noted he had basic computer skills, does not know office type programs but she was not suggesting that he work in a business that needs that. (R2, P. 14). In her opinion, the Petitioner retained the ability to be employed in the open labor market in a large number of occupations that exist in the greater St. Louis labor market. (R2, P. 14).

She noted some of his skills are rusty. She therefore concentrated on basic jobs in order to be able to refresh his skills. (R2, P. 15). She noted his past work history showed he can learn through formal training or on-the-job training. She believed he had a good work history. He changed jobs but she did not detect any gaps in his jobs. He has always worked. A lot of his jobs had a level of responsibility that shows a very good work history. (R2, P. 16). She noted he had been a manager in several different settings. He managed a bar. He worked in an airport in their office. He supervised up to 10-15 people and hired and fired individuals. He has basic knowledge, record keeping knowledge and people skills. (R2, P. 16). People skills are an important part of the job. She thought that he interacted with her appropriately. He was very personable. He had no trouble with communicating or getting her to understand his background. She thought he would make an excellent first impression with a potential employer. (R2, P. 17). In order to assess his transferable skills, she looks at what he has already done, his work history and his education. She noted he has worked with data to level of analyzing information or making interpretations. He has worked with people to the level of supervising them. He has worked with tools level working to very precise standards. He has independence and critical thinking skills. He has math reasoning and language skills above post high school graduation. (R2, P. 18). He described his aptitude as average level clerical and dexterity skills along with verbal skills. He has worked at a number of jobs that would be considered in the skilled range. (R2, P. 18).

With regard to place ability, she looks at a person's aptitudes and potential and how likely he is liable to find a job in the labor market, but also factors in other issues. One of his factors is age. He is a person with advanced age. He is retirement age. He is now 70 years old. She noted age was going to be a factor when he looks for a job just because of the number of people that are looking for work now. (R2, P. 19). She also considered his residence in the labor market. She noted he lives in St. Clair County, which has access to the St. Louis Labor Market. That is a very difficult labor market. She noted there is going to be a lot of competition. She believed he has the ability to convince an employer to hire him but there are barriers. She noted he communicated very well. She noted he did have pain complaints. She thought an employer would recognize his maturity and ethic and make a good first impression. (R2, P. 20). One of

things she noted was how open a person is and how much they believe they can work. (R2, P. 20). She noted that when she asked him if he felt he could work, if a position within the doctor's limitation could be found, he was hesitant. He noted he was not sure if he could because of his medications. He thought subjectively medication made him very fatigued. She noted that because of the amount of water he had to drink, he has to go to the bathroom very frequently. He noted that along with the fact that he had to change positions all the time. (R2, P. 21). It should be noted that there are no medical records introduced that support that he is on any medications that make him fatigued. There are no medical records that indicate that he has to change positions frequently. There is no indication that other than his shoulder, that anything has changed from when he was driving prior to the incident.

Ms. Abram noted that some of these issues can be accommodated. She noted he has not worked since the incident. She noted she has not attempted to work since the incident. He has been out of the work force, which is a factor when looking for a job. She noted he had an extremely high wage and she testified employers are leery of a wide wage differential. She noted it is likely he is going to have a low starting out wage. (R2, P. 21). She noted he does have experience but it is not recent enough to get him in to experienced wages. They are not related to the injury, but they are factors. (R2, P. 21). With respect to motivation, she said it related to how open Petitioner was to returning to work and whether he believes he can work. She did note that he has not attempted to return to work and then stated he does not believe he can work. She noted he has no financial incentive to work. She noted he has already getting a pension. He is on retirement, Social Security and in his mind is retired. (R2, P. 22). She said that is vocationally significant. With respect to his limitations related to the shoulder injury, she noted that limitations are that he cannot return to his old work. She noted it does not mean he cannot continue to drive smaller vehicles, but have to shift jobs, and look for a job in a different area than his recent work experience. (R2, P. 23).

Respondent's expert noted that she had reviewed the deposition of Petitioner's vocational expert, and she specifically chose not to comment on Ms. Gonzalez' comments about Ms. Abram credentials. She said she is ethically constrained from doing so.

She did state that going back 15 years is a Social Security Administration standard not a vocational one. A vocational process goes back and looks at everything a person has done, since if they have done it once, they retain the aptitude to either learn it or do it again. That is an accepted practice in the vocational field.

With regard to a report, she has identified multiple jobs that she believes Petitioner is capable of doing. That would be, if you wanted to look for those jobs. (R4, P. 27). There are multiple titles that she believes the claimant is qualified and able to perform. The fact that he has not made an effort to find a job is significant to her as a vocational expert. The longer a person is out of the labor market, the harder it is for them to get back in. (R4, P. 28). Also, she interprets that he is not interested in working. She stated this was consistent with Petitioner telling her he does not believe that he can work. That makes it very difficult to get a job. (R4, P. 28). To her knowledge, no doctor or other professionals told the Petitioner not to look for a job. (R4, P. 28).

On cross-examination Ms. Abram admitted if the Petitioner had assistance early and had some direction, it may help Petitioner to get out of the mind set of not looking for work. (R4, P. 30). She does not know what prompted him to go on retirement. (R2, P. 30). According to DOT, 70 is retirement age. The job that she is looking at or essentially telling him he has to change the career he has been performing for 18 years. (R4, P. 31). He would have to restart whatever profession he was in at age 70. (R4, P. 31). It is difficult to do this. DOT does not make a recommendation whether a person should do that or not. They do not talk about whether it is likely, but the DOT does indicate whether or not they can do a job that falls in light range of physical demand, and in this case the Petitioner can. (R4, P. 32). He indicated he can drive no more than hour and a half. (R4, P. 32). After that, he said his shoulder would start to hurt. He also told her about his right wrist fracture, he had cataracts, which is why he has to wear glasses. He told her that he had trouble hearing people, which could be vocationally important but she did not notice anything being a problem. (R4, P. 33). She also admitted he complained about his left knee, his gastritis, and heart condition. These could potentially affect his ability to take certain jobs. She noted that when she talked to him he had a raspy voice. He told her he can't talk for extended periods. (R4, P. 34). She stated having to talk for extended periods could be a problem but noted he did not have a problem after 2 hours with her. (R4, P. 35).

She noted that Mr. Markenson said Petitioner cannot do any reaching away from his body or reaching overhead. Dr. Markenson said he could not go back to driving 18 wheelers. He subjectively stated he had trouble moving weights out in front of him. (R4, P. 36). Dr. Milne said no bending, no stooping, no kneeling, no squatting, and no climbing.

She testified that according to Dr. Milne he can work in a light duty category. (R4, P. 37). She disagreed that Dr. Markenson has a below 25 pound criteria. She testified that Dr. Markenson did not put any weight restriction on Petitioner whatsoever. (R4, P. 38). All he said was that he could not reach over and reach out away from him but did not say anything about reaching close to the body or lifting close to the body. Based on the restrictions that she has, she has used light and sedentary ranges. She believes that based on Dr. Markenson's restrictions, the light duty category is appropriate. (R4, P. 39). She is not saying that every job in the light range would be appropriate for him. Not all jobs in light category require lifting. She did not adhere strictly to the DOT categories, for instance, she noted that his profile matched a total of 3,846 classifications but did not believe that he could go out and do a third of all DOT jobs. (R4, P. 40). The ten jobs that she listed are not the only ones but they are representative of jobs that he can do within those restrictions. She disagreed that he would have to tell the employer as part of the interview process that he cannot lift any weights in front of him. It would not be appropriate. He would have to clarify that he could do the job. (R4, P. 41). She testified further than not all jobs in light duty range require 10-20 pounds of lifting capability. He disagreed that his job and his restrictions fall in the sedentary category. (R4, P. 43). She meant use any jobs that involve bending, stooping, squatting or kneeling. It does reduce the number of likely jobs that he would match.

She agreed that there are significant barriers to place ability. (R4, P. 44). One is that he 70 years old. Another is that he was making $36 an hour. Another is the fact that he has not

had a job for 2 years. Another is that he has been driving for 20 years, it has been 20 years since he has done anything other than driving.

She disagreed the St. Louis Metropolitan area is a hindrance. It does not have the greatest labor market right now but still has a diverse employment base. It is difficult, but there is no labor market that is not difficult because of the general economy. (R4, P. 45).

A hindrance, as well as the fact that he claims he had to change position. She disagreed that he had no computer skills. He had basic computer skills. (R4, P. 46). She testified that the Petitioner never did get a degree. (R4, P. 47). She does not know if his prior medical conditions could affect his memory. She knows that there is nothing in his records that indicate his cognizant function was impaired. She stated that he cannot factor how cognitive function could change without a neuro psychological evaluation.

She did not perform an evaluation to see if any employer has an opening in any of the ten classifications she listed. (R4, P. 51). Some of the positions are in the light duty category. (R4, P. 51). She disagreed that a stock clerk is a heavy duty position. (R2, P. 52). She admitted that the stock clerk position would be entry level at $8.25 an hour. (R4, P. 53). She noted he had experience with inventory both at the bar and similar types of duty not necessarily stock but when he was a cargo agent. She admitted that goes back many years. (R4, P. 54). She stated it is an entry level position, and his work history is old but he has the capability of doing it. She did believe that he is employable as a stock clerk. She is not certain that he was place-able as a stock clerk. (R4, P. 54).

She admitted that he could not work as a bartender or bar back. He could work as a manager. (R4, P. 56). She stated that he did a lot of the paperwork in the past. He did paperwork when he was a cargo agent and he has the ability to do paperwork. She stated that for any of the jobs on the list, she would have to say that he is employable. Her question is how realistic is he in terms of being place-able. She stated its more likely than not the employee's labor market, he is not place-able. (R4, P. 58). She testified that he is capable of performing the job as a metal lab technician. His prior skills would transfer over. (R4, Pg. 60). He would have to learn the new equipment. The machinery would be different. The understanding of what he had to do, the fact of the job would transfer over. There would be a learning curve. (R4, P. 60). Anyone whose entering the field would have to learn the specific computer use that is involved. There are some employers that would look at someone with a degree. (R4, P. 60). There are some jobs he could do involving sampling. It would depend on the job. Some would not require him to hold samples in front or overhead. (R4, P. 61).

With regard to being an apartment manager, that doesn't just look at apartment experience as an apartment house manager, but also management experience. She has put people into jobs as apartment house managers before who had no direct apartment house management, but had skills that they were able to show their company that they could do the job. They do not always require sales experience. (R4, P. 62). His customer service experience would help him in that regard. She did not believe that his throat cancer would cause any difficulty. It is not as if he cannot carry on a conversation. (R4, P. 63). She did not believe his

voice was at a level that would be a deterrent. (R4, P. 64). With regard to laboratory clerk, they have to have the ability for data entry skills. (R4, P. 64). She testified further that if he presents his skills in a negative way, he is not in a job in any position. (R4, P. 66). She also noted that he could easily increase his skill while he was looking for a job so that it is not just hunt and peck typing. It would not take him very long to do simple basic data entry, because speed is not an issue its accuracy. (R4, P. 66). It is not fair to say that he would be competing on a hunt and peck basis, one he can practice on hunt and peck and second he is going to be competing with people who had more recent, better skills which goes with place-ability. (R4, P. 67). He did tell that he did not believe he was physically capable of working after this accident. (R4, P. 68). She disagreed that the same skill set may not be there at age 70 as it was at age 18. His skill set may be there, but the potential is still there. Generally an employer is not looking for someone that does not have the skill set, he is looking for someone who already has the skill set. (R4, P. 69).

On re-direct, she testified that presentation of skills in a negative light can affect someone's employability and place-ability. She testified that presentation makes a major difference in an interview. You cannot tell an employer, I cannot lift more than 20 pounds. If you say to them, I can easily lift up to 20 pounds, that has a positive impact. (R4, P. 70). With regard to employability and place-ability, if the Petitioner does not want to work, he is not going to accomplish either, employability or place-ability.

On re-cross examination, she was asked if the Petitioner appeared to be in pain. She noted he did not display what she considers over the top pain behaviors. Petitioner stated he was in pain and she took it at face value.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE "C": DID AN ACCIDENT OCCUR THAT AROSE OF THE AND IN THE COURSE OF PETITONER'S EMPLOYMENT BY RESPONDENT":

The resolution of Issue C resolves all the issues herein. The Arbitrator finds Petitioner's present condition of ill-being is not causally related to the alleged incident of August 23, 2011.

It is without dispute that Petitioner took a week off to move his family belongings the week of August 11th.

More importantly, Petitioner admitted, as did his wife, that he took a half day on Friday, August 19th, to return back to his residence to continue the process of unpacking and establishing their household after the move the week before. The Petitioner attempted to diminish the amount of physical effort he did, but grudgingly admitted that he and his wife packed up all of their belongings, and then after moving, unpacked them. The Petitioner admitted, grudgingly, that he did in fact move some end tables and other items that he did not let the movers to move. It is noteworthy that while Petitioner has entered into evidence that movers moved the family and moved the boxes during the week of August 11th, the focus in this case is not on that week. It is on the weekend after that.

The Petitioner admitted that he came back on that Friday and Saturday, the 19th and 20th to move boxes, unpack boxes and put things away. That history is entirely consistent with the history contained in the Morris Urgent Care records, which in two places document a history of the Petitioner having a strain or injury to his right shoulder while moving four days previously. As all parties have noted, that four days would be Saturday, August 19th.

It is somewhat inexplicable that Petitioner would report to his employer that he had injured his shoulder moving the latch, and then give a contradictory history to the doctors at Urgent Care. However, what is without dispute is that four days prior to going to Urgent Care, he had been at his residence and in the process of unpacking or rearranging his furniture after the move the week before. How anyone at Morris Urgent Care would have that information, other than from the Petitioner, makes no sense. The only source of that history would be from the Petitioner.

The Petitioner implies, in a roundabout way, that somehow the employer called Morris Urgent Care and gave them a contradictory history. However, Jerry Curl testified that he did not call Urgent Care and while someone else may have, this never arises beyond the level of speculation. Morris Urgent Care had all the other details of his history correct, including his medications, his age, his past history, his throat cancer, and the history noted in two different places of moving furniture four days before.

Logically, if the employer were to engage in some subterfuge and somehow infer to Morris Urgent Care that he really injured himself while moving, they would not have suggested that it occurred four days before but the week prior to that, when he actually took a week off to move.

The histories in this matter with regard to Dr. Markenson making causation, rely upon the Petitioner's history. Both Dr. Milne and Dr. Markenson note that their opinions on causation are only as good as the history they are given. Dr. Milne readily acknowledges that the Petitioner could have injured his shoulder engaged in household activities, such as moving boxes or furniture. Dr. Milne also notes that the activities depicted on Respondent's Exhibit 4, the videotape, are not consistent with the force needed to cause a rotator cuff tear.

I have reviewed the videotape and while it is brief, it clearly shows an individual pushing down the same hatch, according to Mr. Curl, that the Petitioner allegedly injured himself on. It does not appear to require a great deal of force.

While it may be acknowledged that it is possible that the Petitioner could have injured himself pushing the latch down, the inconsistent history from Morris Urgent Care is detail specific and contains information that could have only been known to the Petitioner.

It is noted in the examination of Mr. Curl that he was not aware that the Petitioner was doing additional moving or unloading on the weekend of August 19th. To the general knowledge of everyone at the respondent, the move had occurred a week before that.

Petitioner's protestations that he was able to work the week following his move, the week following August 11th, is of no avail. The history at Morris Urgent Care did not refer to moving 11 days prior, but to August 19th, a week after the move. If he had not injured his shoulder the week before, it certainly would not be an impediment in the week following. The only activity that the Petitioner was engaged in following his return to work after the 19th was to drive his truck to Fort Smith, pick up another load and go to Perry, Missouri.

Dr. Milne testified that the Petitioner would certainly be able, with a torn rotator cuff, to drive the truck, unload the truck with that injury.

There are other aspects of the Petitioner's testimony that affect his credibility. He testified, on direct examination, that there was a discrepancy between his driver's log and the Qualcomm report. Petitioner addressed this directly instead of waiting for cross examination. In his direct testimony, he admitted that he had essentially falsified his driver log by stating that he stayed at Bois D'arc as opposed to Cuba, Missouri, where he originally stayed. In order to justify this falsification, Petitioner had an elaborate scenario wherein he testified that all of management for respondent condoned the falsification of DOT logs in order to grab more time to work the following day. As Mr. Curl stated in his direct examination, that explanation did not make sense. The Petitioner simply could have driven an extra couple of hours on Sunday instead of falsifying the log. His driving on Sunday would have no impact on his availability for work on Monday.

In addition, Mr. Curl testified credibly that this was an ongoing problem with falsification of reports, to the point that they had to hire an individual to manage the problem. Petitioner's theory that management condoned this practice is not credible.

Petitioner also attempted and stated directly that respondent's witness was lying about the repair to the latch. He testified that the morning of the 24th, he saw the trailer being brought into the shop and Petitioner claims he saw repair. Again, respondent's witness, Mr. Curl, testified credibly that there would not have been time for the trailer to have been repaired from the night before. He testified, again credibly, that what the Petitioner thought he saw was not true. He testified that in fact what the Petitioner probably saw was the trailer being inspected. It does not do the Petitioner credit that he alleges respondent of falsifying paperwork and making illicit repairs they would not admit to.

I therefore find that Petitioner has failed in his burden of persuasion, proving that an accident occurred that arose out of the course of his employment on August 23, 2011.

WITH RESPECT TO ISSUE "F": IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY":

For the reasons set forth in response to Issue C, I find that Petitioner's current condition of ill-being is not causally related to the alleged incident of August 23, 2011. I find that there was no incident on August 23, 2011.

WITH RESPECT TO ISSUE "J": WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES":

In response to Issue J, the Arbitrator finds that the medical services that were provided to Petitioner were reasonable and necessary and related to his torn rotator cuff. However, for the reason set for in response to Issue C, the Arbitrator does not find that the services were causally connected to his employment.

WITH RESPECT TO ISSUE "K": WHAT TEMPORARY BENEFITS ARE IN DISPUTE, EITHER TTD OR MAINTENANCE":

Due to the Arbitrators find regarding Issue C, Issue K is now moot.

WITH RESPECT TO ISSUE "L": WHAT IS THE NATURE AND EXTENT OF THE INJURY":

For the reasons set for in response to Issue "C", Issue "L" moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bobby Crespi,
Petitioner,

vs.

NO: 10WC 20886
13WC 02308

State of Illinois/Tamms Correctional Center,
Shawnee Correctional Center,
Respondent,

15IWCC0261

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 2, 2014, is hereby affirmed and adopted.

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

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

DATED: APR 13 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRESPI, BOBBY
Employee/Petitioner

Case# **10WC020886**
13WC002308

ST OF IL/TAMMS CORR CTR SHAWNEE CORR CTR
Employer/Respondent

15IWCC0261

On 9/2/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

SEP 2 - 2014

15IWCC0261

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Bobby Crespi
Employee/Petitioner

v.

State of Illinois/Tamms Corr. Ctr.
Shawnee Corr. Ctr.
Employer/Respondent

Case # **10** WC **20886**

Consolidated cases: **13 WC 02308**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Belleville**, on **June 17, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident? (10 WC 20886)
E. ☒ Was timely notice of the accident given to Respondent? (10 WC 20886)
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **5/12/10 & 12/23/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$42,082.00/$58,680.00 respectively**; the average weekly wage was **$1,052.18/$1,128.46 respectively**.

On the date of accident, Petitioner was **32/34** 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 $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

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

ORDER

Respondent shall pay Petitioner additional temporary total disability benefits of $752.31/week for a further period 1.438 weeks, as provided in Section 8(b) of the Act. No overpayment has been made.

Respondent shall pay reasonable and necessary medical services of $94,069.21, as provided in Section 8(a) of the Act. Respondent shall have credit for any amounts paid through its group carrier, but shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $631.31/week for 75.9 weeks, because the injuries sustained caused the 15% loss of the left and right arms (10 WC 20886), as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $677.08/week for 12.65 weeks, because the injuries sustained caused the additional 5% loss of the left arm (13 WC 02308), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

8/18/14
Date

SEP 2 - 2014

FACTS

Petitioner began his employment with Respondent in March of 2001 at its Tamms Correctional Center facility. Tamms is a super maximum security facility. (T.8). During his time at Tamms, 99% of his shifts were spent on the 3-11 shift. (T.9-10). In addition to being a Correctional Officer, his specialty title was that of a Tactical Officer. (T.10). This meant in addition to all of the regular duties of a pod officer, Petitioner he had to be activated, put on gear, and respond to incidents in a unit much like a SWAT team when dangerous situations arose. (T.11). This involved specialized training, including control tactics, mock cell extractions, and cuffing/uncuffing procedures. (T.11).

At Tamms Correctional Center, all inmate services are given through a chuckhole, which Petitioner testified is a small port in a door which had to be unlocked and relocked with a Folger Adams key. (T.12). Petitioner testified that the Folger Adams key was large and the locks did not work. Specifically he testified:

> They were rarely maintenanced [sic] and a lot of them are covered from stuff that inmates would feed through the ports that would gum up the hinges, the locks. A lot of them were actually painted shut. (T.12).

Petitioner used both hands in performing this activity because the locks and hinges did not work. (T.13).

Through the chuckhole, the maximum security inmate received and sent everything, including mail, laundry, food, trash, medicine, and literature. (T.13, 20-21). Petitioner demonstrated unlocking and locking a chuckhole as follows:

> Well, we had a carrier that holds five trays. So you'd have a tray in one hand. Then you would unlock the chuckhole, have the inmate step back. You have to secure the keys to your belt, open the chuck. You would pull the tray out from the carrier, put it on the chuck, step back, inmate would take it. And we'd step back. You'd take your keys off. We shut the chuck, take your keys off and then lock it back. (T.13-14).

During this entire procedure, Petitioner was using his hands and arms. (T.14). If his hands were full, occasionally he would have to use a knee to force the chuckhole to shut completely. (T.14).

All cuffing and uncuffing was also done through the chuckholes. (T.14-15). Because they were difficult to open, sometimes Petitioner had to use two hands. (T.15-16). Petitioner credibly testified to the procedure for cuffing and uncuffing an inmate as follows:

> At Tamms it would take two officers. We'd go up, we'd unlock the chuckhole. chuckhole. We'd strip search the inmate before he came out of the cell, which means we remove all his clothes, feel all through the clothes, make sure there wasn't any hidden cuff key or piece of staple or paper clip, feed the clothes

> back through the chuckhole. The inmate would get dressed. We'd have him turn around and stick his hands out of the chuckhole, cuff both hands. We'd have his palms out, call for the door to be open through the radio. The door would slide open. We'd bring the inmate out. He'd be placed on his knees and leg irons were applied to the inmate. (T.16).

Each pod had 60 cells, and in addition to all of his duties he previously testified to, he had to make 30-minute rounds each shift. (T.17-18). He described yanking on the doors as necessary because of inmate welfare and equipment malfunction/failure. (T.18). This activity required force and grip, for which he used his arms and hands. (T.19). During the cuffing and uncuffing procedure, inmates sometimes resisted. (T.19). He was required to use grip force and hold on tight to secure the inmates. He described this as:

> Grab on the cuffs and then pull the cuff out through the chuck hole so we could get the cuffs off. That way, they wouldn't have a weapon or tear up the cuffs when they got them inside the cell. (T.20).

Petitioner also performed shakedowns, which involved strip searching the inmate, cuffing the inmate through the chuckhole, removing the inmate from the cell, placing the inmate in leg irons, escorting the inmate to the shower using his arms and hands, and then going through the cell to look for any type of contraband. (T.21). Petitioner had to search for anything, even paper clips and staples. For this used his arms and hands. (T.21).

At Tamms, there were no inmate workers; therefore Correctional Officers performed the cleaning including mopping floors, cleaning washrooms, cleaning windows and cleaning stainless steel. (T.23, 27-28). During his years at Tamms Correctional Center, Petitioner opened thousands of chuckholes, pulled on thousands of doors, and cuffed and uncuffed thousands of inmates. (T.23). Petitioner also testified to lifting and carrying heavy mail bags and laundry up flights of stairs weighing as much as 90lbs. (T.56, 94). After listening to Petitioner testify, Respondent's witness Jason Hall testified that he worked briefly on the 3-11 shift, and the mail bags only weighed 30-35lb. On rebuttal, Petitioner testified that he never worked with Jason Hall (T.92), he never watched any of his activities (T.93), disagreed with his testimony on the locks, and testified for he knew for a fact that the mail bags weighed as much as he testified to:

> A: We would weigh them in the health care unit on the pods. Some of them would get so heavy we'd set them up on the scales just to see what they weighed.
>
> Q: Did you do that on yourself personally?
> A: Yes.
>
> Q: What's the record?
> A: 90 pounds. (T.94).

Respondent had a Job Site Analysis of the duties of a Tamms Correctional Officer generated by Melanie Welch of CorVel Corporation, who testified by way of deposition. (PX17). CorVel is a national corporation that provides services to employers, third party administrators, insurance companies, and government agencies. *Id.* at 33. She testified that she has never performed a job site analysis for an injured worker. *Id.* at 33. She obtained her certification by mail from Ergo-Rehab, a corporation in Florida run by Nicole Matoushek, a physical therapist. *Id.* at 33-36. She did not know where this company was located or whether or not they even had an office. *Id.* at 33-35.

Ms. Welch toured the facility for approximately three hours and took approximately ten (10) minutes of video. *Id.* at 30. She testified that she was restricted from filming Correctional Officers performing their regular duties. *Id.* at 13-14. She acknowledged that there was nothing in her report or video about mail delivery or the weight of the delivery bags, nursing rounds or the administration of bandages or wraps. *Id.* at 37-39. She was unaware of what a security inspection is and did not witness how an inmate is secured for movement. *Id.* at 37, 40. The procedure was simulated by two Correctional Officers, however, it was not referenced anywhere in her report. *Id.* at 41. She did not know often shakedowns were performed. *Id.* at 42. She did not know which movements were conducted on different shifts, or how many movements were required to secure and move an inmate. *Id.* at 43-44. She did not know much keying or cuffing and uncuffing was done each day and no estimate was included in her report. *Id.* at 45. Although she knew that sweeping and mopping was done by the Correctional Officers, she did not know who emptied the trash receptacles, washed the windows, cleaned the showers, toilets, ice machines, stainless steel, furniture and ducts, and stocked the janitorial closets. *Id.* at 46-51. She did not know the Area Cleaning Cycle sheet stated, "Area will be inspected and officers will be held accountable for ensuring areas are clean and orderly." *Id.* at 49-50. Counsel for Petitioner questioned Ms. Welch for 10-15 minutes regarding data not included in her analysis. *Id.* at 51. She conceded that her analysis omitted a tremendous amount of data. *Id.* at 43, 51.

. Ms. Welch was specifically questioned regarding the effort involved in Petitioner's feed duties. The following exchange took place:

Q: Okay. I'm going to now read you some descriptions that I have from some of my other clients. Do you know if -- and if you don't know, Miss Welch, it's okay. I sort of don't expect you to know, but at least I figured I'd ask to try and lay some foundation. Do you know if a gentleman named Rollin, R-0-L-L-I-N, Raugust, R-A-U-G-U-S-T, works there?

A: I don't know.

Q: Do you know how many food trays are carried up steps at one time?

A: We do have a picture of a cart type thing that they carry with a handle on the top, and I thought they said five at a time.

Q: Very good. Do you know how much they weigh?

A: We had just what the empty tray. They didn't have full food on them when we were there. We did get a weight I believe of just the tray.

Q: Okay. When you open a chuckhole, do you have to turn the key clockwise?
A: I don't remember.

Q: Do you pull down the chuckhole at the same time?
A: It's in the video how they turn it and when the door is pulled. I really don't remember.

Q: Are the chuckhole doors heavy?
A: I don't know.

Q: Do they pull down easily?
A: It appeared to.

Q: Do all the chuckholes turn easily?
A: I don't know.

Q: When these gentlemen are keying the inmates, do they open, that is, key open the chuckhole, pull down the door with one hand and hold the loaded food tray with the other and then attempt to slide the food tray through the chuckhole while still holding down the chuckhole and keying it open?
A: I didn't observe the food being passed through, but that sounds accurate based on what portions of it I did see.

Q: Okay. When they're cuffing and uncuffing inmates, do they also have to key open and hold open the chuckhole at the same time just like passing in the food tray?
A: Yeah. I do think it is a two-handed component. *Id.* at 55-57.

Ms. Welch was completely unaware of the Tamms mission statement, and was further unaware that Yolanda Johnson, former Warden of Tamms Correctional Center, indicated that "work at the Tamms Correctional Center will be demanding." *Id.* at 50-51. When asked to assume that the description of job duties given by Petitioner was true, she agreed that Petitioner had an arm-and-hand intensive, repetitive job. *Id.* at 55.

In 2008, Petitioner began developing symptoms of numbness and tingling in his hands. (T.24-26). He was diagnosed with carpal tunnel syndrome, for which he filed a workers compensation claim. (T.24). A decision was rendered in his favor, and Petitioner testified he was performing the same job duties in 2008 as he testified to at Arbitration. (T.25). Petitioner testified that he did not seek any treatment for his elbows in 2008. (T.25, 27). Petitioner further testified that no one informed him of any problems in his elbow in 2008. (T.27). Petitioner continued to work at Tamms and began developing progressive symptoms in his elbows. (T.26).

Petitioner sought treatment with Dr. David Brown on May 12, 2010. (PX3, 5/12/10). Dr. Brown's physical examination was positive for bilateral compression neuropathy over both elbows. *Id.* Dr. Brown, already familiar with Petitioner's job condition and his previous repetitive injuries to his hands, stated that based on Petitioner's job duties, including cuffing and uncuffing, shackling and unshackling inmates, using Folger Adams keys throughout the work day to open and close chuckholes, Petitioner's work was a contributing/aggravating factor of his development of bilateral cubital tunnel syndrome. *Id.* Petitioner testified that this was the first time he became aware that he suffered from cubital tunnel syndrome related to his employment. (T.26-27). After electrodiagnostic studies were positive (PX4), Petitioner was approved by Respondent for surgery. Petitioner testified he would not have had the surgery done had he known he was not going to get paid. (T.28-29). These surgeries were done on October 14, 2010, and November 4, 2010. (PX5). Petitioner's condition improved following surgery, but mild symptoms of soreness/tenderness and weakness remained. (PX3, 11/17/10, 12/15/10). Petitioner returned to work full-duty on January 3, 2011. (PX3, 12/15/10).

Following his return to unrestricted duty, Petitioner gradually developed recurrent pain over the medial aspect of his elbow and recurrent numbness in his left little and ring fingers. (PX3, 3/21/11). He returned to Dr. Brown, reported these symptoms, and was given a Medrol Dosepak and non-steroidal anti-inflammatory medication. *Id.* Petitioner returned approximately a month later with no improvement in his recurrent symptoms. (PX3, 4/18/11). Dr. Brown obtained new nerve conduction studies, which were compared with his pre-operative nerve conduction studies, and showed recurrent ulnar neuropathy at the elbow. *Id.* Dr. Brown recommended exploration and revision ulnar nerve transposition. *Id.* Petitioner was to continue working full-duty up until the time of the surgery. *Id.* Petitioner continued to work, but did not schedule the surgery.

Respondent had Petitioner's records reviewed by Dr. Anthony Sudekum on March 30, 2011. (RX15). Dr. Sudekum gave a brief summary of Petitioner's medical history, omitting the positive findings on clinical examination, and stated his belief that Petitioner's job duties at Tamms Correctional Center did not cause, aggravate or exacerbate Petitioner's condition. *Id.* He believed that Petitioner was obese and that his age, 32, were risk factors that contributed to Petitioner's condition. *Id.* Dr. Sudekum testified to his opinion on February 23, 2012. (RX17). Dr. Sudekum testified that he agreed with Dr. Brown's diagnosis, but stood by his causation opinion. *Id.* at 74. He also acknowledged that Respondent offered two conflicting analyses regarding Petitioner's job duties; one indicating that Petitioner lifts up to 20lb. maximum, the other indicating the maximum as 50lb. *Id.* at 76-77. Dr. Sudekum did not know whether or not the mail bags lifted by Petitioner exceeded 50lb. *Id.* at 78-79. He presumed the laundry bags weighed less than 10lb. *Id.* at 79. Dr. Sudekum's testimony overall on cross-examination demonstrated that he was generally unaware of the difficulties faced by Correctional Officers at Tamms.

In June of 2011, Petitioner transferred to Shawnee Correctional Center. (T.7). On December 23, 2012, Petitioner sustained a traumatic injury to his left elbow after escorting an inmate back to his cell cohabited with another inmate. (T.31-32). After Petitioner cuffed the inmate already in the cell, placed the inmate he was escorting in the cell, and uncuffed both inmates, Petitioner tried to close a chuckhole that stuck. (T.31-32). Petitioner had to slam the chuckhole to get it shut, and when he did, he felt a pop in his elbow followed by fire and numbness running down his arm into his pinky and ring finger. (T.31-32). Petitioner was treated at the Memorial Hospital of Carbondale Emergency Room on the same day. (PX7). Petitioner was given an arm sling and Ibuprofen. *Id.*

Petitioner was referred to Dr. J.T. Davis of the Orthopaedic Institute of Southern Illinois. (PX8, 12/28/12). Dr. Davis noted Petitioner's prior medical history and that Petitioner's left revision ulnar nerve transposition was placed on hold. *Id.* He noted that Petitioner's traumatic accident aggravated Petitioner's symptoms. *Id.* Following physical examination, Dr. Davis believed that Petitioner suffered an acute exacerbation and worsening of his underlying condition from his prior ulnar nerve transposition. *Id.* He also believed that Petitioner had an apparent new onset of flexor pronator strain versus tear as well as some lateral epicondylosis and likely strain of the triceps tendon. *Id.* Dr. Davis recommended repeat EMG nerve conduction studies and an MRI scan. *Id.* Petitioner was given Norco and Mobic and restricted to no use of the left arm. *Id.*

Petitioner's MRI examination was limited by motion artifact, but demonstrated findings consistent with tendinopathy at the flexor tendon origin at the medial epicondyle, biceps tendinopathy, and a possible subtle partial tear. (PX8, 1/4/13). Petitioner's repeat electrodiagnostic studies done on January 10, 2013, demonstrated evidence of persistent ulnar neuropathy at Petitioner's left elbow. *Id.* On January 14, 2013, Dr. Davis reviewed these studies and noted that Petitioner's physical examination continued to demonstrate evidence of left elbow neuropathy and symptomatic medial epicondylosis. (PX8, 1/14/13). Dr. Davis recommended that Petitioner see Dr. Young for potential surgical consultation, but Petitioner returned to Dr. Brown on March 6, 2013. (PX3, 3/6/13).

Dr. Brown noted Petitioner's recurrent symptoms and his traumatic injury on December 23, 2012, as well as the diagnostic studies and clinical examination ordered and performed by Dr. Davis. (PX3, 3/6/13). Dr. Brown's physical examination was consistent with Dr. Davis' assessment, demonstrating tenderness over the medial aspect of Petitioner's left elbow and painful Tinel's over the ulnar nerve at the left elbow. *Id.* Dr. Brown continued to recommend a revision ulnar nerve transposition. *Id.* Petitioner finally received the recommended surgery on March 28, 2013. (PX5). Petitioner improved following surgery, and was released to return to work full-duty without restrictions on May 13, 2013. (PX3, 5/13/13).

Petitioner testified that despite the improvement resulting from surgery, he occasionally experiences shooting pain down his left and right elbows. (T.35). He also still has a lot of numbness and pain down in the joint around the surgery site of his left elbow. (T.35). He has

also suffered loss of grip strength, greater on his left side than his right. (T.35). Petitioner explained that his left side gives out much quicker than his right side. (T.35-36). Petitioner's hobby of weight lifting has been negatively impacted by his injuries. (T.36).

On May 6, 2013, Respondent had Petitioner evaluated in person by Dr. Sudekum regarding the traumatic incident on December 23, 2012. (RX16). Dr. Sudekum had the opportunity to see Petitioner with his own eyes and stated that Petitioner's "physical form is characterized by extremely large, well-developed muscles throughout the bilateral upper and lower extremities, chest, neck and torso," noted that Petitioner was "extremely muscular with a bodybuilder's physique." (RX16). Despite Petitioner's accident being traumatic, Dr. Sudekum opined that he did not feel that Petitioner's job duties at Shawnee Correctional Center would cause or aggravate Petitioner's cubital tunnel syndrome. *Id.* He further did not believe that "closing" the chuckhole door would have aggravated any pre-existing cubital tunnel pathology.

Dr. Sudekum testified by way of deposition a second time and stated that he agreed with Petitioner's diagnoses of Dr. Davis, and that he believed that the revision surgery required by Petitioner was reasonable for his condition. (RX19, p.26). However, he did not believe this procedure was causally related to Petitioner's repetitive job duties or his traumatic accident in December of 2012. (RX19, p.26-28, 34). He further testified that he did not believe that the chuckhole slamming incident would aggravate Petitioner's underlying conditions or his need for surgery. *Id.* at 27-28, 34. Dr. Sudekum believed that Petitioner's symptoms were most probably caused by scar tissue from his first left elbow surgery. *Id.* at 32-33. Dr. Sudekum did not have the deposition of Melanie Welch, the CorVel analyst. *Id.* at 46.

Dr. Sudekum rescinded his classification of Petitioner as obese, but qualified his initial statement by indicating that Petitioner's height and weight cause him to fall into the category of obesity on medical charts. *Id.* at 43. Dr. Sudekum was aware that Petitioner spent only one hour per day in the gym, either 5 or 7 hours per week, compared to the 37.5 hours per week he spends working. *Id.* at 48. However, he did not know how much time Petitioner spent exercising his lower body and was not using any part of his elbows. *Id.* at 48.

Dr. Sudekum was unaware of whether or not Petitioner was working full-duty without restrictions up until his traumatic accident in December 23, 2012, but acknowledged that Petitioner's pain increased following that incident. *Id.* at 55. He found no evidence of malingering on the part of Petitioner. *Id.* at 55-56.

Dr. Brown testified by way of deposition. (PX11). Dr. Brown is a board certified orthopedic specialist whose practice is devoted to treatment of the hand, wrist, and elbow. *Id.* at 4. Dr. Brown primarily practices as a treating physician; however, he also does independent medical examinations, gives second opinions, and gives testimony by way of deposition. *Id.* at 7. Dr. Brown testified that the vast majority of his referrals come from insurance companies, defense attorneys and occupational medical clinics. *Id.* at 4. He serves as a consultant for the St.

Louis Cardinals and receives many referrals from employers such as Continental Tire, Walgreens Distribution Center and Caterpillar. *Id.* at 5. He also candidly testified to treating patients referred by Petitioner's attorney. *Id.* at 5. He has also performed independent medical examinations for the State of Illinois. *Id.* at 7-8.

Dr. Brown summarized Petitioner's history given to him when he first treated Petitioner in 2009 for the repetitive injuries that were the subject of the claim filed in 2009. *Id.* at 9. Petitioner had developed bilateral carpal tunnel syndrome, undergone bilateral carpal tunnel releases in 2008 and gained significant improvement in his condition. *Id.* at 9. Petitioner returned in May of 2010 with complaints of discomfort, numbness and tingling in his bilateral elbows, radiating into the little and ring fingers bilaterally. *Id.* at 10. When Petitioner's physical examination was positive, Dr. Brown referred Petitioner to Dr. Phillips. *Id.* at 11. Dr. Brown stated that Dr. Phillips is one of the leading experts in electrical diagnostic studies because he is one of the few, if not the only, neurologist that limits his practice to nothing but electrical diagnostic studies and has one of the only accredited electrical diagnostic laboratories in the country. *Id.* at 11-12. Dr. Brown testified that the findings on the electrical diagnostic studies were significant:

> A: . . . On the left, it was characterized as a moderate demyelinative ulnar neuropathy across the elbow, which means the outer sheath of the nerve, the myelin, was damaged, which was causing slower conduction of the nerve. And on the right, it was a milder demyelinative ulnar neuropathy, but there was axonal involvement, which means there was damage to the axons.
>
> Q: Why is that important, sir?
>
> A: Well, when you start getting involvement of the axons, it's the next level of nerve injury, and sometimes axonal nerve injuries are not fully reversible. Most demyelinative type of nerve injuries are reversible if they're treated early enough and appropriately. When you start getting into the realm of axonal nerve damage, that means the fibers within the nerves are damaged, and those are not often fully recoverable or reversible. *Id.* at 13-14.

Dr. Brown further explained that when measuring conduction velocity across the elbow, any drop in velocity below 50 meters per second is confirmatory of the diagnosis of cubital tunnel syndrome. *Id.* at 14-15. Petitioner's velocity measured 45.5 meters per second on his right side and 38.5 meters per second on his left. *Id.* at 15.

After two months of conservative care failed to improve Petitioner's symptoms and further examination demonstrated further reduction in grip strength, Dr. Brown sought and successfully obtained approval for surgery and proceeded with same. *Id.* at 16-18. When Petitioner's symptoms returned on his left side, he ordered new electrodiagnostic studies, which confirmed evidence of recurrent nerve compression and injury. *Id.* at 26-27. Dr. Brown believed

this was a structural or anatomical change due to scar tissue or nerve movement. *Id.* at 27. He expressed concern that if this was not resolved, Petitioner could have an irreversible nerve injury. *Id.* at 27. Dr. Brown testified that nerve exploration through surgery was necessary. *Id.* at 28.

Dr. Brown testified that non-occupational risk factors for carpal and cubital tunnel syndrome include diabetes, obesity, arthritis around the elbow, of which Petitioner has no sign of, rheumatoid arthritis and potentially hypothyroidism. *Id.* at 22-23. Dr. Brown testified that Petitioner is neither diabetic nor obese. *Id.* at 22. Petitioner testified at Arbitration that he does not suffer from diabetes, gout, hypothyroidism, or rheumatoid arthritis and further testified that he has never been overweight in his life. (T.8-9). Petitioner's weight came from his muscular stature; Petitioner weighs is 5'11, has a 32in. waist, and weighs 230lb. (T.9).

Dr. Brown testified that he was provided with the CorVel Job Site Analysis and Petitioner's job description, which he noted were inconsistent. (RX11, p.29). Dr. Brown testified that the analysis failed to give him the important information he desired. *Id.* at 30. Dr. Brown was further aware of the repetitive motion study, which showed that keying was done approximately 270-plus times per shift. *Id.* at 30-31. This was also inconsistent with the CorVel report and Petitioner's description. *Id.* at 30-31. Dr. Brown concluded that the Job Site Analysis alone simply did not have enough information for a physician to render an opinion within a reasonable degree of medical certainty. *Id.* at 31-32. Dr. Brown testified that the DVD likewise failed to provide sufficient incite, although it did show some of the difficulties described by Petitioner. *Id.* at 32. He testified:

> Well, the DVD, again, was not the type of video analysis that I'm used to seeing when I'm asked to do this for other insurance companies. Typically, when I do a video analysis or look at a video analysis, they actually show actual workers doing the work in the normal course of the work day. This DVD shows one officer. At the first part, he's demonstrating opening and closing a chuckhole. He demonstrates it two times. And then it shows him one other time during the DVD opening and closing a door with a key. So it only shows unlocking doors three times, and on one of the three he's clearly having trouble opening it. He's doing multiple turns, he can't unlock it. He actually takes the key out, tries it again. He eventually is able to unlock it, and then he tries to relock it and he's having trouble, but then the camera cuts off. *Id.* at 32-33.

Dr. Brown testified that activities such as keying, forceful gripping, grasping by pulling on heavy steel doors, and opening chuckholes and slamming them shut were factors in the development of cubital tunnel syndrome because those activities affect muscles in the arm which compress the nerve at the level of the cubital tunnel and also involve flexion and extension of the elbow. *Id.* at 33. Dr. Brown further noted that if officers are having trouble performing these activities in one try, like the officer in the DVD, then these stresses occur more often than quantified in any of Respondent's evidence, and the only individuals whom would best know how to quantify these stresses would be the correctional officers. *Id.* at 34.

Dr. Brown also reviewed the report authored by Dr. Sudekum and testified that he omitted key components of his records and key components of the electrical diagnostic studies. *Id.* at 35-37. Dr. Brown disagreed that Petitioner's age was a contributing factor in his condition, as an individual in his or her early 30's is youthful. *Id.* at 38. Dr. Brown also noted that Petitioner was fit. *Id.* at 38. Dr. Brown candidly acknowledged that weight-lifting, depending on the type of lifting done and frequency and duration, could potentially be a factor in cubital tunnel syndrome. *Id.* at 39. Dr. Brown noted, however, that he could not possibly exclude Petitioner's work activities, done up to 40 hours per week, as a factor and blame Petitioner's condition on weight lifting, done far less frequently, as did Dr. Sudekum. *Id.* at 40-41.

CONCLUSIONS

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

This case involves both repetitive and traumatic, accidents/injuries.

10 WC 20886:

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. "The word 'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens..Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254. Accidental injury need only be ***a*** causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003) (emphasis added). Even when other non-occupational factors are present, a "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The same theory applies to cases in which the employee's preexisting condition is aggravated by the repetitive nature of the employment. *Cassens Transport Co., Inc. v. Indus.*

Comm'n, 262 Ill.App.3d 324, 633 N.E.2d 1344, 199 Ill.Dec. 353 (Ill.App. 2d, 1994). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982).

For this reason, the Court has refused to adopt any standard threshold which a claimant must meet in order for his or her job to classify as repetitive enough to establish causal connection. *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App. 2nd Dist. 2005). The Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. The Court has also repeatedly found that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury. *Darling v. Indus. Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1st Dist., 1988); *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (1st Dist. 2000); *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773 (2d Dist., 2005). In a recent unpublished decision, the Appellate Court cited *Darling* and even stated that "in no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case" (DeKalb); *See e.g. Dorhesca Randell v. St. Alexius Medical Ctr.*, 13 I.W.C.C. 0135 (2013) (citing the Appellate Court in *Edward Hines* and holding that there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made). *See also* the Appellate Court's finding in *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009) (holding that a claimants work duties can be "varied" yet "repetitive and intensive;" repetitive is *not* defined as performing the exact same task over and over).

In *Fierke*, the Appellate Court found that a demand for quantitative proof was improper, reiterating that a claimant must only prove that some act or phase of employment was *a* causative factor. *Fierke*, N.E.2d at 850 citing *Darling*, N.E.2d at 1141-42. In *Darling*, the Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Darling,* N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. Working in a super maximum security prison facility, engaging in tactical training for cell extractions, slamming difficult chuckholes and turning Folger Adam keys are not activities to which the public is even remotely exposed. Rather, the risks associated with this type of labor are distinctly related to Petitioner's employment.

As a Correctional Officer at Tamms, Petitioner repetitively used his arms throughout the day to open and close chuckholes to pass or receive items such as food, laundry, mail, medicine, literature and trash, and to perform all inmate services. (T.13, 20-21). Petitioner also had to perform strip searches, cuff and uncuff inmates through chuckholes, apply leg irons once the inmate was removed, and once more open and close the chuckhole to uncuff the inmate once he returned to his cell. Petitioner testified that he had to keep firm hold on the handcuffs to prevent inmates from taking and weaponizing or damaging the handcuffs from within the cell. (T.12-21). Due to the security status of the facility, Officers such as Petitioner performed all of the cleaning and maintenance tasks in the facility without the assistance of inmate workers. (T.27-28). Petitioner also lifted mail bags weighing up to 90lb. (T.56, 94). Respondent also offered conflicting evidence, some of which supports Petitioner's claim as indicated by Dr. Brown. The repetitive motion study shows that Petitioner on average keys 270 times per shift, and Respondent's DVD cut away when an Officer had difficulty with one of the locks. (RX10; RX11).

Petitioner has no comorbid health risk factors for the development of cubital tunnel syndrome. Petitioner is not obese, and does not suffer from diabetes, gout, hypothyroidism, or rheumatoid arthritis. (T.8). Even though Petitioner's weight lifting may be a factor, given the brevity of his workout sessions compared to his full-time work schedule, the Arbitrator agrees with Dr. Brown's assessment that it would be possible to exclude Petitioner's employment as a causative factor in his condition. A fellow Arbitrator and the Commission reached a similar conclusion in *Burns v. SOI/Pinckneyville Corr. Ctr.*, 14 I.W.C.C. 0482 (holding that if claimant's martial arts played a factor in his condition, then his hand-intensive employment likewise was a contributing factor). Similarly, Petitioner's hobby and his employment require significant use of the hands, specifically for grasping and lifting; however, the time and hand usage demanded by Petitioner's employment far outweigh that which is devoted to his hobby. The testimony of Dr. Brown and Dr. Sudekum reveal that Petitioner only works out 1 hour per day, 5-8 hours per week. However, Petitioner is employed full-time by Respondent, and repetitively performs not only grasping and lifting, but twisting while using Folger Adams keys 270 times or more per shift, and experiences jarring/trauma while closing chuckholes that stick and restraining resistant inmates. Therefore, the Arbitrator finds the opinion of Dr. Brown more credible than that of Dr. Sudekum, and finds that Petitioner met his burden of proof regarding accident and causation as to his bilateral cubital tunnel syndrome.

13 WC 02308:

The Supreme Court holds that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (1955). If the injury

coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Id.*

It is clear that Petitioner's injuries occurred in the course of his duties. The question before the Arbitrator is whether Petitioner's duties arose out of his employment. An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* As recently noted by the Appellate Court in *Accolade*, one cannot dismiss an injury that occurs during a routine, uneventful motion such a reaching, simply because the motion itself is not peculiar, if at the time of the occurrence the "claimant was engaged in an activity she might reasonably be expected to perform incident to her assigned duties." *Accolade v. Illinois Workers' Comp. Comm'n*, 2013 IL App (3d) 120588WC, 990 N.E.2d 901, 908. (3rd Dist. 2013). This principle was reaffirmed in the Appellate Court's recent decision in *Young v. Illinois Worker's Comp. Comm'n*, 2014 IL App (4th) 130392WC, July 7, 2014.

The occurrence of Petitioner's traumatic accident is unrebutted. On December 23, 2012, after his transfer to Shawnee Correctional Center, Petitioner had to slam a stuck chuckhole to get it shut and felt a pop in his elbow followed by fire and numbness running down his arm into his pinky and ring finger. (T.31-32). Petitioner was clearly engaged in an action required or reasonably foreseeable by his employer in the performance of his job duties. The Arbitrator therefore finds that Petitioner met his burden of proof regarding accident.

Both Dr. Davis and Dr. Brown opined that this incident aggravated Petitioner's condition and need for further surgery. If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977). There is no evidence that Petitioner's symptoms ever returned to baseline following this incident. The Arbitrator therefore relies on the credible opinions of Dr. Davis and Dr. Brown and finds that Petitioner met his burden of proof regarding accident and causation in 13 WC 02308.

Issue (D): What was the date of the accident? (13 WC 02308 only)
Issue (E): Was timely notice of the accident given to Respondent? (13 WC 02308 only)

The Supreme Court's ruling in *Durand* stated: "[w]e decline to penalize an employee who who diligently worked through progressive pain until it affected her ability to work and required medical treatment," *Durand v. Indus. Comm'n*, 862 N.E.2d 918 at 930; "[t]he purpose behind the Workers' Compensation Act is best served by allowing compensation where an injury is gradual but linked to the employee's work," *Id* at 925; "the 'fact of injury' is not synonymous with the

'fact of discovery'" *Id.* at 927. A claimant is not required to solely rely on symptoms and suspicion to determine that their condition is work-related; the Supreme Court stated that to rely solely on a claimant's testimony concerning symptoms, without accurate knowledge of the cause of those symptoms, would essentially be asking them to "rely on 'expert' medical testimony from a layperson." *Id.* at 929.

Petitioner alleged a manifestation date of May 12, 2010. Although Respondent claimed and offered proof that Petitioner was aware of his symptoms before this date, Petitioner testified that this was the first time he became aware that he suffered from cubital tunnel syndrome related to his employment. (T.26-27). Petitioner testified that his carpal tunnel syndrome was "the only thing the doctor went over" in 2008. (T.25). Hence, Petitioner's "fact of injury" did not occur at the same time his "discovery."

The Arbitrator notes that the manifestation date can be determined several ways: (a) the date the employee actually became aware of the physical condition and its relation to work, presumably through medical consultation; (b) the date the employee requires medical treatment; (c) the date on which the employee can no longer perform work activities; or (d) when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Indus. Comm'n*, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Hone v. Indus. Comm'n*, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Indus. Comm'n*, 531 N.E.2d 174 (Ill. 1988); *Three "D" Discount Store v. Indus. Comm'n,* 556 N.E.2d 261 (Ill. 1989). In short, there are three groups of claimants: (1) those who do not recognize that their symptoms are related to work; (2) those who have a "suspicion" that they may have a work related condition, along with a "sketchy and equivocal understanding" of the condition; and (3) those who know they have a work related condition, but diligently work through their progressive condition until it requires treatment. All three groups are given protection under the Act by virtue of the Supreme Court's ruling in *Durand.*

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

was related to work. The Appellate Court found that Petitioner's manifestation date was the day he met with Dr. McKechnie and stated the following:

> The evidence in this case establishes that Dr. Carl Johnson discussed Dr. Block's report of the EMG results with petitioner. . . **No direct evidence was presented regarding whether Dr. Johnson ever told Petitioner that his injury was work related.** . . . It was not until July 10, when petitioner met with Dr. McKechnie, that it became clear that petitioner's condition necessitated surgery. . . Based on the evidence of record, it could be reasonably inferred that petitioner first learned that his condition of ill-being was work-related at some point between July 10, and the first of August, 1984. Applying the reasonable person test to these facts, we find that although petitioner persisted in his employment until August 10, a reasonable person in these circumstances would have been on notice that the condition was both work-related and medically disabling on July 10, 1984. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261, (1989) [emphasis added].

Similarly, Petitioner may have had cubital tunnel symptoms in 2008, but there is no evidence that Petitioner was advised that his condition was work-related, and Petitioner did not realize same until he sought treatment again in 2010 with Dr. Brown, after diligently working through his progressive symptoms. (T.26-27). Thus, the Arbitrator finds Petitioner's manifestation date, May 12, 2010, appropriate under the aforementioned precedent. *Durand v. Industrial Commission*, 862 N.E.2d 918 (2007); *Three "D" Discount Store v. Industrial Commission* 556 N.E.2d 261 (1989).

Following his consultation with Dr. Brown, Petitioner completed an incident report with Respondent. This incident report, dated May 18, 2010, is included in the materials offered by Respondent. (RX2). Thus, the Arbitrator finds that Petitioner gave timely notice of his injuries.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services? (both claims).

Upon establishing causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary and prospective medical care required by their employees, including treatment required to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 294 Ill.App.3d 705, 691 N.E.2d 13, 229 Ill.Dec. 77 (2000); *F & B Mfg. Co. v. Industrial Com'n of Illinois*, 758 N.E.2d 18 (1st Dist. 2001).

The Arbitrator finds that Petitioner's care and treatment has been conservative and reasonable. Immediately following both accidents, all of Petitioner's physicians attempted to resolve Petitioner's symptoms conservatively. Only after Petitioner's symptoms failed to improve

with conservative measures was surgery recommended. Thus, all of the treatment received by Petitioner was rendered in the quest to cure or relieve the effects of his work-related injuries. The Arbitrator therefore awards the medical expenses contained in Petitioner's group exhibit pursuant to §8(j) of the Act:

Dr. Brown/The Orthopedic Center of St. Louis	$	38,736.00
Neurological & Electrodiagnostic Institute	$	4,510.00
Timberlake Surgery Center	$	38,662.77
Premier Anesthesia	$	1,275.00
Joyner Therapy Services	$	7,325.00
Memorial Hospital of Carbondale	$	1,077.44
Dr. Davis/Orthopaedic Institute of Southern Illinois	$	2,262.00
Rehabilitation Institute of Chicago/Southern Illinois Healthcare	$	221.00
TOTAL:	**$**	**94,069.21**

Issue (K): What temporary benefits are in dispute? (TTD)

The medical records show that Petitioner was off work for his first claim from October 16, 2010 to October 21, 2010 and from October 27, 2010 to January 2, 2011, totaling 10 3/7 weeks at the TTD rate of $701.45/week ($7,316.12). Petitioner was off work for his second claim from March 28, 2013 to April 8, 2013, or 1 4/7 weeks at a TTD rate of $752.31/week ($1,181.13). (PX3; PX5; AX1). Respondent claims it paid 7,415.58 in temporary total disability benefits and claims an overpayment of benefits. However, the total amount of benefits owed to Petitioner is $8,497.25. Therefore, no overpayment has been made.

Respondent shall pay the remaining $1,081.67 in temporary total disability benefits owed at a weekly rate of $752.31/week for the next 1.438 weeks.

Issue (L): What is the nature and extent of Petitioner's injuries?

Petitioner's injuries from his bilateral ulnar neuropathy manifested prior to the Amendment to the Act enacting §8.1(b). Regarding Petitioner's traumatic injuries, the Arbitrator notes that neither party obtained an AMA rating, and has given due consideration to the remaining factors:

(i) Occupation: Petitioner is employed as a Correctional Officer at Shawnee Correctional Center, and continues to close difficult chuckholes (the cause of his second injury), and deal with inmates.

(ii) Age: Petitioner was 32 and 34 years of age respectively at the time of his injuries. Petitioner is young, but will have to live with his disability for a longer period of time.

(iii) Earning Capacity: There is no direct evidence of diminished future earning capacity in the record; however, based on Petitioner's testimony of how his injury negatively impairs his activities, it is reasonable to conclude that such repercussions will manifest in the future.

(iv) Disability: As a result of his repetitive job duties, Petitioner developed bilateral cubital tunnel syndrome which required bilateral cubital tunnel releases and ulnar nerve transpositions. Petitioner's left side did not improve as significantly as hoped, and his symptoms recurred. He then sustained a traumatic injury, which further aggravated his condition. Petitioner then underwent a revision ulnar nerve transposition, which further improved his condition. Petitioner testified that despite the improvement resulting from surgery, he occasionally experiences shooting pain down his left and right elbows. (T.35). He also still has a lot of numbness and pain down in the joint around the surgery site of his left elbow. (T.35). He has also suffered loss of grip strength, greater on his left side than his right. (T.35). Petitioner explained that his left side gives out much quicker than his right side. (T.35-36). Petitioner's hobby of weight lifting has been negatively impacted by his injuries. (T.36).

Based upon the foregoing, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 20% loss of his left arm, (15% for 10 WC 20886;.5% for 13 WC 02308) and the 15% loss of his right arm.

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Cari Anderson,
Petitioner,
vs.

NO: 11WC 21479

Gardner Denver Machinery,
Respondent,

15IWCC0262

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 18, 2014, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 13 2015
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CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANDERSON, CARI
Employee/Petitioner

Case# **11WC021479**

GARDNER DENVER MACHINERY
Employer/Respondent

15IWCC0262

On 7/18/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

RUSIN MACIOROWSKI & FRIEDMAN LTD
TERRY SCHROEDER
2506 GALEN DR SUITE 104
CHAMPAIGN, IL 61821

15IWCC0262

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

☐ 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

CARI ANDERSON
Employee/Petitioner

v.

GARDNER DENVER MACHINERY
Employer/Respondent

Case # 11 WC 21479

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of Quincy, on May 8, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 5, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$13,309.94**; the average weekly wage was **$689.17**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$2,422.81** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$2,422.81**.

Respondent is entitled to a credit for all medical bills paid pursuant to Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $459.45/week for 10 weeks, commencing June 3, 2011 through August 12, 2011, as provided in Section 8(b) of the Act. Respondent is entitled to a credit of $2,422.81, as referenced above.

Respondent shall pay reasonable and necessary medical services set forth in Petitioner's Exhibit 6 (and as discussed in the Memorandum of Decision of Arbitrator), as provided in Sections 8(a) and 8.2 of the Act. The parties stipulated to medical bills that were paid by Respondent's group medical carrier pursuant to Section 8(j) of the Act, and Respondent shall receive a credit for such payments and hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall pay Petitioner permanent partial disability benefits of $413.50/week for 38.25 weeks, because the injuries sustained caused the 15% loss of the right hand as provided in Section 8(e) of the Act, and the 1.5% loss of the person as a whole as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

07/02/2014
Date

JUL 18 2014

15IWCC0262

STATE OF ILLINOIS)
)SS
COUNTY OF ADAMS)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CARI ANDERSON
Employee/Petitioner

v. Case # 11 WC 21479

GARDNER DENVER MACHINERY
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On April 5, 2011, Petitioner, Cari Anderson, was employed by Respondent, Gardner Denver Machinery. Petitioner is right hand dominant. On November 17, 2008, Petitioner was initially hired as a stockroom attendant and worked for approximately four and a half months. Thereafter, she was laid off from March 2009 through November 2010. Petitioner was then recalled back to work for Respondent.

On November 3, 2010, Quincy Medical Group records indicate Petitioner underwent a physical examination for job placement. According to the physical examination results, her upper extremities where normal, her nervous system was normal, her general health was excellent and the doctor concluded that she was suitable for stockroom work. (Petitioner's Exhibit (PX) 4). Petitioner testified that at that time she had no problem with her hands or arms.

Petitioner testified that between November 15, 2010 and April 2011, she worked in the stockroom as a stockroom attendant. Petitioner testified that her job duties included putting away/segregating parts, uncrating boxes and parts, counting and separating parts, and sorting, packing, and stocking. Petitioner testified that she would have to perform lifting, pushing and pulling activities with her hands for approximately 90% of her workday. She testified that the parts ranged from small screws/nuts weighing only ounces to metal parts weighing up to 70 pounds. She would handle hundreds to over a thousand parts per day, depending on the sizes. She indicated that at times she used her hands/wrists in awkward twisted positions and performed forceful and constant hand activities for six to seven hours of the work day. She also testified that she operated a computer for approximately one hour per day.

Petitioner testified that she had two additional jobs over the last six years. She owns a cleaning service called Fine Line Janitorial, where two employees perform the cleaning and she occasionally checks on the quality in a mostly supervisory role. Additionally, she works for Global Trans Freight Company in customer service approximately two hours per day. This requires phone work and some minor typing. She testified that most data entry involved in the position was completed by customers.

Scott Lain testified on behalf of Petitioner. Mr. Lain testified that he was subpoenaed to appear in court

and first met with Petitioner's attorney the day of the trial. Mr. Lain testified that he currently works for Respondent and has worked there for three years, with the last two years in the stockroom with Petitioner. Mr. Lain testified that the stockroom hand duties were physical, forceful, and repetitive and required a significant amount of hand intensive activities handling the nuts, bolts, and parts. Mr. Lain testified that the parts weighed anywhere from several ounces to 80 pounds, and there was a significant amount of gripping, pushing, pulling, and lifting with both hands throughout the workday.

Chad Penn testified on behalf of Petitioner. Mr. Penn testified that he was subpoenaed by Petitioner's attorney to appear in court and first met with Petitioner's attorney the day of trial. Mr. Penn testified that he was previously employed by Respondent from 2005 through 2012, and is currently employed as a truck driver. Mr. Penn testified that he was voluntarily laid off in May 2012. Mr. Penn testified that he worked in the stockroom from November 2006 through January 2008, and again from November 2010 through May 2012. He testified that he periodically worked with Petitioner. Mr. Penn testified that the stockroom was similar to a large warehouse and the stockroom job duties included stocking, storing, and handling parts throughout the workday. Mr. Penn testified that the job was hand intensive and that the stockroom attendant handled hundreds to over a thousand parts per day, and many of the hand/wrist activities were awkward. He testified that he would spend approximately seven hours a day gripping, pulling, pushing, or lifting with his hands in the stockroom to perform the stockroom duties. With reference to the hand movements, Mr. Penn testified he considered the job to be repetitive, forceful, and physical.

Jerry Ludlum testified for Respondent. Mr. Ludlum is the director of operations for Respondent. He testified that he was asked to observe Mr. Lain's job duties and did so in April 2014 for approximately five minutes. He testified that Petitioner's job duties varied throughout the workday, were not constantly repetitive, and approximated that Mr. Lain would utilize his hands two to six hours per day. Mr. Ludlum also testified that this was the first safety observation of the stockroom attendant position.

Donald Hegg testified for Respondent. Mr. Hegg is the production supervisor for Respondent and Petitioner's immediate supervisor. Mr. Hegg testified that Petitioner used a scale to count and weigh parts during inventory, but that he had never seen the scale used for daily sorting and segregating of parts. He testified that he frequently assigned Petitioner to help with the loading and unloading of trucks, which he believed could sometimes be for long periods. He would also pull her away for other minor tasks occasionally and intermittently during her shift. Mr. Hegg testified that stockroom attendants could be responsible for sorting hundreds if not thousands of parts, but that the work would be spread out over or up to three shifts.

Josh Inghram testified for Respondent. Mr. Inghram works for Respondent as a buyer/planner and has done so in that capacity for five years. He was in charge of releasing the orders for picking and pulling in the stockroom. Mr. Inghram testified that Petitioner did not utilize the stud nut kit on April 8, 2011, as is noted in her accident report, because he did not have any stud and nut assembly data from that date. He also testified that she could not have worked on a stud and nut kit from a previous shift. According to his data, she only worked on 21 of the 76 stud nut kits Respondent ordered between November 2010, and April 2011. He acknowledged that he accumulated the pick and pull lists and orders within the four weeks before trial, approximately three years after the accident report was completed. Mr. Inghram brought in parts to the stud and nut kits which included studs, fasteners and multiple parts weighing anywhere from several ounces to 3.2 pounds, according to Mr. Inghram, and the Arbitrator took notice of the parts. Mr. Inghram testified that he did not know how many parts Petitioner handled, but there were a total of 94 parts to handle in a stud and nut kit and that Petitioner did handle at least 1,974 parts in the stud and nut kits between November 2010, and April 2011, according to his data. The total number of parts in the stud and nut kits that Petitioner could have handled was 7,144 according

to Mr. Inghram's data. Mr. Inghram testified that his information was data-driven and not gathered through observation, and his numbers were based on the stockroom attendant's initials written on completed paperwork. After being questioned multiple times regarding whether he ever saw Petitioner used her hands for gripping at work, Mr. Inghram finally responded in the affirmative.

In February 2011, Petitioner saw her family doctor, Dr. David Ouellette, for right shoulder and left foot pain. Petitioner was diagnosed with right shoulder pain with intermittent tingling in her right arm. Petitioner testified that her hands began tingling toward the end of March 2011, and she followed-up with Dr. Ouellette on March 31, 2011. Dr. Ouellette noted right arm paresthesias which seemed consistent with compression of her ulnar nerve although she did not have any serious neurological deficit such as wrist drop or weakness. According to the records, Petitioner was diagnosed with right arm paresthesias and a possible ulnar nerve injury, and the doctor recommended a nerve conduction test. (PX 2).

On April 5, 2011, Petitioner underwent a nerve conduction study, which showed right median neuropathy that could be consistent with right carpal tunnel syndrome (CTS). (PX 2). Petitioner testified this was the first time she was made aware that she had CTS.

On April 7, 2011, Petitioner followed up with Dr. Ouellette. The doctor's records note that Petitioner was diagnosed with right CTS. (PX 2). On April 8, 2011, Petitioner testified she notified Respondent that she had right CTS and completed an injury report. According to the injury report, Petitioner's injury was from lifting stud and nut boxes. She felt pain in her elbow and wrist and she documented that she was counting and separating studs and nuts for kits, lifting from one box and lowering into another, and that the parts varied in weight. (RX 4). Respondent also had her complete a Suspected Cumulative Trauma Checklist. (RX 5).

On April 13, 2011, Petitioner was seen by Dr. Gregory Henry at Respondent's request pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"). Dr. Henry testified that Petitioner's job included processing of parts and moving parts from one spot to another of various sizes. Dr. Henry testified that some of the parts may be small and other parts extremely large and it required various degrees of force. (RX 1, p. 14). The doctor also testified that Petitioner's job duties would be classified as repetitious for short periods of time, but he did not believe that it was repetitious for the standard eight hour work shift. (RX 1, p. 15). Dr. Henry concluded that Petitioner's right carpal tunnel condition was idiopathic in nature, not work related, and based that upon his belief that she had only done the job for two months and she had a second job working for a cleaning company or janitorial service. (RX 1, p. 17). On cross-examination, Dr. Henry admitted that he filled out a Report to Employer after the April 13, 2011 evaluation indicating that Petitioner's injury was work-related and diagnosing right wrist pain/numbness. (RX 1, pp. 22-23). Dr. Henry also admitted that he was unaware that Petitioner worked for Respondent in 2008, was unaware that she had passed a post-employment physical in November 2010, acknowledged that he did not document the amount of weight Petitioner lifted at work, the amount of activities of pulling, and use of her hands while working in the stockroom. He opined that some of Petitioner's work was forceful but could not place a percentage of her work activities which he believed was forceful. (RX 1, pp. 24-26). After the Dr. Henry examination, Petitioner testified that Respondent denied her workers' compensation claim.

On May 10, 2011, Petitioner saw Dr. George Crickard, who was referred to her by Dr. Ouellette. Petitioner complained of bilateral hand numbness, right greater than left, and she discussed overuse at work. On May 31, 2011, Petitioner followed up with Dr. Crickard, who noted that he saw patients performing her type of work activities that developed CTS. The doctor recommended surgery. (PX 4).

On June 3, 2011, Petitioner underwent a right carpal tunnel release. (PX 3; PX 4). Petitioner testified that following surgery she developed right trapezius pain around her shoulder blade and was referred to Dr. Newton. On August 23, 2011, Dr. Newton performed a trigger point injection into her right trapezius. Petitioner followed up with Dr. Newton for ongoing right trapezius pain and numbness in her right fourth and fifth digits, and the doctor found that her problem was perpetuated by repetitive use and heavy lifting at work. Dr. Newton noted no permanent damage. (PX 4).

On December 20, 2011, Petitioner followed up with Dr. Crickard and testified that she described her stockroom duties. Dr. Crickard noted that Petitioner's right CTS was work related. (PX 4).

On July 2, 2012, Petitioner saw Dr. Jeffrey Coe at her attorney's request. Dr. Coe believed that Petitioner's stockroom duties from November 2010 through April 2011, which included picking up, counting, and separating hundreds of parts each shift using both hands, were a factor causing the development of right CTS. (PX 5, pp. 34-35). Dr. Coe further opined that Petitioner's right carpal tunnel surgery was complicated by the development of the muscular issue, treated by Dr. Newton, which was scapulothoracic dysfunction. (PX 5, pp. 33-34). Dr. Coe found the scapulothoracic dysfunction was a condition with the muscles in the upper back and around the back of the shoulder and shoulder blade region. (PX 5, p. 20). The doctor found that this condition was a post-operative complication, based upon the overuse sprain/strain of the muscles of the upper right arm above the site where the right carpal tunnel release was carried out. (PX 5, p. 22). Dr. Coe found that this was a complication that occurs with individuals who have had surgery on their hand, who simply do not use their hands normally because of discomfort, modify their movements and create the problem, and he concluded that it was related to the surgical release. (PX 5, p. 22).

Petitioner no longer experiences the hand numbness that she had before surgery, but does have a loss of grip strength in her right hand. She notices problems with her hand/wrist condition with weather changes. After a long day at work, her right hand is tired. She uses Epson salt baths on her hand to relieve her symptoms. Petitioner's trapezius now feels "tight," especially in the evening. It "pops" frequently.

CONCLUSIONS OF LAW

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

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

There is no standard threshold which a claimant must meet in order for his or her job to classify as "repetitive" enough to establish causal connection. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 193-194, 825 N.E.2d 773 (2d Dist. 2005). There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. *Id.* When a claimant's work activities are varied, the Court has specifically held that "repetitive" is not defined as performing one or two tasks; rather, "repetitive" refers to the rigorous use of an extremity throughout employment, even though the tasks performed may vary. *City of Springfield v. Ill. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 901 N.E.2d 1066 (4th Dist. 2009). Furthermore, a claimant need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Comm'n*, 309 Ill. App. 3d 1037, 1040, 723 N.E.2d 846 (3d Dist. 2000).

Petitioner worked for Respondent for approximately four months in 2008, and was re-employed in

November 2010. Her job as a stockroom attendant required handling hundreds of parts daily, which included nuts, bolts, studs, metal pipes, and other steel parts of various sizes. A substantial portion of Petitioner's work day was spent gripping, pushing, pulling, and lifting with her hands in the stockroom, and many of these hand activities were in awkward wrist positions.

Mr. Penn and Mr. Lain, both stockroom attendants, verified the repetitive and forceful nature of the hand activities in the stockroom. Although Respondent's witnesses testified to less hand-intensive activities, all three witnesses confirmed that the stockroom duties necessitated the handling of parts throughout the workday. Mr. Lundlum testified that two to six hours were spent in the stockroom with hand activities. Mr. Hegg testified that Petitioner handled numerous parts of various sizes. Although Mr. Inghram testified that the order sheets did not confirm she worked on the stud nut kit in April 2011, he did acknowledge that she did work on 21 kits which contain 94 parts in each.

Taken in total, the Arbitrator finds Petitioner's stockroom duties required a significant amount of daily hand use. Medically, both Dr. Crickard and Dr. Coe indicated that Petitioner's right carpal tunnel condition was related to her stockroom duties. Dr. Henry, Respondent's doctor, testified that Petitioner's carpal tunnel condition was not work-related, but he testified to a limited knowledge of her specific work duties with reference to her hands. Additionally, Dr. Henry completed a Report to Employer indicating that Petitioner had a work-related injury to her right wrist.

The Arbitrator makes special note concerning witness credibility in this case. The Arbitrator found Petitioner to be an extremely credible witness at trial. She testified in a credible and believable fashion consistent with the evidence presented in this case. She was forthcoming, and appeared to be endeavoring to give the full truth during her testimony. She was a candid and pleasant witness, and great weight is placed on Petitioner's credibility. The Arbitrator also found Mr. Lain and Mr. Penn to be credible witnesses. The Arbitrator found the testimony of Mr. Inghram particularly lacking credibility in regard to his knowledge of Petitioner's work activities. Further, on cross-examination, he was combative and seemed to go to great lengths to avoid giving candid and simple answers to Petitioner's counsel.

In addition, the Arbitrator places greater weight in the opinions of Dr. Crickard and Dr. Coe on the issue of causation, and hereby adopts their well-reasoned causation opinions. The Arbitrator therefore concludes that Petitioner sustained an accident that arose out of and in the course of her employment by Respondent on April 5, 2011, at which time her condition manifested upon learning nerve conduction testing results diagnosing CTS, and that Petitioner's current condition of ill-being is causally related to the injury. The Arbitrator also finds that Petitioner's trapezius condition was the direct result of her carpal tunnel surgery, and is therefore also causally related to the work accident.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent disputed the medical expenses based upon liability. After determining that Petitioner's right CTS is work related, the Arbitrator finds that the medical services provided for the right carpal tunnel condition were reasonable and necessary and related to the work accident. Following the right carpal tunnel surgery, Petitioner developed right trapezius pain and was diagnosed with scapulothoracic dysfunction. Dr. Coe, supported by the Quincy Medical Group doctors, including Dr. Newton, determined that the right trapezius pain was a consequence of the right carpal tunnel syndrome/surgery and physical work. These medical opinions are un-rebutted. Therefore, the Arbitrator finds that the medical bills contained in Petitioner's Exhibit 6 pertaining

to the carpal tunnel condition and the right trapezius/right extremity condition are related and awards the following:

- Advanced Physical Therapy & Sports Medicine - $150.55
- Blessing Hospital - $682.02
- First Choice Physical Therapy - $44.02
- First Choice Physical Therapy - $44.65
- Hannibal Clinic - $478.59 ($120.00 paid by Petitioner)
- Quincy Medical Group - $4.710.06 ($42.00 paid by Petitioner out of pocket)

TOTAL: $6,165.87

The Arbitrator awards payment of such medical expenses referenced above pursuant to Sections 8(a) and 8.2 of the Act.

Issue (K): What temporary benefits are in dispute? (TTD)

Respondent disputed Petitioner's entitlement to temporary total disability (TTD) benefits. After finding Petitioner's conditions work-related and based on the medical records, the Arbitrator awards TTD benefits from June 3, 2011 through August 12, 2011. The parties stipulated that Respondent paid $2,422.81 in non-occupational indemnity disability benefits pursuant to Section 8(j) of the Act for which Respondent is entitled to a credit (and Respondent shall hold Petitioner safe and harmless up to the extent of the credit).

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

The Arbitrator finds that Petitioner sustained work-related right CTS, and underwent a surgical release. Following surgery, she developed scapulothoracic dysfunction which manifested in her right trapezius and upper extremity pain radiating down her back with tingling into her right arm. She underwent a trigger point injection and was found by Dr. Coe to have mild weakness of her right hand, decreased light touch sensation on her flexor surface of her right second and third fingers, and decreased light touch sensation on the flexor surface of her right fifth finger. (PX 5, pp. 29, 20). Dr. Coe also noted tender areas that he identified as trigger points in the right trapezius muscle extending out along the inner border of the right shoulder blade. (PX 5).

Petitioner testified that she notices right hand weakness and soreness, which is her dominant hand/arm, tightness and an achy sensation in her right shoulder blade along with a popping sensation in her trapezius region. She treats her conditions by taking periodic Epson salt baths. The Arbitrator also takes note of Petitioner's credibility, discussed *supra*, when assessing her testimony concerning current disability.

Based on the foregoing, the Arbitrator concludes that Petitioner suffered the 15% loss of use to her right dominant hand pursuant to Section 8(e) of the Act, as well as the 1.5% loss of use to the person as a whole for her trapezius condition pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Primotivo Gonzalez,
Petitioner,
vs.

NO: 13WC 25276

LCN Closures, Inc., and Manpower, Inc.,
Respondent,

15IWCC0263

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical, temporary total disability, penalties under sections 19(k), 19(l), attorney's fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 5, 2014, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 1 3 2015
o040715
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

GONZALEZ, PRIMITIVO
Employee/Petitioner

Case# **13WC025276**

LCN CLOSURES INC AND MANPOWER INC
Employer/Respondent

15IWCC0263

On 9/5/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1097 SCHWEICKERT & GANASSIN LLP
SCOTT GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

2993 CASSIDAY SCHADE LLP
JENNIFER B SANTORO
20 N WACKER DR SUITE 1040
CHICAGO, IL 60606

15IWCC0263

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Primotivo Gonzalez,
Employee/Petitioner

v.

LCN Closures, Inc. and Manpower, Inc.,
Employer/Respondent

Case # **13** WC **25276**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Ottawa**, on **6/26/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

15IWCC0263

On the date of accident, **6/19/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$23,666.76**; the average weekly wage was **$455.13**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **no** dependent children.

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

Respondent shall be given a credit of **$4,247.88** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$4,247.88**.

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

ORDER

The Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on June 19, 2013 and failed to prove that his current condition of ill-being is causally related to said accident. Accordingly, Petitioner's claim for compensation is hereby denied.

No benefits are awarded.

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

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

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

Signature of Arbitrator

9/3/14
Date

ICArbDec19(b)

SEP 5 - 2014

STATEMENT OF FACTS:

Petitioner, a 46 year old machinist, alleges injuries to his bilateral hands and elbows on or about June 19, 2013. Petitioner testified he was employed at LCN through the staffing agency Manpower from August 7, 2012 until June 19, 2013 working on the shell line. Petitioner's duties involved picking up parts weighing 9 to 10 pounds with his left hand, inspecting the part, putting the part in the machine, pushing two buttons which caused the machine to drill a hole in the part, taking the part out with his right hand, inspecting it again and putting it either on the line or in a basket. Petitioner noted that a regular shift was 8 hours long, exclusive of overtime, with 20 minutes for lunch and a ten minute break. He estimated that he would hone 1700 to 1900 parts during a regular shift.

Petitioner testified that on or about January 12, 2012 he began developing pain, numbness and tingling from his elbows to his wrists and into the hands. He first reported these complaints to Eddie on June 19, 2013. He testified he sought treatment for his complaints at Ottawa Regional Medical Center and with Dr. Rhode at Orland Park Orthopedics. On October 22, 2013, he underwent a carpal tunnel release on the left side. Petitioner testified that initially his left side improved, but over time, he continued to have pain and weakness in the hand. Surgery has also been recommended for the right side. However, Petitioner testified he is hesitant to have surgery on the right as he does not believe he has recovered well enough on the left to function once he has surgery on the right.

Petitioner reviewed a video of work on the shell line. He testified that while the activities of the person on the video were similar to what he did in his job, the video was likely in training mode which runs at about 10% of the normal speed or much slower than the speed at which he actually performed his duties.

At the time of his June 19, 2013 evaluation, Petitioner was given a release to return to work light duty. Petitioner testified that he was offered a light duty assignment in Respondent's office. Petitioner testified the light duty involved counting pencils in a small room. Petitioner indicated that he has a history of anxiety issues and that working in the small room gave him anxiety and a stomach ache. Petitioner testified that because there was no other work available and he had anxiety, he did not return to light duty. He thought he went to the doctor to get a note stating the light duty caused anxiety, but could not recall for sure.

Dawn Peterson, Manpower Operations Manager for Metro Chicago, testified she is the individual who coordinates light duty issues for the Respondent when an injured worker is released to modified work. Ms. Peterson testified she wrote a letter to Petitioner offering him light duty. (RX6). Petitioner accepted the light duty offer and started his modified duty assignment in the Peru, Illinois office. The first day of work, he was assigned to sorting supplies. After learning that Petitioner walked off the job, Ms. Peterson had a telephone conversation with Mr. Gonzalez in which he told her that he did not like the work. Ms. Peterson testified there was a larger conference room where Petitioner could have done his job if he wished and that at no time did Mr. Gonzalez relay to her or any other supervisory individual that he was having anxiety as a result of the room he was working in being too small. Ms. Peterson further testified that the Respondent has a policy of offering light duty and that workers are offered work either in the local office or through a non-profit agency. She noted that light duty work would have continued to be available had Petitioner made himself available for work.

On July 3, 2013, Petitioner underwent an EMG which showed right and left carpal tunnel syndrome. (PX5). On July 9, 2013, Dr. Bhurgri took Petitioner off work until he could be seen by Dr. Perona. (PX3). On July 22, 2013, Petitioner was seen at Illinois Valley Community Hospital Emergency Room after having been rear ended in an automobile accident the day before. (RX11).

On July 25, 2013, Petitioner was examined by Dr. Rhode. (PX6). At that time he gave a history of bilateral hand pain and numbness developing in January 2013 which did not improve. (PX6). Per Dr. Rhode's records, Petitioner stopped working on June 18, 2013. (PX6). Dr. Rhode injected the right wrist, prescribed Norco and Mobic and took Petitioner off work at that time. (PX6).

On August 5, 2013, Dr. Rhode recommended that Petitioner return to work full duty as of August 12, 2013. (PX6). The left wrist was also injected at this visit. (PX6). On August 8, 2013, Petitioner reported significant relief with the injection and was again instructed to return to work full duty on August 12, 2013. (PX6). Petitioner next returned to Dr. Rhode on September 5, 2013 at which time he complained of continued numbness and tingling to the thumb, index and long fingers. (PX6). Surgery was recommended and Petitioner was authorized off work on that date. (PX6).

On October 22, 2013, Petitioner underwent a left sided carpal tunnel release. (PX6). He returned to Dr. Rhode on November 14, 2013, for suture removal. As of that visit Petitioner continued to complain of right sided symptoms with a positive Tinel sign. (PX6). As of December 12, 2013, there was pain with palpation of the left palm and a positive Tinel sign. The note indicates sutures were discontinued on the right without difficulty. (PX6). The assessment was of wrist pain and carpal tunnel syndrome. (PX6).

As of January 9, 2014, Petitioner had full active range of motion of the left wrist. (PX6). On palpation of the right wrist there was pain over the palm and a positive Tinel sign. (PX6). Again the diagnosis was of wrist pain and carpal tunnel syndrome. (PX6). Petitioner was to remain off work and follow up in four weeks for right wrist pain.

On February 4, 2014, Petitioner was seen at Ottawa Regional Medical Center. (PX2). He complained of continued pain in the left wrist despite surgery. (PX2). Another NCT was requested to assess whether the median nerve was still affected. (PX2). Petitioner noted that he did not want to have the right hand operation until the left wrist was corrected. (PX2).

Petitioner returned to Dr. Rhode on February 6, 2014 with continued right sided complaints. (PX6). On examination there was pain to palpation over both palms and a positive Tinel on the right. (PX6). Petitioner was to remain off work. He returned to Dr. Rhode on March 6, 2014 indicating that he was significantly apprehensive about treatment to the right hand. (PX6). Dr. Rhode indicated he had a long discussion with the patient about treatment options and that Petitioner stated he did not wish to proceed with surgery on the right. (PX6). Dr. Rhode returned Petitioner to medium work as of that visit. (PX6).

In follow up on April 3, 2014, Petitioner again noted right sided complaints. (PX6). There was pain to palpation of the right wrist, Phalen testing was positive on the left and Tinel's testing was positive bilaterally. (PX6). The recommendation was for a repeat EMG and Petitioner was authorized off work. (PX6).

As of May 1, 2014, Petitioner reported pain with gripping on the left. (PX6). On examination of the left wrist, there was pain with palpation, and Tinel and Phalen testing were negative. (PX6). Dr. Rhode noted the examination for compressive neuropathy was negative. (PX6). Another EMG was recommended and Petitioner was authorized off work. (PX6). On June 12, 2014, Petitioner continued to complain of left hand pain with grip. (PX6). Phalen and Tinel testing were negative on the left and Tinel testing was positive on the right. (PX6). Dr. Rhode noted pain and loss of grip strength. (PX6).

Respondent submitted testimony of an ergonomic expert, Gwen Deckow-Schafer. (RX4). Ms. Deckow-Schafer interviewed Mr. Michael Smith, the Regional EHS Leader at LCN Closures, where the petitioner was working

as a machine operator. Mr. Smith indicated that Petitioner worked from 7 a.m. to 3 p.m. with one 10 minute break and one 20 minute lunch with occasional breaks as needed. (RX4). Petitioner confirmed these working hours during his testimony. Ms. Deckow-Schafer testified that the production rate was 225 parts per hour and that 95% of Petitioner's work was on the shell line. (RX4). Ms. Deckow-Schafer testified that Petitioner takes a new part with the left hand from the conveyor to his left and places it into the machine while removing a honed part with his right hand and placing it on the conveyor to his right. (RX4). The process requires a somewhat hard grip strength and force of approximately 10% - 29% of maximal strength. (RX4). Ms. Deckow-Schafer utilized the Strain Index to objectively analyze Petitioner's job duties. (RX4). The Strain Index (SI) calculates a score based upon multiplicative interactions among the task variables consistent with physiological, biomechanical and epidemiological principles. (RX4). A numeric score is then reached which correlates with the risk of developing distal upper extremity disorders. (RX4). Jobs associated with distal upper extremity disorders have SI scores of greater than 7. (RX4). Scores of 7 are considered "hazardous." (RX4). Scores less than 3 are considered "safe." (RX4). The SI for the shell line was a 4.5 for both hands. (RX4). Ms. Deckow-Schafer interpreted this as a relatively low risk to both upper extremities, noting the relatively minimal to moderate grip/pinch forces, near neutral posture of the wrist and forearm, minimal wrist deviation, the frequency and duration of the tasks and the lack of heavy lifting. (RX4). While there is somewhat hard grip strength force required, there are a few seconds during each cycle which helps minimize the onset of muscular fatigue. (RX4).

Ms. Deckow-Schafer also performed a video job analysis. (RX5). The video is titled "Shell Line" and depicts an individual placing parts on the machine, honing the parts and removing them as previously described by Ms. Deckow-Schafer. (RX5). The video is approximately three minutes and 50 seconds in length. (RX5). A review of the video shows the individual completing approximately 5 parts per minute. (RX5).

At the request of Respondent, Petitioner was examined by board certified hand surgeon Dr. Prasant Atluri on November 12, 2013. At that time Petitioner gave a history of beginning employment in August 2012 as a machinist. (RX, p. 7). Petitioner described placing 9 to 10 lb parts into a machine which drilled into both sides. (RX1, p. 8). After 4 to 6 months, Petitioner stated he began to drop parts as a result of pain and weakness in both hands. (RX1, p. 8). As of Dr. Atluri's examination, Petitioner continued to have complaints of pain and weakness in both hands. (RX1, p. 9). The petitioner stated he quit his job in June 2013. (RX1, p. 10).

Upon examination Dr. Atluri found no atrophy of the left hand with full range of motion of the digits. (RX1, p. 11). He also noted near full thumb opposition and some swelling at the base of the palm as well as a positive Tinel over the carpal tunnel and some tenderness over the A1 pulley of the left middle finger. (RX1, pp.11-12). There was also some tenderness along the base of the palm. (RX1, p. 12). As to the right hand, there was no atrophy, full finger motion, full thumb motion and no tenderness over the A1 pulley of any digits. (RX1, p. 12). Dr. Atluri also noted some tenderness throughout the wrist on the right, a negative Tinel's and normal circulation was normal. (RX1, pp. 12-13). Dr. Atluri also took x-rays of both hands and found no abnormalities other than a little degeneration in some of the wrist bones, a chronic finding. (RX1, p. 15).

Dr. Atluri performed a QuickDASH disability score which is a validation instrument for assessing patient function from the patient's standpoint. (RX1, p. 16). Dr. Atluri was of the opinion that the QuickDASH score for Petitioner was a little higher then he would have expected given the physical findings, though it did match his subjective complaints. (RX1, p. 17). Based on his review of the records, the history and his physical examination, Dr. Atluri concluded that Petitioner's clinical picture was consistent with carpal tunnel syndrome and that a carpal tunnel release was appropriate. (RX1, pp. 19-20). Dr. Atluri noted that Petitioner described repetitive activity rapidly over a period of months and did not describe any forceful gripping or pinching on a frequent or continuous basis. (RX1, p. 21). Petitioner did report some forceful use of the hands, but stated it

was occasional and not performed regularly. (RX1, p. 21). Based upon all of the information presented to him, Dr. Atluri did not feel that Petitioner's bilateral carpal tunnel syndromes were related to his employment. (RX1, p. 22). At the time of his November report, Dr. Atluri qualified his opinions, stating that if there were a greater exposure to forceful gripping, heavy lifting, or awkward positioning than what was described, his opinion about causality could change. (RX1, p. 23).

Dr. Atluri issued a second report on January 27, 2014 in response to a request that he review an ergonomic report and video job analysis. (RX1, p. 24). In reviewing the video analysis, Dr. Atluri noted the work was done repetitively at a consistent, rapid pace. (RX1, p. 25). He indicated that there was no awkward positioning of the hand and no apparent force used. (RX1, pp. 25–26). Dr. Atluri noted that the ergonomic report and video job analysis clarified the job history for him and that it supported his original assessment that there was insufficient exposure to forceful gripping, heavy lifting or awkward positioning of the hands to contribute to or to cause carpal tunnel syndrome. (RX1, p. 27). Dr. Atluri noted the vast majority of carpal tunnel cases develop spontaneously or, in other words, are idiopathic in nature. (RX1, p. 37). He indicated that the second most common cause of carpal tunnel syndromes are metabolic factors or systemic changes in the overall health of a person such as diabetes, hormonal problems and smoking. (RX1, p. 37). Dr. Atluri also noted that Petitioner had carpal tunnel prior to his employment with respondent and that once you have the condition it will progress over time; however, he indicated that it will not worsen as a result of activity unless it is in conjunction with activity which is forceful or heavy. (RX1, pp. 39–40). Dr. Atluri also indicated that carpal tunnel complaints can overlap with cervical spine issues. (RX1, p. 20). Dr. Atluri pointed out that in this case Petitioner had a history of cervical spine problems which he felt was relevant to determining the source of his complaints. (RX1, p. 20). Along these lines, Dr. Atluri testified that if there were to be residual problems after surgery, he would look to the neck to see whether there was some other issue contributing to his carpal tunnel symptoms. (RX1, p. 43).

On cross examination, Petitioner denied prior problems to his hands but agreed that if the medical records showed prior problems, the medical records were likely correct. He also agreed he had a long history of cervical problems. Medical records documenting Petitioner's cervical treatment start in 2002 when he had an MRI of the cervical spine. (RX11). In 2003 he was seen after falling 10 feet head first. (RX11). At his June 2003 emergency room visit he complained of left hand and wrist pain. (RX11). Petitioner had a second cervical MRI in November 2004. (RX11). In November 2004 he was seen for radiating neck complaints with weakness to the left arm and left hand grip. (RX11). Complaints of left wrist weakness were present in March 2006. (RX11). There was a third cervical MRI in May 2006. (RX11). In January 2007, Petitioner described consistent weakness to the left hand with decreased grip strength. (RX11). Again in October 2007 he complained of weakness of the left hand. (RX11). Treatment for cervical radiculopathy was still continuing as of April 2008. (RX11). A fourth cervical MRI was performed in September 2008. (RX11). Cervical treatment continued in 2009. (RX11).

On July 22, 2013, or subsequent to the alleged accident in this case, Petitioner was in a rear end automobile accident which aggravated his neck pain. (RX11). He sought treatment for the neck while also treating for his complaints of carpal tunnel syndrome. (RX11). Petitioner testified he had a law suit pending for those injuries.

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

Petitioner testified the duties depicted in the job analysis video were the duties he performed, but that the demonstration was likely performed in training mode. It was Petitioner's testimony he performed those same activities much faster than in the video, estimating the video was at 10% of full speed. A review of the video,

however, would appear to show that the individual demonstrating the shell line duties completed approximately 5 parts per minute in the video. (RX5). Over the course of 60 minutes or one hour, this would result in his completing 300 parts. Petitioner testified that his shift was from 7 a.m. to 3 p.m. with 30 minutes for breaks or a total work time of 7.5 hours, which would equate to 2,250 parts (300 x 7.5). Petitioner testified that in a typical shift he would hone 1,700 to 1,900 parts. Ms. Deckow-Schafer suggested shell line workers produced 225 parts per hour which would equal 1,700 parts per shift, or slightly less than 4 parts per minute. Accordingly, it would appear that the video depicts the approximate speed Petitioner would have worked at on the shell line, contrary to his claim that it only showed 10% of full speed.

Furthermore, Ms. Deckow-Schafer, a Registered Occupational Therapist, analyzed Petitioner's job duties and found them to be a "low relative risk" for causing upper extremity disorder. (RX4). Ms. Deckow-Schafer used the Strain Index to objectively analyze the petitioner's job duties and supported her use of the same with current literature supporting the test's validity and reliability. (RX4). The video supports Ms. Deckow-Schafer's opinion in this regard to the extent that it did not demonstrate forceful grasping, awkward positioning of the wrist, or heavy lifting.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained accidental repetitive trauma injuries arising out of and in the course of his employment with a manifestation date on or about June 19, 2013. More to the point, based on the job analysis video and testimony of both Ms. Deckow-Schafer and Dr. Atluri, the Arbitrator is not convinced that the tasks Petitioner was performing involved sufficient grip strength or awkward positioning on a repetitive basis so as to cause Petitioner's bilateral carpal tunnel syndrome condition. Accordingly, his claim for compensation is hereby denied.

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

Petitioner reported the injury and filled out an "Associate's Report of Injury" dated June 24, 2013. (RX9). In this report, Petitioner initially noted a date of injury of "approximately 1/12/13." (RX9). Petitioner later amended his Application for Adjustment of Claim to show an alleged date of accident of June 19, 2013. or five (5) days prior to the completion of the above report of injury.

Based on the above, and the record taken as a whole, the Arbitrator finds that timely notice of the accident was provided by Petitioner pursuant to §6(c) of the Act. The Arbitrator finds that Respondent failed to prove any prejudice in the defense of this claim given the original claimed date of injury of January 12, 2013, particularly in light of the Arbitrator's determination as to accident and causation (issues "C", "D" and "F").

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

While the petitioner testified that the duties depicted on the job analysis video were the duties he performed, he also testified the video was likely taken in training mode, testifying he performed those activities much faster than in the video. However, as previously noted, it would appear that the video is in fact an accurate real time depiction of Petitioner's job activities. In reviewing the video, the individual demonstrating the shell line duties completed approximately 5 parts per minute. (RX5). Over the course of 60 minutes or one hour, this would amount to 300 parts. Petitioner testified that he worked from 7 a.m. to 3 p.m. with a total of 30 minutes for breaks, or a total work time of 7.5 hours, which would equate to 2,250 parts (300 x 7.5). Petitioner testified that in a typical shift he would hone 1,700 to 1,900 parts. Ms. Deckow-Schafer suggested shell line workers

produced 225 parts per hour which would equal 1,700 parts per shift, or slightly less than 4 parts per minute. Thus, contrary to Petitioner's testimony, the video appears to accurately reflect the speed that he was working at during the course of his employment.

Ms. Deckow-Schafer, a Registered Occupational Therapist, analyzed Petitioner's job duties and found them to be a "low relative risk" for causing upper extremity disorder. (RX4). In addition, Respondent's §12 examining physician, Dr. Atluri, opined that Petitioner's condition of bilateral carpal tunnel syndrome was not related to the employment given that the job as depicted in the video did not involve heavy lifting, forceful grasping, or awkward positioning. Petitioner offered no medical opinion to rebut Dr. Atluri's opinion in this regard, other than to point to Dr. Rhode's conclusory statement in the record that Mr. Gonzalez suffered a "work injury." Along these lines, the Arbitrator is unwilling to accept such a statement at face value without further explanation, particularly in light of the fact that there is no indication that Dr. Rhode had the opportunity to review either the ergonomic report or the video job analysis in question.

Therefore, based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident (issues "C" & "D", supra), the Arbitrator finds that Petitioner failed to prove that his current condition of ill-being with respect to his bi-lateral hand and elbow conditions is causally related to the accident on June 19, 2013. Accordingly, his claim for compensation is hereby denied.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C", "D" & "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to medical expenses pursuant to §8(a) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C", "D" & "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to prospective medical treatment pursuant to §8(a) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to accident and causation (issues "C", "D" & "F", supra), the Arbitrator finds that Petitioner failed to prove his entitlement to temporary total disability benefits pursuant to §8(b) of the Act. Accordingly, Petitioner's claim for same is hereby denied.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Respondent's conduct in the defense of this claim was neither unreasonable nor vexatious, given the legitimate questions of law and fact that existed between the parties, so as to warrant the imposition of penalties. Accordingly, Petitioner's claim for additional compensation pursuant to §19(k) and §19(l) and/or attorneys fees pursuant to §16 is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jay Bauer,

Petitioner,

vs.

NO: 13WC 36011

Icon Mechanical Contractors,

15IWCC0264

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2014, is hereby affirmed and adopted.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 13 2015
o040715
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

BAUER, JAY
Employee/Petitioner

Case# **13WC036011**

ICON MECHANICAL CONTRACTORS
Employer/Respondent

15IWCC0264

On 8/19/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3067 KIRKPARTICK LAW OFFICES PC
ERIC KIRKPATRICK
#3 EXECUTIVE WOODS COURT
BELLEVILLE, IL 62226

0180 EVANS & DIXON LLC
ROBERT HENDERSHOT
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

15IWCC0264

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jay Bauer
Employee/Petitioner

v.

Icon Mechanical Contractors
Employer/Respondent

Case # 13 WC 36011

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Edward Lee, Arbitrator of the Commission, in the city of Collinsville, on June 24, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 1, 2013**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$21,809.88 (15 weeks)**; the average weekly wage was **$1,453.99**.

On the date of accident, Petitioner was **36** years of age, *married* with **1** dependent children.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services as Respondent is found to have no liability for any medical services provided Petitioner.

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

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

ORDER

Petitioner has failed to meet his burden of proof with respect to the issues of accident and medical causation; therefore, no benefits for past medical treatment expenses or temporary total disability are awarded.

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

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

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

Curt Lee
Signature of Arbitrator

8/13/14
Date

ICArbDec19(b)

AUG 19 2014

IN SUPPORT OF THE DECISION, THE ARBITRATOR FINDS THE FOLLOWING FACTS:

Petitioner's Job Duties and Alleged October 1, 2013 Accident

Petitioner, a thirty-seven year old union steamfitter, testified he became employed by Respondent in July or August 2013. Petitioner testified his job was to install food-grade stainless pipe at a Kraft Foods plant in Granite City, Illinois, and required him to work ten hours shifts at night, six days per week. Petitioner explained the piping varied from three to six inches in diameter and could be as long as twenty feet. Petitioner testified the piping was lifted twenty feet in the air near the plant's ceiling via a scissor lift. Petitioner testified installing the pipe once in the air was physically challenging, explaining he would have to position the pipe by lifting it on his shoulder and then above his head into a rack. Once the pipe was in position, Petitioner testified he bolted down clamps with a DeWalt power tool. Petitioner stated much of this work was done above his head, and extended out as far as he could reach. Petitioner testified the process of pipe installation was repeated approximately thirty times per shift.

Lee Heise, a union steamfitter also on the Kraft Foods plant job, testified at trial. Mr. Heise explained it was possible to avoid overhead work simply by repositioning oneself in the rack, and testified most of the bolting work was done not overhead, but at waist or chest height. Mr. Heise also explained the majority of the work was done with less than ten feet of pipe, with twenty foot pieces only lifted via scissor lift with at least two to three employees. Union steamfitter Zach Newirth, who also worked on the Kraft Foods plant job, echoed Mr. Heise's testimony, stating most of the bolting was done at the stomach or chest level and not overhead. Mr. Newirth also indicated the work could be done from the rack sitting on the rack and working below the waist.

Petitioner testified he was not in any pain until October 1, 2013. Petitioner explained on that date his arms and hands began to go numb, and he experienced pain in his neck. Petitioner testified he discussed the numbness with his general foreman, Pat Bailey, and his regular foreman, Charlie Bailey, although he acknowledged he did not mention the pain in his neck. Both Pat and Charlie Bailey testified at trial. Pat Bailey testified although Petitioner did complain about his neck and arms as well as feelings of numbness and tingling, Petitioner never specifically reported a work injury. Charlie Bailey, a journeyman union steamfitter hired as a foreman on the Kraft Foods plant job, testified Petitioner did not report pain due to his work at the Kraft site, nor did Petitioner ever report injuring himself on the job. Mr. Heise testified although Petitioner told him about having pain in his neck, back, and shoulder, Petitioner indicated the pain was from a previous injury, a motor vehicle accident, and some fights.

Petitioner's Medical Treatment

Petitioner testified on October 1, 2013 he presented to Dr. Robert Garner, to whom he reported the onset of neck pain and numbness and tingling in his upper extremities. However, Dr. Garner's note of that date makes no mention of complaints of numbness and tingling in his upper extremities, instead documenting the reason for Petitioner's visit as "chronic recheck visit" with a chief complaint of "follow up back and neck pain, wants referral to pain management." (Pet. Ex. 1) Dr. Garner further noted Petitioner "presents with complaints of gradual onset of constant episodes of moderate bilateral upper back pain" which had started "about 1 year ago" and were worsening. (*Id.* Emphasis omitted). Petitioner was noted to have "Active Problems" including back pain, herniated discs at C5-6 and L3-4, and myalgia, while his chief complaint on October 1, 2013 was "follow up back and neck pain, wants referral to pain management." (*Id.*)

Dr. Garner diagnosed back pain and herniated discs at C5-6 and L3-4, and recommended evaluation and treatment with pain management. At trial, Petitioner testified Dr. Garner's history of his upper back pain starting "about 1 year ago" was incorrect. Petitioner advised Dr. Rende he had "contacted Dr. Garner and told him that was incorrect", and Dr. Garner subsequently amended his note for October 1, 2013 on December 13, 2013 to state "[t]his visit was an acute new complaint for neck pain". (Resp. Ex. 2, 11; Pet. Ex. 1, Emphasis omitted). At trial Petitioner could not explain why Dr. Garner's records did not reference any complaints of numbness or tingling, insisting he advised Dr. Garner of those complaints.

X-rays of the cervical spine taken at Dr. Garner's direction on October 10, 2013 revealed findings of an anterior C5-6 fusion, while a cervical MRI taken the same date was interpreted to show "degenerative changes throughout the spine", including a disc bulge at C4-5 and "a small disc bulge" at C6-7, as well as a prior C5-6 fusion. (Pet. Ex. 5) Petitioner had continued to work following Dr. Garner's October 1 visit; however, Petitioner testified he continued to have numbness into his fingers which he mentioned to Pat and Charlie Bailey. Petitioner testified Pat Bailey told him to take the weekend off; however, Petitioner stated Pat Bailey later called him to advise Petitioner was being laid off or terminated. Charlie Bailey testified he was aware Petitioner was taking time off to undergo the x-rays and MRI scan, while Pat Bailey acknowledged initially advising Petitioner to take some time off when he reported having difficulties or pain before laying him off. Both Pat and Charlie Bailey testified; however, Petitioner never related these symptoms to his work on the Kraft Foods plant job. Pat Bailey explained Petitioner was laid off as they were working shorthanded and Petitioner needed to be replaced.

Pursuant to Dr. Garner's referral for pain management, Petitioner was seen by Dr. William Thom on October 14, 2013. Dr. Thom noted complaints of "bilateral neck, shoulder, upper extremity and wrist/hand pain for three months" as well as low back and leg pain for seven years. (Pet. Ex. 7) Dr. Thom documented Petitioner's symptom onset as "gradual onset, slowly progressive. No history of trauma. No inciting event." (*Id.*) Dr. Thom reviewed Petitioner's surgical history, noting a prior C5-6 fusion by Dr. Kennedy which Petitioner reported "helped some". (*Id.*) Dr. Thom diagnosed degeneration of cervical disc, cervicalgia, lumbago, neuralgia, pain in limb, and myalgia and recommended treatment including nerve conduction studies, a lumbar spine MRI, a C6-7 epidural steroid injection, and medications. Dr. Thom also recommended work restrictions. At trial, Petitioner denied providing Dr. Thom with a history indicating there was no specific onset of his symptoms.

Petitioner underwent the C6-7 epidural steroid injection on October 15; however, on October 29 he advised Dr. Thom he had received no relief from the injection. At the October 14 visit, Dr. Thom had discussed with Petitioner "acetaminophen toxicity that could lead to liver damage, liver failure, and death" after noting the medications Petitioner was using "without relief"; however, on October 29 Dr. Thom noted "[i]n a period of about 15 days [Petitioner] has gone through 260 hydrocodone." (Pet. Ex. 7) Dr. Thom "discussed, once again, potential liver damage and liver failure" from acetaminophen overdose with Petitioner, and had Petitioner sign an opioid consent form and patient-physician contract regarding use of medications. (*Id.*) When Petitioner returned to Dr. Thom on November 11, after forgetting an appointment for a liver function panel, he reported changing his "OxyContin dosing regimen from b.i.d. to q.i.d." (*Id.*) Dr. Thom advised Petitioner "taking medications more frequently than prescribed" could result in his discharge from care, and Petitioner agreed he would adhere to the previously signed contract. (*Id.*) At a physical therapy evaluation done through Dr. Thom's office on November

11, Petitioner was noted to report neck pain for the preceding two months "after injuring his neck lifting a pipe while at work", as well as "back pain for years with a flare up 2 months ago." (*Id.*) Petitioner was to be seen three times a week for six weeks; however, there is no evidence he underwent the therapy.

Petitioner testified Dr. Garner referred him to Dr. Matthew Gornet, who first evaluated Petitioner on March 17, 2014. To Dr. Gornet, Petitioner complained of constant symptoms worse with overhead work, bending, or lifting, with bilateral arm pain and numbness. Dr. Gornet reviewed the October 10, 2013 MRI and indicated it revealed disc herniations at C4-5 and C6-7. Dr. Gornet discussed with Petitioner the "whole concept of potential structural injury and aggravation of an underlying condition", and opined the October 1, 2013 injury "at a minimum" aggravated Petitioner's underlying condition "based on the history he has provided to me". (Pet. Ex. 2) Dr. Gornet was unsure whether the accident produced a new injury, and indicated he would need to review the full set of Petitioner's records and films. Nevertheless, Dr. Gornet stated Petitioner's symptoms were related to the accident as prior to the accident Petitioner was able to work full duty. Dr. Gornet also took Petitioner completely off of work.

Dr. Gornet referred Petitioner to Dr. Boutwell "to wean off of his narcotics and medicines", and Petitioner presented to her for treatment on March 18, 2014. (Pet. Ex. 2; Pet Ex. 3) When Petitioner returned to Dr. Gornet on May 19, he reported he was being gradually weaned off his narcotic medications. Petitioner had undergone a new MRI scan that day, which Dr. Gornet compared to a previous January 7, 2008 scan. Dr. Gornet felt the new MRI scan "clearly reveals new disc herniations at the C4-5 and C6-7 levels", which he felt accounted for Petitioner's symptoms. (Pet. Ex. 2) Dr. Gornet again indicated "assuming his history is factually correct, I do believe his current symptoms, at least in their level of magnitude and severity are causally connected to his work injury while pushing a large pipe." (*Id.*) Dr. Gornet felt Petitioner was clearly "not able to do full duty pipe fitter work", recommended restrictions, and recommended surgery in the form of disc replacements at C4-5 and C6-7. (*Id.*) There is no indication in Dr. Gornet's reports that he reviewed any of Petitioner's medical records prior to October 1, 2013.

Petitioner's Current Condition

Petitioner testified he currently experiences numbness in both hand and arms, right greater than left, with shooting pain. Petitioner explained sometimes his right arm will go completely numb, and stated he always has numbness and wakes up every night due to the numbness and his neck pain. Petitioner acknowledged he is able to do some things around the house, but does not do any "hard work". Petitioner testified he did not use any chainsaws, but did start the saw on several occasions for operation by his wife.

Respondent entered into evidence surveillance video footage taken of Petitioner over a period of eight days in January and March 2014. (*See* Resp. Ex. 18) In the footage, Petitioner is observed driving, walking, carrying cases and boxes between his vehicle and his house, and inspecting and working on and underneath his vehicle for approximately forty-five minutes. Petitioner was also shown on January 18, 2014 carrying what appears to be a chainsaw case without his wife being present. Petitioner did not display any limitations or pain behaviors during the course of the surveillance footage.

Petitioner's Prior Injuries and Medical Treatment

At trial, Petitioner acknowledged having previously undergone surgery on his cervical spine and both shoulders; however, he denied having any serious problems with his neck and right upper extremity other than the surgeries. Petitioner further testified his current neck pain and symptoms were different than those he had previously experienced, stating he now has numbness and shooting pain in to his shoulders and arms with a pins and needles sensation.

The medical records document Petitioner was first diagnosed with cervical strain and right shoulder pain on October 18, 2004, when he presented to St. Elizabeth's Hospital. On that date, Petitioner reported his symptoms had developed following an "altercation with a person where they twisted my neck & shoulder", although Petitioner also reported having had shoulder symptoms "since he was 18 yrs old off + on" but worsening over the preceding years. (Resp. Ex. 5) Petitioner further reported "thumb, index, + middle fingers on R[ight] go numb [with] elevation of R[ight] arm" and he had numbness in his entire hand when throwing a ball. (*Id.*) Petitioner underwent a course of physical therapy through St. Elizabeth's without any documented improvement.

On the referral of Chiropractor Mark Eavenson, Petitioner underwent a cervical MRI scan on January 7, 2008 which revealed a right paracentral disc protrusion at C5-6 causing impingement on the C6 nerve root as well as disc bulging at C6-7. Petitioner came under the care of Dr. David Kennedy who noted Petitioner developed sharp right shoulder pain with radiation into the arm and hand in an October 24, 2007 accident which also led a right shoulder reconstruction in 2007. Dr. Kennedy diagnosed cervical radiculopathy with a C5-6 disc herniation as well as recurrent right and new onset left shoulder pain, and indicated Petitioner would very likely require surgery. After obtaining a cervical myelogram which showed "anterior extra dural defect" present at both C5-6 and C6-7, Dr. Kennedy performed an anterior cervical discectomy and fusion at C5-6. (Pet. Ex. 9) Post-operatively, Petitioner continued to complain of pain in his cervical spine and arm; however, he also began to report lumbar spine pain which led to treatment with Dr. Barry Feinberg. When Petitioner was last seen by Dr. Kennedy, he reported still having "some pain at the base of the cervical spine" and was scheduled to undergo shoulder surgery. (*Id.*) Petitioner acknowledged ongoing problems with his right shoulder following his last visit with Dr. Kennedy.

At trial, Petitioner acknowledging suffering a work related left shoulder injury on February 1, 2012, which resulted in surgery with Dr. Emanuel and in Petitioner being off work from March 1, 2012 through June 8, 2013. During the course of treatment for that injury, Petitioner undertook physical therapy through Touchette Regional Hospital where in July and August 2012 he reported soreness and pain in his shoulder up into his neck. Specifically, on August 1, 2012 Petitioner reported "I feel like something is stabbing me when I try and raise my arm". (Resp. Ex. 6) Physical therapy eventually stopped treating Petitioner due to his continuing complaints, and on September 18, 2012 Dr. Emanuel noted "I am unable to explain [Petitioner's] subjective complaints of pain. Nevertheless he is adamant that his shoulder hurts him with active movement in flexion and abduction with a catching type sensation" despite negative MRI findings. (Resp. Ex. 8) Dr. Emanuel's recommendation for a diagnostic arthroscopy resulted in an independent medical evaluation with Dr. Richard Lehman on November 15, 2012. (*See* Resp. Ex. 10) Dr. Lehman reviewed an EMG/nerve conduction test performed by Dr. Peeples which evidenced ulnar neuropathy at the left carpal tunnel and a chronic left C6-7 radiculopathy. Dr. Lehman believed Petitioner demonstrated symptom magnification, noting his "subjective complaints are subjective only with no objective correlation." (Resp. Ex. 10) Dr. Lehman

recommended against surgery as "someone who is not credible in terms of their symptoms is not a reasonable candidate for surgery." (*Id.*)

Petitioner did undergo the arthroscopic surgery with Dr. Emanuel; however, during the course of post-operative physical therapy Petitioner continued to report pain going up into his neck running up to his ear like a trigger point. Petitioner also began treatment with Dr. Garner's practice for complaints of low back pain, for which he received narcotic pain medications. On July 20, 2013, Petitioner advised Dr. Garner's partner Dr. Hitchcock he was "just released back to work after shoulder surgery", "pain meds not working", "pain worsening", and "has been told and knows he needs surgery, but still waiting". (Resp. Ex. 4) Due to "Back pain, neck pain", on September 26, 2013 Dr. Garner referred Petitioner to Dr. Thom for pain management. (*Id.*)

Fall of December 25, 2013

Petitioner testified on December 25, 2013 he fell, suffering an injury to his nose. On that date Petitioner presented to the emergency department of St. Elizabeth's Hospital, complaining of a head injury after falling three to four times subsequent to drinking "a lot of beer". (Resp. Ex. 5). The emergency room triage assessment indicates Petitioner had "a wound to top of head and bloody nose and injury to [right] upper side of back." (*Id.*) Petitioner's wounds were cleaned and treated in the emergency room and he underwent x-rays and CT scans of his face, head/brain, and ribs/chest. At trial, Petitioner testified the history of an injury to his right upper back was incorrect.

Evaluation and Testimony of Dr. Richard Rende

At Respondent's request Dr. Richard Rende, a board certified orthopedic surgeon, evaluated Petitioner on March 18, 2014. Dr. Rende testified on March 18 he spent one and a half hours with Petitioner and his wife, and spent several more hours on records review and report preparation. Dr. Rende testified he reviewed Petitioner's treatment records, and noted Petitioner had become accustomed to the narcotic pain medications he was taking in October 2013 as the level of hydrocodone Petitioner was taking "would be lethal" in a normal person. (Resp. Ex. 2, 13) Dr. Rende also testified his review of the records indicated Petitioner's "neck pain was certainly not new onset", as Petitioner had symptoms dating back to 2007 with the nerve conduction study referenced by Dr. Lehman in 2012 revealing chronic C6-7 radiculopathy. (Resp. Ex. 2, 14-15) Dr. Rende's review also indicated that from February 1, 2013 through September 9, 2013, a period of seven months, Petitioner received "3,045 hydrocodone tablets in various doses and 270 Valium tablets in various doses", which was in his opinion "an inordinately high number of hydrocodone tablets". (Resp. Ex. 2, 25)

To Dr. Rende Petitioner reported constant pain over the posterior neck radiating down both arms associated with numbness and tingling in both hands. Petitioner advised Dr. Rende "he never had neck pain before to this degree, despite the fact that he had surgical intervention four years ago." (Resp. Ex. 2, 25) Dr. Rende also relayed a story about Petitioner's use of a chainsaw which had resulted in an injury to Petitioner's dog four weeks prior. Dr. Rende testified as Petitioner's wife reported this story, Petitioner kicked her under the table. (Resp. Ex. 2, 27) Dr. Rende testified he performed a physical examination which "was entirely within normal limits to the cervical spine" and "entirely normal from an objective standpoint" in the lumbar spine. (Resp. Ex. 2, 28) Dr. Rende diagnosed chronic longstanding lumbosacral disc disease due to congentially short pedicles, while with respect to the cervical spine he felt Petitioner "was exaggerating his complaints" and "could not correlate his complaints in light of

his normal physical examination". (Resp. Ex. 2, 30) Dr. Rende testified Petitioner had degenerative changes in the cervical spine of longstanding duration, unrelated to Petitioner's work activities on October 1, 2013 and not requiring any treatment. (Resp. Ex. 2, 32) Dr. Rende also testified Petitioner did not require any restrictions due to orthopedic problems. (Resp. Ex. 2, 34)

THEREFORE, THE ARBITRATOR CONCLUDES:

Petitioner filed his application for adjustment of claim on October 23, 2013 alleging he sustained injuries to his back, both arms, both hands, and low back as a result of "repetitive trauma" manifesting on October 1, 2013. Petitioner elaborated on this theory to Dr. Rende, attributing the sudden onset of symptoms "to the fact that he frequently used overhead tools in awkward positions". (Resp. Ex. 2, 9) Petitioner also provided a repetitive trauma history to Dr. Gornet, explaining he had to push piping into position multiple times with his upper back and shoulders. (*See* Pet. Ex. 2) At the same time, Petitioner also proffered a specific accident history to Dr. Rende, explaining he developed "immediate onset of pain over the superior aspect of the shoulder and the right side of his neck" and numbness and tingling in his hands while lifting a thirty-foot section of pipe on his shoulder by himself. (Resp. Ex. 2, 8-9) However, regardless of which theory is analyzed, either specific accident or repetitive trauma, the record does not support Petitioner's allegations and therefore Petitioner has failed to meet his burden of proof with respect to the issue of accident.

In testifying regarding his work duties, Petitioner stated much of his work manipulating the pipe into position and using power tools was done above head level with his arms extended out as far as he could reach. Yet, Petitioner did not describe overhead work to his various treating physicians. Dr. Garner simply documented Petitioner's October 1, 2013 complaints as "acute new complaint for neck pain"; Doctors Gornet and Boutwell were simply told Petitioner had to push piping into position using his upper back and shoulders; Dr. Thom did not even have a description of Petitioner's job duties. In fact, the only physician to have a history of use of overhead tools in awkward positions was Respondent's Section 12 examiner, Dr. Rende. Even then, as noted above, Petitioner also provided a specific accident theory. Further, Petitioner was the only one of the five workers on the Kraft Foods plant job testifying at trial who described the work in such a manner. Specifically, both Misters Heise and Newirth testified that while the work could be hazardous, most of the work on at the Kraft Foods plant was done not overhead, but at the waist or chest level. Mr. Newirth even went so far as to testify the work could be done below the waist in a sitting position. Given the lack of support for Petitioner's description of his duties in the medical records and in the testimony of his co-workers, Petitioner's testimony regarding his job duties is simply not credible.

A lack of credibility also dooms a specific accident theory of accident. Although Dr. Garner amended his original note of October 1, 2013 to state the neck pain was an "acute new complaint", there is nothing in Dr. Garner's records to substantiate what happened to cause this "acute new complaint." Aside from the history proffered to Dr. Rende, the only other medical record to discuss a specific accident is the physical therapy note of November 11, 2013, in which Petitioner described "injuring his neck lifting a pipe while at work". (Pet. Ex. 7) Yet this history was not provided until almost a month and a half after the alleged accident, and was provided only after Petitioner had failed to report any specific accident to his foremen or co-workers, as he himself acknowledged. Similar to Petitioner's description of his job duties, the lack of support in

the Record for a specific accident occurring on October 1, 2013 renders Petitioner's testimony on this issue not credible.

Further eroding Petitioner's claim for benefits is the fact the medical evidence and testimony of his co-workers establishes the symptoms of his current condition actually pre-date the October 1, 2013 accident date alleged. Although Petitioner testified he was not in any pain until October 1, 2013, and further testified he did not have any neck and upper extremity complaints in the spring and summer of 2013, the Record shows this testimony is not credible. Specifically, Mr. Heise testified Petitioner described pain in his neck, back, and shoulder which was the result of a previous injury, a motor vehicle accident, and some fights; causes which would comport with Petitioner's injury and medical history prior to October 1, 2013 which document prior accidents and injuries from fights. Further, Petitioner was seen in the St. Elizabeth's emergency room on November 21, 2012 specifically complaining of neck pain for the preceding three days. The physical therapy records from Touchette Regional Hospital repeatedly document complaints of cervical and right shoulder pain in July 2012 and February 2013. Further, before being asked by Petitioner to amend his initial note, Dr. Garner initially documented Petitioner's symptoms as having started "about 1 year ago." (Pet. Ex. 1) Dr. Gornet attempted to explain this initial history away, noting Dr. Garner later indicated the lack of a history of work injury was in error and complaining "this is fairly consistent with 'point-and click' medical record systems." (Pet. Ex. 2) Yet, given the fact Dr. Garner's report on the date of the alleged accident notes the visit is a "chronic recheck visit" for "back and neck pain" after Dr. Garner had previously on September 26, 2013 written a referral to Dr. Thom for "back pain, neck pain", it is Dr. Garner's original history of symptoms for the preceding year which has greater credibility.

Although Dr. Gornet notes Petitioner "readily admits to a history of previous neck and back problems", the facts show Petitioner is not credible when he provides that history to either Dr. Gornet or at trial as Petitioner is not a credible witness. At trial Petitioner attempted to minimize and downplay his physical activity level, yet the surveillance footage shows Petitioner able to function without displaying any evidence of pain resolved despite the use of enough pain medication to be lethal to a normal person. Further, Dr. Rende's credible testimony describes Petitioner's use of a chainsaw and Petitioner's efforts to cover up that use, while at trial Petitioner unbelievingly attempted to explain he only started and did not use the chainsaw. When these facts are combined with Petitioner's symptom magnification as noted by multiple doctors including Doctors Lehman and Rende and the lack of support for his descriptions of his job duties or accident, it is clear Petitioner is not a credible witness.

As Dr. Gornet indicated his opinion on the cause of Petitioner's condition was "based on the history he has provided to me" and assumes "his history is factually correct", given these findings on Petitioner's credibility, Dr. Gornet's opinions cannot be supported nor given any weight. However, even if Dr. Gornet's opinions were to be considered separate from their basis in Petitioner's history, the opinions of the only testifying expert in this case, Dr. Rende, would still have greater credibility. Although Dr. Gornet indicated the May 19, 2014 MRI showed a new herniation at C6-7 when compared with the January 7, 2008 MRI, this reading is not supported by Petitioner's history of complaints or the medical records. Initially, the January 7, 2008 MRI was interpreted to show an anterior extra dural defect at C6-7, contradicting Dr. Gornet's pronouncement of findings at that level as "new" since January 7, 2008. Further, the nerve conduction study referenced by Dr. Lehman in 2012 produced findings of a chronic left C6-7 radiculopathy. Dr. Rende explained C6-7 cervical radiculopathy typically produces

symptoms including "numbness and tingling from the neck, down the hand into the central fingers" occasionally radiating into the ulnar fingers; symptoms which Petitioner currently reports and has reported as far back as 2004. (Resp. Ex. 2, 21) Given the support provided to Dr. Rende's conclusion Petitioner has degenerative changes of the cervical spine of longstanding duration by the prior medical records, which is not clear Dr. Gornet reviewed, his opinions and testimony simply has greater credibility.

For these reasons, I find Petitioner has failed to meet his burden of proof with respect to the issues of accident and medical causation, deny Petitioner's application for adjustment of claim, and do not award any benefits.

2897773

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John A. Wanless,
Petitioner,

vs.

NO: 09 WC 09535

State of Illinois,
Menard Correctional Center.
Respondent.

15IWCC0265

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 30, 2014, is hereby affirmed and adopted.

DATED: APR 10 2015

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-04/08/15
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WANLESS, JOHN
Employee/Petitioner

Case# **09WC009535**

MENARD CORRECTIONAL CENTER
Employer/Respondent

15IWCC0265

On 7/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4852 FISHER KERKHOVER COFFEY ET AL
EDWARD J FISHER
PO BOX 191
CHESTER, IL 62233

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 30 2014

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

John Wanless
Employee/Petitioner

v.

Menard Correctional Center
Employer/Respondent

Case # 09 WC 009535

Consolidated cases: N/A

15IWCC0265

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of Herrin, on **6/3/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/15/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $**$62,364.12**; the average weekly wage was $**1,199.31**.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit for any medical benefits paid through its group carrier under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove he sustained an accident on January 15, 2009 arising out of and in the course of his employment with Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Signature of Arbitrator

July 27, 2014
Date

JUL 30 2014

John Wanless v. Menard Correctional Center
No: 09-WC-9535

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties presented for Arbitration on June 3, 2014 with Petitioner alleging injuries to his bi-lateral elbows and left shoulder from an accident occurring on January 15, 2009. The issues in dispute were accident, medical bills and nature and extent. Petitioner was the sole witness testifying at the hearing. Respondent had a representative, Cindy Cowell, in attendance.

The Arbitrator finds:

Petitioner testified he was employed with Respondent on January 15, 2009. Petitioner had served as a correctional officer for a period of approximately 20 years prior to retiring in November of 2009. Petitioner testified that on January 15, 2009 he was entering the personnel office located on the grounds of Respondent's facility to pick up a copy of his direct deposit bank stub for his bi-monthly paycheck. Petitioner testified that while on his way to said office he caught his toe on the top step of the steps leading to the personnel office, causing him to fall and land on his left and right elbows.

Petitioner testified that he went to get his copy of his deposit slip/pay stub after his shift had ended; however, it was pay day and "everyone else was going to get their paycheck." Petitioner testified that he had direct deposit for his paychecks but liked to get a copy of the deposit to verify his hours. There were a couple of other people with him going to pick up their check or bank deposit slips, too. Petitioner testified it was prior practice for the employees' checks to be passed out at roll call; however, the checks were now available in the personnel office.

Petitioner was asked if he had the option of having his deposit slips or pay checks mailed to him and he replied, "Not as far as he knew." However, he believed one might be able to do so but he didn't know of anyone who had done that.

Petitioner reviewed Petitioner's Exhibit #3, which consisted of a set of photos taken by Respondent depicting the area where Petitioner fell. Petitioner testified that the photos accurately portrayed the location where he fell. Petitioner testified the step where he caught his toe had an overhang of 2 to 3 inches[1]. Petitioner testified this step is also taller than the other steps. Petitioner also testified to the top step having a painted yellow strip and acknowledged that the yellow would have been more vibrant in 2009. Petitioner further acknowledged that he might have caught his toe on the step before, that it was a cold day, and he was "strolling along." Petitioner agreed that nothing blocked his vision and there was nothing unusual about the step that day.

[1] The photos reflect a measurement of 1 3/4 inches.

The personnel office is located on the grounds of Respondent's facility and it is not open to the general public. Furthermore, the personnel office is fenced in and someone inside has to allow access to the same. Petitioner testified the only people who are allowed in the officer are Respondent's employees or someone having security clearance.

Petitioner underwent conservative treatment with respect to his bilateral elbows and shoulders, before ultimately being referred to Dr. J.T. Davis for an orthopedic consultation. Petitioner eventually underwent a left shoulder distal clavicle resection and subacromial decompression with biceps tenotomy and subscapularis tendon repair on August 21, 2012. (PX 1,2)

Petitioner testified he continues to experiences complaints with respect to his left shoulder. Petitioner explained he has a lack of mobility and pain when attempting to lower his arms from an overhead position. Petitioner also testified that the anterior of his shoulder, where a surgical scar is located, is sensitive to touch and causes him pain.

The Arbitrator concludes:

Accident: Petitioner failed to prove he sustained an accident on January 15, 2009 that arose out of and in the course of his employment with Respondent. Respondent did not require Petitioner to go to Personnel and pick up a copy of his deposit slip. Petitioner's decision to go there was personal to him as he wished to have a "hard copy" to verify his hours. Indeed, it was possible a copy could have been mailed to him. He just didn't know. Petitioner's decision to go to Personnel was entirely separate from his duties for Respondent. Hence the risk was a personal one. Additionally, the Arbitrator notes that going up and down steps is a neutral risk and, generally, neutral risks do not arise out of one's employment. Since Petitioner's decision to go up the steps stemmed from a personal risk Petitioner's injury did not arise out of his employment.

Petitioner's claim for compensation is denied. No benefits are awarded. All other issues are moot.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EVETTE DAVIS,

Petitioner,

15IWCC0266

vs.

NO: 07 WC 12719

ELGIN MENTAL HEALTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, TTD and PPD and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Decision of the Arbitration found Petitioner's current condition of ill-being to include posttraumatic stress disorder, a cervical fusion, lumbar problems and fibromyalgia. The Commission finds no credible evidence that Petitioner's posttraumatic stress disorder and fibromyalgia continue to afflict her.

The Commission does not find Petitioner's testimony concerning her on-going treatment for posttraumatic disorder to be credible. On December 23, 2013, she testified that she was receiving treatment from a Dr. D'Souza and had been since 2012, most recently on December 16, 2013. Petitioner's tendered exhibits contained no records of her claimed treatment with Dr. D'Souza. Details of Petitioner's treatment for posttraumatic stress disorder are found in the records of Dr. Quadri of Quardi Family Practice and Drs. Shapiro and Wild of Valley Psychiatry. Dr. Quadri identified that Petitioner was suffering from a mental disorder on March 14, 2007, and Petitioner then treated that mental disorder, later identified as posttraumatic stress disorder by Dr. Shapiro, with Drs. Shapiro and Wild beginning on March 20, 2007. Petitioner's treatment

at Valley Psychiatry continued until February 25, 2008. Petitioner claimed her treatment there stopped as a result of Dr. Shapiro leaving the practice, but the Commission found no evidence that Dr. Shapiro did leave Valley Psychiatry as would be evidenced by a chart note or by way of a referral of Petitioner to another practitioner. Petitioner, on cross-examination, contradicted her claim that she stopped treating with Dr. Shapiro because he left the practice, testifying that she stopped treating at Valley Psychiatry secondary to the State of Illinois terminating payment for her treatment there. Petitioner testified that, after Dr. Shapiro, she continued to treat her posttraumatic stress disorder but failed to provide the name of the physician she purportedly treated with. Based upon the evidence before it, the Commission concludes that Petitioner's posttraumatic stress had abated effectively as of February 25, 2008.

The Commission, similarly, finds Petitioner's fibromyalgia has abated and relies more on her medical records than her testimony. From December 1, 2011, through September 6, 2012, Petitioner treated her fibromyalgia with Dr. Skosey, rheumatologist. Dr. Skosey retired, Dr. Fisher, Dr. Skosey's colleague and the physician treating Petitioner's cervical complaints, wrote that he recommended to Petitioner that she find a new rheumatologist. Petitioner claims to be presently treating with a Dr. Slack, but Dr. Slack's records indicate that he last saw Petitioner on December 10, 2012. It is noted that Dr. Slack's record from that visit indicates he addressed Petitioner's lumbar complaints, not fibromyalgia. As with her contradictory testimony concerning her treating posttraumatic stress disorder, she does the same when testifying about treating her fibromyalgia. She testified that she treated with Dr. Slack after Dr. Skosey retired but then testified that she had neither a successor rheumatologist nor, more generally, a physician she was treating with. The Commission finds no evidence that Petitioner treated her fibromyalgia beyond September 6, 2012, leading to the conclusion that she, in fact, no longer needed treatment for that affliction beyond September 6, 2012.

The Commission finds more credible Petitioner's specific complaints of continued cervical and lumbar pain and tenderness as those complaints are corroborated by Petitioner's treatment records from the Illinois Bone & Joint Institute, though Petitioner's complains significantly more frequently about her cervical pain than her lumbar tenderness. The Commission also finds Petitioner, on May 17, 2012, was found to be at MMI with respect to her cervical condition, only to return a month later complaining of increased and persisting symptoms upon returning to work. Petitioner subsequently underwent a whole body assessment at ATI Physical Therapy and was found to be capable of working at a light physical demand level, of carrying twenty-one pounds occasionally and needing to be allowed to change positions every thirty minutes. Dr. Fisher, Petitioner's treating physician at Illinois Bone & Joint Institute, adopted those findings and declared Petitioner at MMI and released her with restrictions against repetitive bending, twisting, lifting, and prolonged sitting or standing. Dr. Fisher also adopted the whole body assessment recommendation that Petitioner be allowed to change positions every thirty minutes and carry no more than twenty-one pounds. The Commission finds these medical restrictions preclude Petitioner's return to stable, gainful employment and considers Petitioner to be permanently and totally disabled.

The Commission affirms and adopts all other findings of the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to

15IWCC0266

Petitioner the sum of $552.00 per week for a period of 320-4/7 weeks, that being the period of temporary total incapacity for work from March 7, 2007, through May 17, 2012, and from September 28, 2012, through September 3, 2013, under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $552.00 per week for life, commencing on September 4, 2013, as provided in §8(f) of the Act, for the reason that the injuries sustained caused permanent and total disability

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $9,488.84 for medical expenses under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit in the amount of $179,195.06 for benefits paid to Petitioner, $150,491.06 in TTD benefits and $28,704.00 under §8(j) of the Act for payment of a full year's salary to Petitioner.

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

DATED: APR 15 2015
KWL/mav
O: 02/02/15
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Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0266

DAVIS, EVETTE
Employee/Petitioner

Case# **07WC012719**

ELGIN MENTAL HEALTH CENTER
Employer/Respondent

On 3/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0320 LANNON LANNON & BARR LTD
PATRICIA LANNON KUS
180 N LASALLE ST SUITE 3050
CHICAGO, IL 60601

5145 ASSISTANT ATTORNEY GENERAL
KATHARINE ARISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

MAR 24 2014

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Kane)

☐ 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

15IWCC0266

Evette Davis
Employee/Petitioner

v.

Elgin Mental Health Center
Employer/Respondent

Case # 07 WC 12719

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Chicago**, on **12/23/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

15IWCC0266

On **3/2/07**, 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 **$43,056.00**; the average weekly wage was **$828.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **1** dependent children.

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$552.00**/week for **320-4/7** weeks, commencing **3/3/07 through 5/17/12 and 9/28/12 through 9/3/13**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of **$552.00**/week for life, commencing **9/4/13**, as provided in Section 8(f) of the Act.

Respondent shall be given a credit of **$150,491.06** for TTD, **$0** for TPD, **$0** for maintenance, and other benefits for full salary up to the TTD rate of **$28,704.00** ($552.00 x 52 weeks), for a total credit of **$179,195.06**.

Respondent is entitled to a credit of **$28,704.00** under Section 8(j) of the Act, for the full salary paid for one year.

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

Respondent shall pay reasonable and necessary medical services of **$9,488.84**, as provided in Sections 8(a) and 8.2 of the Act.

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

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

Signature of Arbitrator

3/22/14
Date

MAR 24 2014

FINDINGS OF FACT

Petitioner, Evette Davis, was employed by Elgin Mental Health Center on March 2, 2007, as a security therapy aid. The job of security therapy aid involved working with patients who were deemed not guilty by reason of insanity. Her job was to help dress the patients, change beds, clean, distribute trays, observe the patients, transport them to and from different areas.

Petitioner testified that she was employed by the State of Illinois for approximately 22 years at the time of her injury. Petitioner provided she worked as a security therapy aid, I and II and also worked as a mental health technician. Petitioner described her job while working for Respondent as being physical in nature as well as doing paperwork.

Petitioner testified that she was initially employed as a Mental Health Tech. There were three different levels for that job. A Mental Health Technician II and III required additional paperwork and involved some supervision of others. She indicated the job as a Mental Health Tech I, II and III all involved physical work.

Petitioner testified that in the 1990's she switched over to a Security Therapy Aid I. She provided that a Security Therapy Aid I and II involved the same physical activities. However, a Security Therapy Aid II involve extra duties and involved taking a test.

Petitioner testified that in addition to working for the State, she was also involved in care giving. She became licensed as a certified nursing assistant (CNA) and worked in that capacity for 35 years. She obtained her CNA from Waubonsee Community College. Petitioner testified that she had a high school diploma and she took a few college courses but never obtained any type of degree. Petitioner further testified that she has no secretarial experience and has very limited computer skills. She has no experience with any type of Microsoft Word programs. Lastly, she provided that her early employment history included some sales for a local newspaper, Beacon News, which was essentially a part-time position when she was 17 years old.

Petitioner testified that on March 2, 2007, she was assisting a male patient who grabbed her around the neck and began choking her. Petitioner provided that that as she attempted to get away, the male patient began attacking her. This attack went on for approximately 10 minutes before assistance arrived.

Following the incident, Petitioner received treatment at Sherman Benefit Manager. Petitioner advised the medical professionals that she had been attacked by a patient at work and had pain from her neck down through her body to her toes. Petitioner was diagnosed with a neck and back strain. Medication was prescribed and she was released to work with restrictions of no altercations/physical restraining, change positions as needed, and no overhead work. (PX 1)

Petitioner returned to Sherman Benefit Manager on March 4, 2007 and March 6, 2007. She was diagnosed with multi strains, prescribed a pain reliever, physical therapy and returned to restricted work. (PX 1)

On March 14, 2007, Petitioner presented to her family physician, Dr. Syed Quadri with complaints of anxiety and musculoskeletal symptoms after being attacked at work. Dr. Syed noted she presented with extensive weeping and anxiety. Dr. Syed referred Petitioner to Psychiatry Service and noted that she was following up with her workman's center for her musculoskeletal complaints. (PX 2)

Petitioner began seeing Dr. Shapiro at Valley Psychiatry on March 20, 2007. Dr. Shapiro diagnosed post traumatic stress disorder with cervical injury and prescribed Lexapro and Seroquel. He felt that she was in need of individual therapy and medication management. (PX 3)

Petitioner continued with Dr. Shapiro through February 25, 2008. During that period, Petitioner saw the doctor on approximately twenty (20) occasions. Records submitted show that at some point, Petitioner applied for disability benefits from the State Employee's Retirement System. As part of the application, Dr. Shapiro completed a Disability Medical Report on July 26, 2007 indicating Petitioner had a combination of physical injury and post traumatic stress disorder secondary to being attacked at work. (PX 3) Also noted in the doctor's records are references that Petitioner had been attempting to get authorization to treat with Dr. Charles Slack, an orthopaedic surgeon. (PX 3)

Petitioner first saw Dr. Slack on July 12, 2007 for her neck and back complaints. At that visit, Dr. Slack diagnosed Petitioner as having cervical and lumbar derangement with radicular symptoms. The doctor ordered both a cervical and lumbar MRI. (PX 4)

Petitioner returned to Dr. Slack on September 11, 2007. Dr. Slack noted Petitioner underwent the MRI's on September 6, 2007, which showed at C4-C5 mild broad based disc bulge at C4-C5 and at C6-C7. Dr. Slack also noted that there was a small central disc protrusion at L5-S1. Dr. Slack diagnosed Petitioner with cervical and lumbar derangements with C6-C7 mild central disc protrusion and L5-S1 small central disk protrusion. Dr. Slack prescribed Skelaxin and Liboderm patches. He also referred her to Accelerated Facility for physical therapy. (PX 4)

Petitioner attended therapy at Accelerated Rehabilitation through November 8, 2007. She attended 21 sessions. On the last visit, the physical therapist noted that she had plateaued for the most part and there were only minimal changes in her complaints with an inability to make progress performing progressive resistive exercises. (PX 4)

Petitioner returned to Dr. Slack on November 12, 2007. His impression was still persistent cervical derangement with a C6-C7 central disc protrusion and an L5-S1 small central protrusion. Dr Slack referred Petitioner to his associate, Dr. Ted Fisher to see if surgery would be warranted. (PX 4)

Petitioner returned to Dr. Slack on December 10, 2007. The doctor again referred Petitioner to Dr. Fisher. Dr. Slack stated that he was waiting for authorization from the State before he could set up the appointment. He continued treating Petitioner with medication while awaiting authorization. (PX 4)

Petitioner first saw Dr. Fisher on March 26, 2008. Petitioner complained of right sided neck pain and right hand numbness. Dr. Fisher assessed 1.) cervicalgia; 2.) herniated nucleus pulposa cervical spine; 3.) post occupt C3 posterior spinal fusion; and 4.) right upper extremity radiculopathy. The doctor prescribed Medrol Dosepak and recommended she perform an at home exercise program. (PX 4)

On April 23, 2008, Petitioner returned to Dr. Fisher. He noted that the Medrol Dosepak helped relieve her pain temporarily, but her symptoms gradually returned. Dr. Fisher recommended Petitioner undergo an epidural cervical steroid injection. He also increased her intake of Lyrica. (PX 4)

On May 5, 2008, Petitioner followed up with Dr. Slack. The doctor confirmed Dr. Fisher's recommendation for an injection. Dr. Slack also noted Petitioner complained of some swelling in her anterior throat area. Petitioner reported that she had difficulty swallowing and pain since the incident. (PX 4)

On May 23, 2008, Petitioner saw Dr. Murtaza at APAC Groupe for the prescribed injections. She presented complaining of neck pain radiating down both arms and lower back with bilateral lower extremity radiation. Dr. Murtaza performed the first in a series of three cervical epidural injections. (PX 5)

On June 3, 2008, Dr. Murtaza noted the first injection only provided temporary relief. The doctor recommended a second injection. He also recommended an EMG study and prescribed Cymbalta for neuropathic pain and to help stabilize her mood. (PX 5)

On June 16, 2008, Petitioner returned to Dr. Slack. The doctor noted that the injection provided Petitioner with temporary relief and that she still had numbness and tingling in her fingertips. Also noted was ongoing low back pain and radiating right leg pain with activities. Dr. Slack recommended Petitioner undergo an EMG. (PX 4)

On July 28, 2008, Petitioner followed up with Dr. Slack after undergoing an EMG of her upper extremities. Dr. Slack noted the EMG showed peripheral neuropathic changes but no evidence of nerve damage. Petitioner continued to complain of pain across her shoulder and into her arms and hands. Dr. Slack also noted Petitioner complained of continuing throat pain and recommended she see an ear, nose, and throat specialist. A second epidural steroid injection was also recommended. (PX 4)

On August 26, 2008, Petitioner underwent a second epidural steroid injection performed by Dr. Murtaza. (PX 5) On September 8, 2008, Dr. Slack noted that the injection was not as helpful as the first injection. As a result, he recommended she follow up with a pain specialist to determine if a third injection would be appropriate. (PX 4)

Petitioner returned to Dr. Murtaza on September 12, 2008. Petitioner provided that her cervical complaints had returned to the prior levels. She also provided that most of her pain was in the lower back and left lower extremity. Dr. Murtaza administered a lumbar epidural steroid injection on September 16, 2008. On October 3, 2008, Dr. Murtaza determined that Petitioner did not have a clear cut diagnosis of cervical radiculopathy or brachial plexopathy. He noted Petitioner's muscles were normal and there was no sign of any type of muscle or nerve pathology. At that time, he recommended Ultram ER and advised Petitioner to return to Dr. Fisher to see if she would be a candidate for surgery. He stated that she had not obtained long term relief from the cervical and lumbar epidural steroid injections. (PX 5)

Petitioner returned to Dr. Fisher on October 9, 2008. Dr. Fisher noted that Petitioner had undergone three epidural steroid injections and only experienced transient relief of her symptoms. Treatment options were discussed which included surgery. Petitioner opted for the surgical option and a new MRI in a closed scanner was recommended. (PX 4)

Petitioner saw Dr. Slack on October 20, 2008. Dr. Slack again referred Petitioner to an ear, nose and throat specialist due to her ongoing neck symptoms which included difficulty with swallowing. (PX 4)

Petitioner returned to Dr. Fisher on January 7, 2009. The doctor noted Petitioner had undergone the cervical MRI on December 15, 2008 which he noted revealed posterior occiput to C3 fusion; degenerative disk disease throughout the cervical spine; and disk osteophyte complexes at C3-4, C4-5, and C6-7. Radiographs of

the cervical spine taken that day revealed occiput to C3 fusion and 2-3 millimeters of spondylolisthesis at C5-6. Dr. Fisher noted that Petitioner had failed to improve despite exhausting non-operative measures. He felt that she would need a posterior decompression and fusion surgery. He recommended she undergo a CT scan and see an ear, nose, and throat specialist for continued complaints of dysphasia. (PX 4)

Petitioner underwent the recommended CT scan on June 3, 2009 which revealed evidence of an occipital to C3 posterior fusion. At C5-C6 there was significant facet arthropathy, left side greater than right. (PX 4)

On June 24, 2009, Dr. Fisher recommended a C5-C6 bilateral facet injection. His diagnosis at that time was 1.) C3 through occiput fusion; 2.) multiple levels of degenerative disk disease and herniated nucleus pulposa: 3.) C5-6 spondylothesis; 4.) neck pain and bilateral upper extremities radiculopathy; and 4.) C5-6 arthritis. (PX 4)

On November 20, 2009, Dr. Murtaza performed a posterior cervical facet injection at C5-C6 on the right and left. Following the injection, Petitioner returned to Dr. Murtaza on November 30, 2009. The doctor stated that her pain level was still 7/10 and more radicular in nature. He also noted she had low back pain into her buttock and was still using Lyrica. Dr. Murtaza was of the opinion that Petitioner might benefit from a cervical epidural injection and that she needed to follow up with Dr. Fisher. (PX 5)

Petitioner saw Dr. Fisher on February 24, 2010, complaining of severe neck and shoulder pain. The doctor stated that she had failed to improve. He recommended a new MRI prior to proceeding with surgery. (PX 4)

On June 11, 2010, Petitioner returned to Dr. Fisher. He reviewed the recent MRI from June 8, 2010 and noted there was essentially no change from the prior scans. He stated that Petitioner had failed to improve with non-surgical measures and still recommended the surgery. He also noted that she needed an evaluation by an ear, nose and throat physician prior to surgery because of her dysphagia which began at the time of her work injury. He felt that this examination was required due to the necessity of intubation at the time of surgery. (PX 4)

At Respondent's request, Petitioner underwent a Section 12 examination with Dr. Howard An on September 10, 2010. After performing an examination and reviewing diagnostics, Dr. An diagnosed chronic axial neck pain with radicular symptoms associated with cervical spondylosis. Dr. An opined that although her cervical spondylosis was probably pre-existing, the work injury aggravated her condition beyond normal progression. The doctor recommended additional conservative treatment and noted that if same did not improve her symptoms, surgery would be reasonable. Dr. An further stated that Petitioner was not capable of returning to her job as a security therapy aid. (PX 4)

Petitioner underwent surgery on February 1, 2011, at St. Joseph Hospital. Dr. Fisher performed a bilateral hemilaminotomy and foraminotomy at C6-C7, an arthrodesis from C3-C7 with instrumentation and use of an allograft. The post operative diagnosis was degenerative disease C3 through C7 and spondylothesis is with facet athropathy. (PX 6)

Petitioner returned to Dr. Fisher on March 4, 2011. Dr. Fisher noted she was doing better but complained of polyarthralgias and posterior neck pain. He noted that Petitioner did not complain of any upper or lower extremity radicular symptoms. Petitioner however, did complain of numbness in her hands with some motions, but could not pinpoint where she felt that numbness. At that time, Dr. Fisher recommended Petitioner start a walking and routine exercise program. The doctor also noted that Petitioner needed to wear her cervical

collar at all times and restricted her to no lifting over five (5) pounds nor do any range of motion testing of her cervical spine for another two months. (PX 4)

Petitioner testified that by this time she was no longer seeing Dr. Shapiro as he was no longer available. She was referred to several different psychiatrists. However, whenever she started treating with the new psychiatrist, he would leave the practice and she would have to find a new replacement. Her treatment with the psychiatrists became more sporadic.

Petitioner continued to treat with Dr. Fisher. On March 15, 2011, Dr. Fisher noted Petitioner reported doing well, although she still had complaints of posterior neck pain. She denied any radicular symptoms. Dr. Fisher recommended she continue to wear a cervical collar for an additional two weeks. He also lifted her restrictions. On June 10, 2011, Petitioner reported that she was doing "great," with only occasional upper thoracic back and trapezius pain. Dr. Fisher recommended continued home exercise program and a functional capacity evaluation. At that visit, the doctor also provided that she could drive only if she can safely take her foot off of the gas to hit the brake. He further recommended she obtain hyperbolic mirrors to place on her side view mirrors so that she could effectively see her surroundings while driving. (PX 4)

On July 14, 2011, Petitioner underwent a functional capacity evaluation at Accelerated Rehabilitation. The evaluation was determined to be valid indicating Petitioner could function at a light category of work indicative of two hand occasional lifting or carrying of 20 pounds from 15 inches to waist level. (PX 4)

On June 25, 2011, Dr. Fisher noted that her neck was doing fine, but the rest of her body felt like "shit." Dr. Fisher noted Petitioner described polyarthralgias in her elbows, wrists, and ankles. Dr. Fisher noted that her pain was not coming from her cervical spine and recommended that she see a rheumatologist. He recommended that she undergo a CT myelogram to look for any nerve root impingement. The doctor also noted that Petitioner reported seeing a psychiatrist who increased her anti-depressants and anti-anxiety medications. At that time, Dr. Fisher released her to work with the restrictions outlined in the FCE. (PX 4)

On September 7, 2011, Petitioner followed with Dr. Fisher with complaints of continual neck pain, upper extremity radiculopathy, and arthralgias in her knees and ankles. Dr. Fisher noted that she had undergone CT myelogram of the cervical spine on August 16, 2011 and same revealed C2 through C7 posterior instrumentation with no evidence of hardware failure or loosening but that there was some artifact from the hardware which made the fusion mass difficult to visualize. Dr. Fisher again recommended Petitioner see a rheumatologist and participate in a routine exercise program. He also indicated that if Petitioner's symptoms did not continue to improve, a repeat CT of her cervical spine may be necessary to see if she was developing a pseudoarthrosis. (PX 4)

On December 1, 2011, Petitioner presented at Dr. Fisher's office. Petitioner reported that she still had not yet seen a rheumatologist. She reported doing well, but still had complaints of bilateral wrist, elbow, knee and ankle pain. Petitioner also reported that she was seeing a psychiatrist monthly, but did not think that she needed to. Because she had not seen a rheumatologist, Dr. Fischer recommended she see Dr. Skosey, a rheumatologist in his office. (PX 4)

Petitioner saw Dr. Skosey on December 1, 2011. Dr. Skosey opined that Petitioner had fibromyalgia. He recommended Savella and felt Petitioner should discuss this drug with Dr. Hussain, her psychiatrist at that time, to make sure that the drug was appropriate. (PX 7)

Petitioner continued with Dr. Fisher. On May 17, 2012, Dr. Fischer felt Petitioner had reached maximum medical improvement from the standpoint for her neck. He released her on a p.r.n. basis noting she should continue with Dr. Skosey for her polyarthralgias. A work status note from that date indicates Petitioner could use a cane, but should continue to follow up with rheumatology. The doctor noted that work restrictions would include no prolonged sitting or standing, a change in positions every 30 minutes, no lifting over 5 pounds, and no repetitive bending, twisting or lifting. (PX 4) Petitioner also saw Dr. Skosey on that date and he continued Petitioner on Savella. (PX 7)

Petitioner testified that Respondent offered her a light duty job. She returned to work on May 18, 2012 and was given a job shredding papers. Petitioner testified that she immediately began to have additional problems with her neck and back. Petitioner provided that she would bend over to shred the paper and place it in a container and lift the bags of trash. She testified that she developed a pulling in her neck and back from the lifting. Petitioner stated that she informed Respondent of her difficulty and she was subsequently placed in an office position filing papers. Petitioner stated the job involved a lot of bending which caused ongoing neck and back problems. She continued working from May 18, 2012 through September 27, 2012. Petitioner indicated that during this period, she used all of her personal time as there were days that she could not work.

During the period that Petitioner returned to work, she saw Dr. Fisher on June 20, 2012. Petitioner reported that her symptoms increased since her return to work. Petitioner informed the doctor she was shredding papers and was having difficulty working a complete eight (8) hour shift. Dr. Fisher recommended she continue with an exercise program. He also ordered a repeat CT scan noting that previous scan showed a less than robust fusion from C6-C7. (PX 4)

Petitioner returned to Dr. Skosey on July 3, 2012. Dr. Skosey noted tender points over the upper neck bilaterally, the trapezius muscles bilaterally, the mid upper back on the left, the low back on the left, and the left second costochondral junction. Dr. Skosey again diagnosed fibromyalgia. He opined that the onset of this condition was dated to her cervical spine injury. He stated that it occurred secondary to the limitation of motion in the cervical spine as well as the psychological trauma associated with that injury. He recommended that Petitioner continue Savella and noted that her prognosis would require prolonged management because this was a chronic disease. (PX 7)

Petitioner underwent the CT Scan at Sherman Hospital on August 18, 2012. The impression was post surgical changes without evidence for loosening or disruption of the stabilization device. Petitioner returned to Dr. Fisher on September 6, 2012. The doctor kept Petitioner on restrictions including no lifting over 5 pounds, no repetitive bending, twisting or lifting, and no prolonged sitting or standing. He felt that Petitioner needed to change positions every 30 minutes and released her on a p.r.n. basis. (PX 4)

Petitioner also saw Dr. Skosey on September 6, 2012. Petitioner continued to complain of pain in the neck and upper back radiating down into the hips. Petitioner reported that she could only work five hours a day. Petitioner indicated she had difficulty bending over, bending down and raising up for long periods of time. Dr. Skosey again noted that Petitioner complained of depression. Dr. Skosey continued to assess fibromyalgia. He felt Petitioner would benefit from a referral to a pain management program. (PX 7) Petitioner was placed back on temporary total disability benefits as of September 28, 2012.

Petitioner returned to Dr. Slack on December 10, 2012, reporting increased pain in her posterior neck and back when she had returned to work. He felt that she was unable to work and referred her back to Dr Fisher to determine her functional abilities. (PX 4)

Petitioner returned to Dr. Fisher on January 16, 2013. He felt a new functional capacity evaluation was warranted since the earlier one might not represent her true capabilities. Dr. Fisher also recommended she find a new rheumatologist as Dr. Skosey retired. (PX 4)

Petitioner underwent a new FCE on January 30, 2013, at ATI. The test was deemed valid indicating Petitioner's functional abilities were at the light physical demand level which meant occasionally lifting and carrying up to 21.4 pounds. The FCE also found Petitioner's capabilities to include working eight hour days, sitting three to four hours in thirty minute durations, standing eight hours in sixty minute durations, walking four to five hours for occasional moderate distances, climbing stairs occasionally, and frequently bending or stopping. The FCE determined that Petitioner's restrictions were not consistent with her job description as a Security Tech Aid with Respondent. (PX 4)

Petitioner returned to Dr. Fisher for a final visit on February 21, 2013. Dr. Fisher released Petitioner to return to work consistent with the functional capacity test. Although he stated that she could lift up to 21 pounds occasionally, he advised her that she would also need to change positions from sitting to standing every 30 minutes. He recommended that she continue treating with the rheumatologist. Dr. Fisher's diagnosis was status post occipital cervical fusion and fibromyalgia. (PX 4) Dr. Fisher felt Petitioner was at maximum medical improvement. He noted that she should continue to perform a home exercise program and could use a cane. On April 5, 2013, Dr. Fischer indicated that the FCE results and limitations are directly related to the cervical injury in July 2007. (PX 4)

Petitioner testified that inasmuch as Dr. Skosey recently retired, she was currently looking for new physician. She further testified that she recently found a new psychiatrist by the name of D'Souza. She is currently taking medications and has not returned to work. Petitioner also testified that she began a job search and was evaluated by a vocational counselor, James Boyd on September 3, 2013.

At Respondent's request, Petitioner underwent an independent medical examination Dr. Siemionow on October 23, 2013. Upon review of medical records, Dr. Siemenow opined that Petitioner's cervical spine injury was a direct response to the trauma she sustained on March 2, 2007 and that the medical treatment rendered was reasonable and necessary. Dr. Siemenow felt Petitioner was at maximum medial improvement for her neck, noting that further intervention would not improve her situation as it relates to her neck. Dr. Siemenow opined that Petitioner permanently keep her restrictions pursuant to the 2013 FCE. The doctor concluded that Petitioner would not be capable of performing duties as a security therapy aid for Respondent. The doctor also stated that the diagnosis of fibromyalgia was not in his field of expertise, but it did not appear related to the accident itself. Dr. Siemionow opined that he did not have an opinion regarding additional treatment for the lumbar spine and any questions regarding her psychological condition would best be answered by a qualified mental health provider. (RX 2)

At Respondent's request, Ms. Tracey Peterlin, Vocational case manager from Creative Case Management, performed a Blind Labor Market Survey/Transferable Skills Analysis of Petitioner on November 14, 2013. Ms. Peterlin determined that based on Petitioner's work history, education, training level, and physical restrictions, there was an available labor market within a forty-miles radius of Petitioner's residence. The labor market survey identified ninety-three potentially appropriate jobs available during a one-week period in November 2013 with potential salaries ranging from $27,000 to $33,000 per year. Potential job titles included secretary/administrative assistant, general clerical, receptionist, and customer service. Ms. Peterlin opined that there are jobs available which appear to be compatible with Petitioner's skill level, education, and documented restrictions. Ms. Peterlin added that a successful job search would be contingent on Petitioner accepting her limitations and choosing to fully invest herself in the job search which would require a personal

commitment to returning to gainful employment. (RX 3)

Petitioner testified that after she was released by Dr. Fisher, she began looking for jobs. Petitioner kept a detailed list of the jobs where she applied which is contained in Petitioner's Exhibit #3 on the deposition of James Boyd. Petitioner testified that she applied to over 300 places. Petitioner also testified that she contacted each and every employer listed on Respondent's blind labor market survey. (PX 13) Petitioner testified that she has never even been called in for an interview even after contacting the additional 92 employers.

Petitioner was evaluated by James Boyd, a certified vocational rehabilitation counselor on September 3, 2013. Mr. Boyd testified via deposition in this matter. Mr. Boyd testified that his qualifications included working for the State of Illinois for the Department of Human Services. He has performed vocational assessments for individuals applying to the Department of Rehabilitation Services.

Mr. Boyd testified that he reviewed the operative report from Dr. Fisher as well as the FCE and Petitioner's job search records. He also conducted a battery of tests consisting of academic achievement, aptitude, interest, and dexterity testing to evaluate the Petitioner's skill level and employment potential. (PX 8, p. 6)

Mr. Boyd determined that Petitioner's reading, spelling and math were below her stated educational level of a high school graduate. He testified that Petitioner read at a functional level of daily activity meaning that she could understand non-technical materials and write e-mails. He felt her math skills were inconsistent for basic functions of addition, subtraction, multiplication and division although she could perform the functions with whole numbers. Mr. Boyd stated that the Wide Range Achievement Test for word reading was only at a 6th grade level. Petitioner's grade equivalent for sentence comprehension was 8.9, math 5.7, and spelling 8.9. Mr. Boyd felt that Petitioner would have difficulty with continuing types of education without some remediation or accommodation. He felt that she would have difficulties with jobs involving written communication. He stated that the most significant problem about Petitioner's sentence comprehension was that she could get the general gist of what she read but would not understand its full meaning. (PX 8, pgs 7-8)

Mr. Boyd provided that he performed the Minnesota Clerical Test. He determined that Petitioner would never meet a competitive standard in terms of what an employer would expect as far as production. He stated that the results of the test showed Petitioner would not be very accurate in the clerical tasks that she would be asked to perform. Mr. Boyd indicated that he also conducted a Beta III test which is an I.Q. test of non-verbal reasoning. He testified that Petitioner tested very low compared to her age group. She was only at the third percentile indicating that she would have considerable difficulty making judgments, decisions, abstract thinking or problem solving in a job. Mr. Boyd noted that Petitioner had no knowledge of Microsoft Word, office programs, or other software programs and would be unable to compete for jobs in the market for clerical work (PX 8, pgs.9-13)

Mr. Boyd testified that he reviewed the functional capacity evaluation performed. He felt that it did not consider the reaching, handling or fingering functions that are identified by the Department of Labor as key physical components of any job. He administered the Purdue Peg Board test which measures fine finger dexterity with eye hand coordination. The results of the test showed that Petitioner would not be competitive in the market place since she only tested at the first percentile for measuring both hands working together. (PX 8, pgs.14-15)

Mr. Boyd testified that he reviewed the employers Petitioner contacted for work. He provided that it did not surprise him that Petitioner never received a response or any type of interviews. He stated that there was a

lack of any direct work experiences relating to the jobs that she applied for and on paper she had no transferable skills.

Mr. Boyd testified that he further reviewed the blind Labor Market Survey conducted by Respondent. He testified that this blind report did not take into account any actual work history. Mr. Boyd commented on the fact that the jobs listed on the blind Labor Market Survey consisted of clerical, secretarial and administrative work. He indicated Petitioner had neither the experience nor training for any of these jobs. (PX 8, pgs.17-18) Mr. Boyd concluded that the work performed by Petitioner when she returned to restricted work for Respondent in 2012 did not equate to being capable of performing clerical work or secretarial work. (PX 8, p.21)

On cross examination, Respondent posed as to why he did not perform a Labor Market Survey. Mr. Boyd testified that there was no reason to perform a Labor Market Survey since there were no jobs that could be identified from the Department of Labor Dictionary of Occupational Titles which is relied on by the industry. He stated that there were no transferable skills that were currently applicable to the labor market and there was no correlation with any job based on the test results. (PX 8, p.28)

Mr. Boyd testified that he considered the case of *National Tea Company vs. Industrial Commission*, 97 Ill. 2d 424 (1983). He opined that Petitioner would be unable to get back to her pre-injury earnings even with vocational rehabilitation. He stated that she was highly paid over the years of her employment, but she would not demonstrate any capacity for even minimum wage work at a full-time or part-time basis. (PX 8, p.19)

Mr. Boyd concluded that there was no stable labor market for Petitioner. He based his opinion on the results of his vocational assessment as it relates to the job requirements in a competitive labor market. Mr. Boyd recommended that Petitioner get involved in some type of daily work activity to give her some meaning to her day. He noted however, that he did not feel a formal vocational rehabilitation program would be beneficial concluding that she would not be able to obtain employment in a competitive market. (PX 8, p.20)

With respect to (F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner was attacked by a resident at Elgin Mental Health Center on March 2, 2007. The resident choked and attacked her injuring her neck, back and head. Immediately following the injury, Petitioner began seeing a psychiatrist, Dr. Shapiro, at Valley Psychiatry. Dr. Shapiro stated that Petitioner was at work when she was attacked. He noted Petitioner was having difficulty with people coming near her and diagnosed post traumatic stress disorder. He felt that Petitioner's post traumatic stress disorder and cervical injury were due to the injury at work when she was attacked. Petitioner testified that she had never been to a psychiatrist prior to the work injury and she had never sought counseling. Dr. Shapiro treated Petitioner with medication and counseling. Petitioner continued to treat with Dr. Shaprio until February 25, 2008. When Dr. Shapiro left the practice, she tried to see different psychiatrists on and off but was unable to obtain the services of another psychiatrist consistently until recently. She is now under the care of a Dr. D'Souza. She remains on medication. Prior to the injury, she had never been on any type of psychiatric medication.

Petitioner also injured her neck and back in the work injury. She began treating with Dr. Charles Slack who diagnosed both cervical and lumbar derangement which he felt was due to her injury. Dr. Slack referred Petitioner to Dr. Ted Fisher in his office. Dr. Fisher eventually performed a cervical fusion. Both Dr. Slack and Dr. Fisher attributed Petitioner's condition to her work injury.

At Respondent's request, Petitioner underwent two separate Section 12 examinations. On September 10, 2010, she was examined by Dr. Howard An who opined that Petitioner's ongoing neck and back condition was due to her work injury. Dr. An opined that Petitioner's cervical spondylosis was aggravated by the work injury beyond normal progression resulting in the need for surgery. On October 23, 2013, she was examined by Dr. Siemionow who opined that the mechanism of injury could have permanently aggravated her degenerative changes in the cervical spine and that the treatment received was reasonable and necessary.

In regard to the diagnosis of fibromyalgia, Dr. Skosey opined that the onset of the fibromyalgia could be dated to the cervical spine injury. He specifically stated that this was secondary to the limitation of motion of the cervical spine, pain associated with the spinal injury, and the psychological trauma associated with that injury.

The Arbitrator notes that although Dr. Siemionow opined that the fibromyalgia was not related to the accident itself, he admitted that this was not his field of expertise but he accepted the diagnosis since it was made by a rheumatologist. Dr. Siemionow did not comment on whether or not the fibromyalgia could have been aggravated by the trauma Petitioner sustained. Dr. Siemionow also stated that the conditions for Petitioner's psychological problems would best be answered by a qualified mental health provider. He further stated that he could not comment regarding the need for further treatment of the lumbar spine or maximum medical improvement for the lumbar spine without at least having new x-rays taken and available for review.

Petitioner testified that she never had any neck, low back or psychological problems before the date of accident. Petitioner did admit that she had an injury many years ago that involved her right arm. However, she testified that it was a minor injury and she did not lose any time from work. She stated that other than some physical therapy, she returned to all of her activities at work and performed all her job functions until March 2, 2007, the date of the current injury.

Based on all the above, the Arbitrator finds that Petitioner's conditions of ill-being regarding the diagnosis of post traumatic stress disorder, the cervical fusion, Petitioner's low back problems, and diagnosis of fibromyalgia are all causally related to the injury of March 2, 2007. The Arbitrator relies on the records of Dr. Shapiro, the doctors at Illinois Bone & Joint Institute consisting of Drs. Fisher, Slack and Skosey.

With respect to (J.) Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner submitted into evidence a bill from Advanced Pain & Anesthesia in the amount showing total charges of $8,660.00. A portion of the charges were paid leaving a balance of $8,129.48. Dr. Murtaza, from that facility, treated Petitioner and performed a posterior cervical facet injection at C5-C6 on the right and left on November 20, 2009. The injection was performed at the request of Dr. Fisher. The records reflect that Dr. Fisher recommended this treatment due to Petitioner's ongoing neck problems. The Arbitrator finds that the injection was reasonable and necessary and related to Petitioner's work injury.

Petitioner also submitted into evidence a bill from Illinois Bone & Joint Institute for services rendered by both Dr. Charles Slack and Dr. Fisher for various office visits. The charges totaled $1,182.12. The dates of service were from April 15, 2011 through February 21, 2013. The records show that Dr. Slack and Dr. Fisher evaluated Petitioner on these various dates and the treatment rendered was directly related to Petitioner's neck and back condition. The bills should be paid pursuant to the fee schedule.

Finally, Petitioner submitted into evidence a document from the Medicare Secondary Payor Recovery Contractor. The charges that were paid by Medicare were for dates of service on July 3, 2012, and September 6, 2012, from Dr. John Skosey. Medicare paid total charges of $177.24, and requested reimbursement. The treatment rendered by Dr. Skosey was found to be causally related to Petitioner's work injury. Therefore, Respondent is liable for the dates of service as reflected in that document and the charges incurred.

The Arbitrator finds that the charges in Petitioner's Exhibit 10 and 11 should be paid pursuant to the Fee Schedule. The charges from Medicare Secondary Payor must be reimbursed to Medicare.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

Petitioner testified that she was employed by the State of Illinois for approximately 22 years at the time of her injury. Petitioner worked as a security therapy aid, I and II and also worked as a mental health technician. Petitioner described her job as being physical in nature as well as doing paperwork.

Petitioner was initially employed as a Mental Health Tech. There were three different levels for that job. A Mental Health Technician II and III required additional paperwork and involved some supervision over others. However, the job as a Mental Health Tech I, II and III all involved physical work.

Petitioner began working as a Security Therapy Aid I in the 1990's. A Security Therapy Aid I and II involved the same physical activities. However, a Security Therapy Aid II involved extra duties and involved taking a test.

In addition to working for the State, Petitioner was involved in care giving. She became licensed as a certified nursing assistant (CNA) and worked in that capacity for 35 years. She obtained her CNA from Waubonsee Community College. Petitioner had a high school diploma and took a few college courses but never obtained any type of degree.

Petitioner further testified that she has no secretarial experience and has very limited computer skills. She stated that she does not have any experience with any type of Microsoft Word programs. Her early employment history included some sales for a local newspaper. She worked at Beacon News which was essentially a part-time position when she was 17 years old.

Petitioner developed post traumatic stress disorder necessitating medication. She was diagnosed with an L5-S1 central disc protrusion, and a C6-C7 herniated disc which required a cervical fusion with hardware. She was also diagnosed with fibromyalgia requiring medication and ongoing treatment. Petitioner now has permanent restrictions. The FCE performed at ATI on January 30, 2013, indicate Petitioner can only function at a light physical demand level. The therapist noted that she could occasionally lift and carry 21.4 pounds. When she was released by Dr. Fisher on February 21, 2013, he stated that Petitioner could not perform repetitive bending, twisting or lifting, and no prolonged sitting or standing. Petitioner would also have to change positions every 30 minutes and use a cane for support.

As a result of her injury, Petitioner is unable to return to work in her former position at Elgin Mental Health Center as a Security Tech Aid. Respondent's IME doctor, Dr. Siemionow, also concluded that she was not capable of performing the duties of a security therapy aid. Dr. Siemionow felt Petitioner could not perform any lifting over 20 pounds, and should not engage in bending, climbing ladders, stooping or crawling.

Petitioner testified that after she was released by Dr. Fisher, she began looking for work. Petitioner kept a detailed list of the jobs where she applied which tallied over 300 places. Additionally, she contacted each and every employer listed on Respondent's blind labor market survey. Petitioner has never even been called in for an interview even after contacting the additional 92 employers.

Petitioner was evaluated by James Boyd, a certified vocational rehabilitation counselor on September 3, 2013. Mr. Boyd reviewed the operative report from Dr. Fisher as well as the FCE and Petitioner's job search records. He conducted a battery of testing consisting of academic achievement, aptitude, interest, and dexterity testing to evaluate the Petitioner's skill level and employment potential. Mr. Boyd determined that Petitioner's reading, spelling and math were below her stated educational level of a high school graduate. He testified that Petitioner read at a functional level of daily activity meaning that she could understand non-technical materials and write e-mails. He felt her math skills were inconsistent for basic functions of addition, subtraction, multiplication and division although she could perform the functions with whole numbers. Based on the results of the Wide Range Achievement Test for word reading, Petitioner was only at a 6th grade level. Petitioner's grade equivalent for sentence comprehension was 8.9, math 5.7, and spelling 8.9. Mr. Boyd felt that Petitioner would have difficulty with continuing types of education without some remediation or accommodation. He felt that she would have difficulties with jobs involving written communication. He stated that the most significant problem about Petitioner's sentence comprehension was that she could get the general gist of what she read but would not understand its full meaning.

Mr. Boyd also performed the Minnesota Clerical Test. He determined that Petitioner would never meet a competitive standard in terms of what an employer would expect as far as production. He stated that test showed Petitioner would not be very accurate in the clerical tasks that she would be asked to perform. Additionally when he conducted a Beta III test which is an I.Q. test of non-verbal reasoning, Petitioner was very low compared to her age group. She was only at the third percentile indicating she would have considerable difficulty making judgments, decisions, abstract thinking or problem solving in a job. Mr. Boyd also noted Petitioner had no knowledge of Microsoft Word, office programs, or other software programs and would be unable to compete for jobs in the market for clerical work.

Mr. Boyd also reviewed the functional capacity evaluation. He noted that it did not consider the reaching, handling or fingering functions that are identified by the Department of Labor as key physical components of any job. He administered the Purdue Peg Board test which measures fine finger dexterity with eye hand coordination. The results of the test showed that Petitioner would not be competitive in the market place since she only tested at the first percentile for measuring both hands working together.

Mr. Boyd reviewed the employers where she looked for work. He testified that it did not surprise him that Petitioner never received a response or any type of interviews. He stated that there was a lack of any direct work experiences relating to the jobs that she applied for and on paper she had no transferable skills. Mr. Boyd further reviewed the blind Labor Market Survey conducted by Respondent. He testified that this blind report did not take into account any actual work history. Mr. Boyd commented on the fact that the jobs listed on the blind Labor Market Survey consisted of clerical, secretarial and administrative work. He noted Petitioner had neither the experience nor training for any of these jobs. Mr. Boyd stated that although the Blind Labor Market survey suggested Petitioner worked as a secretary, Petitioner testified that she was not a secretary but merely shredded papers and did some filing. Mr. Boyd concluded that the work performed by Petitioner in 2012, did not equate to being capable of performing clerical work or secretarial work. Mr. Boyd opined that there were no transferable skills that were currently applicable to the labor market and there was no correlation with any job based on the test results.

Mr. Boyd considered the case of *National Tea Company vs. Industrial Commission*, 97 Ill. 2d 424 (1983). He opined that Petitioner would be unable to get back to her pre-injury earnings even with vocational rehabilitation. He stated that she was highly paid over the years of her employment, but she would not demonstrate any capacity for even minimum wage work at a full-time or part-time basis. Mr. Boyd concluded that there was no stable labor market for Petitioner.

Ms. Peterlin, who authored the blind Labor Market Survey, stated that a successful job search would be contingent on Petitioner accepting her limitations and fully investing herself in a job search. However, Mr. Boyd testified that Petitioner did make a consistent effort to look for work but would not have been successful based on her qualifications.

Based on the above, the Arbitrator finds that commencing September 3, 2013, Petitioner is permanently and totally disabled under an odd lot theory. She conducted a diligent but unsuccessful job search. Respondent did not provide true vocational counseling, rehabilitation or assistance to enable Petitioner to return to the work force. Instead, Respondent conducted a blind Labor Market Survey which was not based on Petitioner's qualifications. The Arbitrator relies on the testimony of James Boyd, who conducted testing, reviewed the FCE and the restrictions of Dr. Fisher. Based on his evaluation and testing, he concluded that there was no stable labor market for the Petitioner.

With respect to (N.) Is Respondent due any credit, the Arbitrator finds as follows:

The parties stipulated that Petitioner was temporarily totally disabled from March 3, 2007 through May 17, 2012, and again from September 28, 2012 through September 3, 2013. Respondent stated that temporary total disability benefits were paid up through the date of the hearing. Respondent further submitted that Petitioner received full salary for one year pursuant to the Public Employee Disability Act.

Petitioner did not dispute that Petitioner received full salary for one year pursuant to the Public Employee Disability Act. However, Petitioner claimed that Respondent is only entitled to a credit for the salary paid up to the TTD rate.

> Section 8(j)2 of the Act states:
> "where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, … or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment" (820 ILCS 305/8(j)2).

Therefore, although Respondent paid full salary for the period of 365 days or 52 weeks, it is entitled to a credit only up to the TTD rate. Petitioner's TTD rate was $552.00. Therefore, Respondent is entitled to a credit for the full salary in the amount of $28,704.00 (52 weeks x $552.00) plus the additional payments of temporary total disability benefits paid in the amount of $150,491.06. The total credit Respondent is entitled to for the amount of temporary total disability paid from the date of accident through the date of the hearing is $179,195.06.

STATE OF ILLINOIS)
) SS.
COUNTY OF DU PAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rebecca D. Munoz,

Petitioner,

15IWCC0267

vs.

NO: 13 WC 13171

Workers United,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 24, 2014 is hereby affirmed and adopted.

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 15 2015

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 4/9/15
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MUNOZ, REBECCA D
Employee/Petitioner

Case# **13WC013171**

15IWCC0267

WORKERS UNITED
Employer/Respondent

On 9/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0317 LAW OFFICES OF PERRY M LAKS
120 N LASALLE ST
SUITE 1200
CHICAGO, IL 60602-3496

2837 LAW OFFICES OF JOSEPH A MARCINIAK
BRENT A HALBLEIB
TWO N LASALLE ST SUITE 2510
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

☐ 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

15IWCC0267

REBECCA D. MUNOZ
Employee/Petitioner

v.

WORKERS UNITED
Employer/Respondent

Case # 13 WC 13171

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Wheaton**, on **August 13, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS 15IWCC0267

On December 10, 2012, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$61,000.16**; the average weekly wage was **$1,173.08**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** dependent children.

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

Respondent ***is not liable for*** charges for all reasonable and necessary medical services.

ORDER

For reasons set forth in the attached decision, this matter is denied.

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

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

Signature of Arbitrator

Sept. 24 2014
Date

SEP 24 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

REBECCA D. MUNOZ,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13 WC 13171
	)	
WORKERS UNITED,	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

The petitioner filed three claims, receiving case numbers 10 WC 41127, 10 WC 41128, and 13 WC 13171, which were consolidated for purposes of litigation. On the date of the hearing, the parties reported that claim number 10 WC 41127 had been resolved via negotiation. Cases 10 WC 41128 and 13 WC 13171 were tried jointly on August 13, 2014; settlement contracts regarding claim number 10 WC 41127 were thereafter submitted to the Arbitrator and were approved on September 5, 2014.

Separate decisions will be authored relative to claims 10 WC 41128 and 13 WC 13171; however, the reader will please note that because the issues do overlap, the medical history in the decisions will be comprehensive and therefore duplicative.

MEDICAL HISTORY

The claimant is a union organizer who has had a longstanding history of back and leg problems. She has treated with Dr. Bartman since at least 2005. See generally PX1. Her treatment with Dr. Bartman includes a number of references to unrelated issues such as sinus infections, allergies, and so on. However, his notes do contain repeated references to lumbar and lower extremity conditions. On August 5, 2005, she reported to him having fallen getting on an airplane and injured her left knee and right ankle. On June 20, 2006, she noted low back pain radiating into the left leg. In November 2007, she reported low back pain for three weeks with radiating discomfort and with left knee pain and swelling. In December of 2007 she was referred to physical therapy for low back pain. In January 2008, she reported a left foot injury following a slip on ice[1]. On August 18, 2008, she reported low back pain over the prior week. See PX1.

The petitioner testified in December 2008 she began working in Tampa, Florida. While there, on May 16, 2009[2], she slipped and fell in a motel parking lot. She began a

[1] The parties indicated that this incident was the event represented by claim number 10 WC 41127.
[2] This is the incident reflected in claim number 10 WC 41128; see Arb.Ex.1.

course of chiropractic treatment with Dr. Long-Palestro in Florida on May 18, 2009 for neck and back pain. See PX2. She related a prior history of back and knee injury following a 2005 fall at that point as well as the more recent injury. She received chiropractic treatments with Dr. Long-Palestro until May 29, 2009, noting pain and symptoms in her right shoulder, low back and left leg. PX2.

The petitioner returned to Illinois not long after ceasing care with Dr. Long-Palestro and on July 3, 2009, the petitioner returned to Dr. Bateman. She reported low back pain following a fall in Florida. She was noted to have a diagnosis of lumbosacral disc disease. She was thereafter referred for physical therapy and continued to treat for low back pain. See PX1. On August 21, 2009, a lumbar MRI was performed, revealing mild disk bulging at L4-5 and L5-S1 without foraminal narrowing or canal stenosis, suggesting chronic degeneration and arthritis. See PX1.

Following that MRI, the claimant was recommended to see an orthopedist for evaluation. On September 1, 2009, Dr. Curtis Whisler, an orthopedist, noted she had been seen on August 26 and reported a history of back pain over three years without injury and without relief despite therapy. He noted no neurologic loss and evidence of degeneration on MRI, and referred her to a pain specialist for injection therapy. See PX1.

The petitioner saw Loyola pain clinic that day. They noted a two year history of low back pain which was exacerbated by a fall three months prior and was assessed with a possible myofascial pain syndrome. PX1. She thereafter underwent a series of epidural steroidal and trigger point injections in September and October 2009. See PX1.

On December 30, 2009, an EMG of the lower extremities was performed to evaluate possible radiculopathy; the EMG proved normal. PX1.

On January 12, 2010, she underwent trigger point injections at Loyola. PX1. On January 27, 2010, the petitioner noted improvement following the injections but a spike in symptoms over the weekend. A sacroiliac joint injection was done that day. PX1.

On February 4, 2010, the petitioner followed up at Loyola. They recommended a left femur MRI to evaluate localized swelling. PX1.

On March 6, 2012, the petitioner returned to Loyola Pain Clinic, reporting recent increases in symptoms, apparently without precipitating incident. She was noted to have degenerative joint disease in the lumbosacral spine as well as unspecified myalgia and myositis. PX1. Ongoing treatment notes show that on July 5, 2012 she underwent a sacroiliac joint injection there. PX1.

On July 30, 2012, the petitioner presented to Dr. Bartman. This visit indicates that she was following up for persistent back pain radiating throughout the left leg down to the foot. The reported history was of an onset six years prior with a further traumatic fall on New Year's Day in 2009. She had been seeking care with Loyola pain clinic since September 2009 with injection series being performed, and had most recently been there

three weeks prior. She reported a prior diagnosis of a herniated disk and was assessed with sciatica caused by a lumbar disk displacement. She was prescribed a new MRI and medication refills. PX1.

The petitioner had a lumbar MRI on August 8, 2012. It demonstrated disk bulging with mild canal stenosis from L4 to S1 with foraminal narrowing at L4-5. PX1.

On November 29, 2012, the petitioner saw Dr. Bartman. She reported increasing back pain without recent trauma, but described ongoing radiation into the leg and stated that recent injections had not proven beneficial. He referred her for physical therapy at that time. PX1.

On January 30, 2013, the petitioner saw Dr. Bartman. She complained that her back pain was continuing to get worse and asserted a recent fall on December 14, 2012[3]. Dr. Bartman referred her to a physical medicine and rehabilitation (PMR) specialist. PX1. She saw Dr. Murtaza that same day pursuant to Dr. Bartman's order. Dr. Murtaza noted a history of six years pain originally due to a 2007 fall with several other falls noted, most recently one month prior to this appointment. Dr. Murtaza recommended a new MRI scan and an epidural injection. PX1.

The petitioner had another lumbar MRI on February 1, 2013. It was compared by the radiologist to the August 8, 2012 MRI. The radiologist reported that the petitioner had multilevel degenerative disk disease, and the overall impression was "stable multilevel spondylosis" compared to the prior exam. PX1.

On February 7, 2013, Dr. Bartman saw the petitioner to assist her with FMLA paperwork. Chronic conditions were noted but no active treatment was rendered at this meeting. PX1.

On February 12, 2013, Dr. Murtaza performed a L4-5 epidural steroidal injection. No complications were noted. PX1, PX4. On February 25, 2013, the petitioner reported 20% improvement to Dr. Bartman following the injection. PX1. On February 27, Dr. Murtaza noted improvement following the injection and recommended a second injection. PX1.

Another lumbar epidural injection was performed on March 8, 2013 by Dr. Murtaza. PX1, PX4. On March 13, 2013, Dr. Murtaza noted no relief and recommended she see a spine surgeon. PX1.

On March 22, 2013, the petitioner saw Dr. Gupta, a spine surgeon. She reported a five year history of back and leg pain which had worsened since December. She characterized her pain as "13/10" and noted ongoing difficulty with walking. X-rays showed degenerative spondylolisthesis at L4-5 and he noted the MRI films were not available at that point. He instructed her to bring the MRI in but advised surgery was likely. PX3. On March 27, 2013, Dr. Gupta saw her again. His review of the MRI

[3] This refers to the injury at issue in 13 WC 13171; see Arb.Ex.II.

suggested she had significant spinal stenosis at the L4-5 level associated with degenerative spondylolisthesis. He recommended laminectomy and fusion. He opined her symptoms became severe following the December 2012 fall and had therefore aggravated her condition as a result of that accident. He also recommended a thoracic MRI as a result of her "ataxic gait" and ongoing symptoms. PX1, PX3. However, on March 29, he notes her gait was "normal" as was the thoracic MRI. He noted she may need a C-spine MRI. PX1, PX3.

On April 25, 2013, Dr. Gupta saw the petitioner. He noted no relief from epidural injections and noted surgery was pending. PX3. A lumbar MRI was performed that day, demonstrating degenerative changes at L4-5 and L5-S1; it does not appear to have been compared to the prior MRIs. PX3.

On May 2, 2013, Dr. Gupta performed L4-5 laminectomy and posterior fusion. No complications were noted during the procedure. PX3, PX5. On May 16, 2013, Dr. Gupta noted relief of all leg pain and reduced back pain. Gait was normal. He instructed her to return in two weeks for a wound check. PX3.

On May 29, 2013, the petitioner saw Dr. Bartman. He noted she had undergone low back surgery three weeks ago and was using a walker and a cane to ambulate. She also reported a neck MRI having been done. She reported improvement in her back symptoms and the treatment at this point was concentrated on a facial rash and sleep apnea rather than musculoskeletal issues. PX1.

On June 14, 2013, Dr. Gupta noted good healing and normal gait with good strength and intact sensation. He told her to avoid bending, twisting or lifting. PX3. On August 2, 2013, Dr. Gupta noted some leg pain but demonstrated normal gait. He assessed left hip bursitis. She declined an injection in favor of physical therapy, and he released her to light duty. PX3.

On September 12, 2013, the petitioner was seen by Dr. Bernstein for a Section 12 examination. The petitioner acknowledged a history of low back problems dating back to 2005, as well as the fall in Florida in 2009. At the point where she saw Dr. Bernstein, she reported being able to ambulate but still had postoperative low back pain. She reported having been fired or laid off during the postoperative period, which caused significant emotional distress. She otherwise reported no significant difficulties on examination. Dr. Bernstein reviewed the MRI films from before and after the December 2012 accident and concurred with the radiologist that no significant change was notable. Dr. Bernstein concluded that the claimant had a significant chronic and pre-existing condition which had been symptomatic for years before this incident. He noted worsening symptoms during 2012 before the incident which were not responding to conservative treatment and concluded that the work related incident was not a factor in the progression of the spinal disease or the surgery to correct it. See PX7, RX1.

On December 6, 2013, the petitioner reported some improvement in the distance she could walk. She had normal gait, painless range of motion, and a negative straight leg raise. Dr. Gupta opined she was improving but was unable to work at all. PX3.

On March 13, 2014, Dr. Gupta saw the claimant. She reported ongoing pain in her back and legs despite benign objective studies and clinical physical examination. He instructed her to wean off the ibuprofen, maintained her off work and opined she was depressed. PX3.

The petitioner underwent postoperative physical therapy at Loyola rehabilitation through April 2014. Improvements in range of motion were noted, as was her ability to walk over a mile, by the time of her discharge to a home exercise program. See PX13.

Beginning in February 2014, the petitioner sought counseling for depression at Pillars after moving in with her daughter secondary to having been laid off from work. She treated there for approximately four months before advising she would seek care elsewhere. See PX12.

On June 11, 2014, Dr. Gupta saw the claimant. She reported persistent back and leg pain, but the fusion appeared solid on radiographs. He opined she had made a limited recovery but was unable to work in any capacity. He instructed her to follow up in six months; however, he believed she "has reached some semblance of maximum medical improvement."

The petitioner testified she went on medical leave on January 27, 2013. Her medical bills were submitted through her group health insurance. She was laid off approximately one month after surgery. She has not returned to work in any capacity. She did not testify that she looked for work post-surgery. She has sought Social Security Disability, which she testified was approved as of July 28, 2014. At the time of trial, the claimant has not returned to work in any capacity. She testified as to some limitations in her activities of daily living and lifting limitations, but is able to drive, and the Arbitrator notes she testified while seated for over an hour.

OPINION AND ORDER

The petitioner acknowledged having had back problems for a number of years prior to this incident which are thoroughly laid out in the medical records. Her treatment had consistent of multiple and varied attempts at nonoperative treatment, which had not been successful at eliminating her symptoms. While epidural injections had at one point provided transient relief, the petitioner returned to her treating physicians complaining of low back pain which was increasing in intensity over the course of the year leading up to the accident at issue herein. The most recent such visit was less than two weeks before the asserted date of loss of December 10, 2012.

Following the December 2012 fall, a new MRI scan was prescribed to evaluate whether there had been any structural damage to the petitioner's spine. The radiologist compared the two sets of films and concluded they were effectively identical with no significant difference between the two.

Dr. Gupta opined the fall did cause a progression in the petitioner's symptoms, but her clinical presentation does not appear to have markedly changed in any neurologic sense. She had previously described to multiple treating providers a long history of radiating pain and symptoms which were progressing over time despite their various attempts at curing, relieving or controlling it.

Dr. Bernstein reviewed the MRI scans from before this accident and after it, and agreed with the radiologist that there had been no worsening of the pre-existing spinal pathology. Dr. Bernstein concluded that there was no evidence that there had been any worsening of the condition and that the petitioner was at a status that had not changed from where it would have been absent this accident. Dr. Bernstein's assessment appears thorough and logical, and the Arbitrator does find his conclusion credible.

While treating physicians are often granted a degree of deference over examining ones, in this case, the treating radiologist determined there was no structural damage having been done to the petitioner. All indications suggest this to have been a minor incident. She lost no time from work and pursued her normal employment activities for over a month before she even mentioned this to a doctor. Moreover, the medical records clearly demonstrate that the petitioner's complaints were becoming progressively worse over the year prior to the work injury. Had the petitioner been symptom-free following the 2010 injections until the December 2012 date of loss, or had she demonstrated a significant change in her condition after it, a workplace aggravation may well have been shown. However, the evidence clearly and conclusively shows that was not the case.

The Arbitrator finds that the medical records and evidence submitted do not persuasively demonstrate that this incident caused any pathology or need for ongoing treatment. The medical expenses incurred, disability benefits, and the requested penalties and fees are accordingly denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jason McKenna,

Petitioner,

15IWCC0268

vs.

NO: 12 WC 01105

Lincolnshire-Riverwoods Fire Protection District,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 15, 2014 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 15 2015

DLG/gaf
O: 4/9/15
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McKENNA, JASON
Employee/Petitioner

Case# **12WC001105**

15IWCC0268

LINCOLNSHIRE-RIVERWOODS FIRE PROTECTION DISTRICT
Employer/Respondent

On 8/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1228 KINNALLY FLAHERTY KRENTZ & LOR
MARK MASUR
2114 DEERPATH RD
AURORA, IL 60506

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
STEPHEN J FRIEDMAN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☐ 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

15IWCC0268

JASON McKENNA,
Employee/Petitioner

v.

LINCOLNSHRE-RIVERWOODS FIRE PROTECTION DISTRICT,
Employer/Respondent

Case # 12 WC 001105

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Waukegan**, on **June 23, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0268

FINDINGS

On **October 7, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$88,073.96**; the average weekly wage was **$1,693.73**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **two** dependent children.

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

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

Respondent shall be given a credit of $ **24,518.67** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **24,518.67**.

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 **$1,129.15**/week for **21-5/7** weeks, commencing **October 9, 2011** through **December 31, 2011,** and again commencing **January 26, 2012** through **April 2, 2012,** as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$24,518.67** for temporary total disability benefits that have been paid to Petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of **$695.78**/week for **63.25** weeks, because the injuries sustained caused the serious and permanent disability to his **left arm,** to the extent of **25%** thereof, as provided in Section 8(e) of the Act.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

August 11, 2014
Date

ICArbDec p. 2

AUG 15 2014

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

Petitioner worked for Respondent as a Lieutenant Firefighter/Paramedic. He was required to perform all duties of a firefighter and a paramedic in addition to certain administrative and supervisory duties as a Lieutenant. On October 7, 2011, Petitioner attempted to lift a large hose filled with water weighing 150-180 pounds when he experienced a loud pop in his left elbow, causing his arm to drop. Petitioner testified he is left hand dominant. Petitioner experienced an immediate onset of pain to his left elbow with swelling, a deformity and an inability to lift his arm.

Petitioner was transported by ambulance to the emergency room of Highland Park Hospital. Examination revealed tenderness and swelling in the distal aspect of the left bicep. X-rays performed were described as being negative for acute fracture or dislocation. Petitioner was prescribed medications along with a sling, and instructed to follow up with an orthopedic surgeon. (Px2)

Petitioner then saw Dr. Richard Thomas, an orthopedic surgeon, on October 10, 2011. Dr. Thomas recorded complaints of numbness, tingling and electrical type pain up and down the left arm with bruising to the elbow. Examination revealed exquisite tenderness and significant swelling to the left elbow. Dr. Thomas diagnosed a probable left biceps tendon rupture, prescribed additional medications and an MRI. (Px5)

The MRI was performed on October 10, 2011. This revealed a complete tear with 4cm retraction of the biceps tendon from the radial tubercle. (Px3) Dr. Thomas then prescribed surgery. Dr. Thomas performed surgery on October 14, 2011 in the form of an open left distal biceps tendon repair using the endobutton technique. Post surgery, Petitioner was placed in an arm splint and prescribed physical therapy. (Px4)

Petitioner then underwent regularly scheduled physical therapy commencing on October 19, 2011 through January 23, 2012. Therapists throughout noted complaints of pain, spasms, weakness and restricted range of motion to the left elbow. (Px6)

Petitioner saw Dr. Thomas on January 23, 2012, who noted continuing pain and weakness along with restricted range of motion to the elbow. Also noted was left sided weakness with supination. Dr. Thomas prescribed a functional capacity evaluation (FCE) followed by a work hardening program.

Petitioner underwent the FCE on January 25, 2012. He demonstrated medium to heavy work capacity, below his job requirements at a very heavy work level. He also was described to have provided maximum effort during the examination. Following the FCE, Petitioner commenced a daily work hardening program through March 26, 2012. During the last work hardening session, Petitioner was found to have left forearm weakness with supination and grip strength less than equal to his right, non-dominant hand. Petitioner was discharged from the program on that date.

Petitioner then saw Dr. Thomas on April 2, 2012 with complaints of ongoing pain and occasional elbow cracking. Dr. Thomas noted some loss of supination and felt he had a satisfactory outcome to his post-left distal biceps tendon repair. Petitioner was released to full time work at that time.

Petitioner then returned to full time work for Respondent and worked in such a capacity for the rest of the year. On December 20, 2012, he returned to see Dr. Thomas with complaints of persistent elbow pain especially with heavy lifting. Dr. Thomas noted tenderness to palpation over the biceps tendon and painful resisted supination and elbow flexion. Dr. Thomas discharged Petitioner to return as necessary and felt he had reached maximum medical improvement.

Petitioner saw Dr. Mark Levin on August 6, 2013. This examination was at the behest of Respondent and included an American Medical Association (AMA) rating report. Dr. Levin found elbow flexion restricted with weakness and pain to the left upper extremity, especially with outward rotation. Dr. Levin also noted the surgical hardware remained in the left elbow consisting of the endobutton and metallic clips. Dr. Levin diagnosed a complete tear of the left distal biceps tendon requiring surgery and felt this injury was caused by the accident of October 7, 2011. (Rx2)

Petitioner testified he continues to experience left elbow and arm pain, especially with increased work activities and weather changes, most notably cold. Petitioner testified to elbow weakness, especially with supination and he has to push to reach full elbow flexion. Petitioner testified he is unable to fully rotate his left hand facing upwards due to supination difficulties. This forces him to make certain modifications in his job duties and with recreational activities.

Petitioner also testified he was involved in a snowmobile accident on January 24, 2014. He fractured his left clavicle at that time. Petitioner denied any trauma or increased symptoms to his left elbow or forearm and denied any medical treatment to those areas of his body. This testimony is corroborated by the medical records introduced into evidence for treatment to the left clavicle fracture. (Rx2)

Based upon the above, the Arbitrator finds that the injuries and treatment to the left arm and elbow is causally related to the accidental injury of October 7, 2011.

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

See findings of this Arbitrator in "F" above.

Section 8.1(b) provides: *"In determining the level of permanent partial disability, the Commission shall base its determination upon the following factors: (1) The reported level of impairment pursuant to subsection (a): (2) The occupation of the injured employee; (3) The age of the employee at the time of the injury; (4) The employee's future earnings capacity; (5) Evidence of disability corroborated by the treating medical records."*

The Arbitrator is required to determine the nature and extent of the injury using the above statutory standards as follows:

(1) An AMA ratings report was authored by Dr. Levin. Dr. Levin's report noted continuing restriction in elbow flexion, occasional weakness to the left upper extremity, particularly in forearm rotation and he guarded his left dominant arm to prevent reinjury. Petitioner was also found to have ongoing pain in the left elbow and arm. Dr. Levin then concluded in spite of these findings that Petitioner sustained 0% impairment to his left upper extremity using AMA guidelines. The Arbitrator has taken the impairment level concluded by Dr. Levin into consideration along with the other factors mandated in Section 8.1(b).

(2) Petitioner worked for Respondent as a Lieutenant Firefighter/Paramedic that the Arbitrator notes is a heavy, physically demanding job. The Arbitrator further notes Petitioner's complaints of ongoing pain, weakness and loss of motion to the left upper extremity that were corroborated by Dr. Levin and Dr. Thomas.

(3) At the time of this accident, Petitioner was 39 years of age and is expected to continuing working with this disability in a heavy occupation until approximately age 67.

(4) Evidence introduced at trial indicates that Petitioner's future earnings capacity has not been diminished presently as a result of this accident. Petitioner continues to experience pain and weakness in his dominant left arm and elbow and has been forced to modify his current work activities due to his symptoms that have been documented by Dr. Thomas and Dr. Levin. These modifications may negatively affect Petitioner's future earnings capacity;

(5) Medical evidence reflects Petitioner has sustained disability that is corroborated by his testimony. Petitioner testified credibly that he continues to experience left elbow pain, weakness and restricted range of motion with heavy lifting and weather changes. Petitioner testified he is left hand dominant. Petitioner has undergone surgery for repair of a complete tear of the distal biceps tendon with 4cm retraction and placement of certain hardware during the surgical procedure. The medical evidence further reflects a lack of a few degrees of supination on the left side as compared to the right.

Based upon the above, the Arbitrator finds that Petitioner has proved that he has sustained permanent partial disability to the left arm to the extent of 25% thereof, pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rodrigo Contreras,

Petitioner,

15IWCC0269

vs.

NO: 09 WC 38553

Mercury Chicago Skyline Cruiseline,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of jurisdiction, the nature and extent of Petitioner's disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 21, 2014 is hereby affirmed and adopted.

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 15 2015

David L. Gore

Stephen Mathis

Mario Basurto

DLG/gaf
O: 4/9/15
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CONTRERAS, RODRIGO
Employee/Petitioner

Case# **09WC038553**

15IWCC0269

MERCURY CHICAGO SKYLINE CRUISELINE
Employer/Respondent

On 2/21/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2194 STROM & ASSOCIATES
LINDSEY STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
MICHAEL MOORE
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 15IWCC0269

Rodrigo Contreras
Employee/Petitioner

v.

Mercury Chicago Skyline Cruiseline
Employer/Respondent

Case # 09 WC 38553

Consolidated cases: none

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of **Chicago**, on **January 15, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0269

FINDINGS

On **December 8, 2008**, Respondent ***was not*** operating under and subject to the provisions of the Workers' Compensation Act; the Longshore and Harbor Workers' Compensation Act ("LHWCA") has exclusive jurisdiction over the accident at issue.

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

On this date, the Petitioner was injured while at work but ***did not*** sustain an accident that falls within the purview of the Act, as the LHWCA has exclusive jurisdiction regarding remedies in this matter.

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

Petitioner's current condition of ill-being ***is in part*** causally related to the accident; however, for reasons noted above, the remedial provisions of the Workers' Compensation Act do not apply.

In the year preceding the injury, Petitioner earned $**23,400**; the average weekly wage was $**450.00**.

On the date of accident, Petitioner was **58** years of age, ***married*** with **1** dependent child.

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

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

Respondent would be entitled to a credit of $**16,508.80** for disability benefits pursuant to Section 8(j) of the Act; however, this is moot for the reasons noted above.

ORDER

For reasons set forth in the attached decision, benefits under the Act are not applicable; this claim is denied.

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

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

Signature of Arbitrator

Feb. 21, 2014
Date

FEB 21 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RODRIGO CONTRERAS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 09 WC 38553
	)	
MERCURY CHICAGO SKYLINE CRUISELINE,	)	
	)	
	)	
Respondent.	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

On December 8, 2008, the petitioner was injured in a fall while performing maintenance work on the respondent's boat, the MV Chicago's Little Lady. The parties disputed the applicability of the Illinois Workers' Compensation Act, as the respondent asserts that the Longshore and Harbor Workers' Compensation Act would have exclusive jurisdiction in regard to this matter.

The petitioner testified that the petitioner was working for the respondent on the date of loss, and that his general duties included cleaning and maintenance of the vessel. He testified that on December 8, 2008, the boat had been docked at the pier while he was working on it. He testified that he was a seasonal employee and would work at the yard when work on the river was suspended.

Robert Agra testified for the respondent; he is the president of Mercury Chicago Skyline Cruiseline, a Captain in the Merchant Marine (see RX2) and a licensed ship master for vessels less than 100 tons. He is also in charge of accounting and management, and will at times pilot the ships in the company's fleet of six ships. His company is engaged in a touring, sightseeing and charter service practice along Lake Michigan and the Chicago River, and will also sell alcohol and food items on board for profit. Typically the respondent will tour during the day and conduct private charters in the evening. The petitioner introduced PX12, a copy of the company's tour brochure. The touring season is from April through November; once the main dock closes for the winter, the boats are piloted down the Little Calumet River to Pier 11. The boat never leaves the water and is not taken by either tugboat or trailer. During the off-season the respondent sands, paints and cleans the ship and performs engine maintenance. After the spring thaw the vessels return to the downtown area. The respondent introduced documentation regarding the dock area; RX3 and RX7 are river charts showing the location of Pier 11 where the MV Chicago's Little Lady was berthed on December 8,

2008. RX4 is a satellite view of the Pier 11 marina. Captain Agra also testified as to the accuracy of these maps and photograph. See RX3, 4, 7.

Captain Agra described the MV Chicago's Little Lady as a Coast Guard regulated and inspected passenger vessel under 46 C.F.R. The respondent introduced an excerpt from its website describing the vessel; see RX6. The Chicago's Little Lady is a diesel-powered 68 foot long vessel with a 23 foot beam, built in 1999 in Freeport, Florida. Captain Agra testified that the Chicago's Little Lady was built to specifications and never had a history as a shipping or cargo vessel. The Little Lady was taken from Florida via the Tennessee, Ohio and Mississippi River systems. It could, in theory, be piloted from Pier 11 or Lake Michigan through these navigable waterways to the Gulf of Mexico or the Atlantic Ocean. Captain Agra testified that during the summer season, the Little Lady uses generator power during the day and shore power at night; in winter, shore power is almost always used. He testified use of shore power is more economical, reduces wear and tear on the engines and generators, and makes engine room work easier.

Captain Agra testified the petitioner was one of his employees on the date of loss. After the tourist season ends there is a short break for its employees and then some of them will return to work, performing inside maintenance. The extent of any off-season depends on the worker's job classification. The petitioner had returned to work and his job duties included cleaning, sweeping, light sanding, moving items and assisting other employees. Captain Agra testified these duties were typical longshoring activities. Captain Agra testified that the MV Chicago's Little Lady remained on the water at the time of the accident; to pull the ship away from the dock, all that would have been necessary is to unhook the shore power, undo the lines, and prepare and start the engines.

The medical records introduced demonstrate that he presented at Ingalls Hospital on December 10, 2008, describing pain in the right leg and ankle following a fall into an access hatch at work. See generally PX1. No acute fracture was noted at the time. He was assessed with sprains to the right leg and knee.

He continued to treat for left elbow and low back pain, as well as pain in his abdomen, groin and right leg. Conservative treatment did not produce relief. On March 21, 2009 an MRI of the low back demonstrated minor bulging with foraminal narrowing at several levels without disk herniation. Physical therapy was attempted without relief. See generally RX2.

The petitioner was thereafter diagnosed with a hernia, which culminated in surgical repair on June 15, 2009. See RX7. Following the hernia surgery, the petitioner developed postoperative orchitis causing testicular pain and swelling. He was referred to Dr. Gordon Gluckman, a urologist, on July 8, 2009; following testing and due to persistent symptoms, Dr. Gluckman recommended singular testicle removal on July 22, 2009, which was thereafter performed without complications. See PX3, PX9.

The petitioner sought treatment for his right knee with Dr. Nikhil Verma on August 19, 2009. See generally PX4. He was prescribed an MRI, which was conducted

on August 28, 2009. It demonstrated chondral defect and the petitioner was thereafter recommended arthroscopy. Dr. Verma performed right knee diagnostic arthroscopy on November 25, 2009; ligaments and menisci were intact and chondroplasty was performed. The petitioner was prescribed postoperative rehabilitation, which produced some improvement in symptoms.

The petitioner underwent an FCE on March 11, 2010, which was conditionally valid. PX6. On March 29, 2010, Dr. Verma reviewed the FCE findings and examined the petitioner. Dr. Verma assessed the claimant at MMI and prescribed permanent restrictions of lifting more than 50 pounds and recommended against climbing, squatting, kneeling or jumping.

The petitioner did not treat thereafter regarding this matter. On April 19, 2010, Dr. Verma authored an AMA impairment rating letter in which he provided an impairment rating for petitioner if a 7% lower extremity impairment and a 3% whole body impairment based on a 3 mm cartilage interval with a diagnosis of underlying osteoarthritis. PX4.

The petitioner did not return to work for the respondent following the accident. He was paid disability benefits through the respondent's Longshoreman policy and all medical bills were satisfied through that policy. No testimony or documents were introduced regarding any job search following the accident. On October 21, 2010, approximately seven months after the petitioner achieved MMI, the petitioner suffered the first of two strokes. These have rendered him incapable of employment, and he testified from a wheelchair; the parties stipulated that these were not related to the accident at issue herein. While the claimant had at one point requested vocational rehabilitation (PX13), the request was made after the petitioner's stroke and the parties concurred that vocational rehabilitation was no longer being sought.

OPINION AND ORDER

The threshold issue presented in this matter is whether the claimant's injury is covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et. seq. ("LHWCA"), or by the Illinois Workers' Compensation Act. The LHWCA has exclusive jurisdiction when a worker is injured on a vessel that is on navigable waters while the worker is engaged in traditional maritime activity. *Uphold v. Illinois Workers' Compensation Commission*, 385 Ill.App.3d 567, 896 N. E. 2d 828 (5th Dist. 2008). Some cases can involve concurrent jurisdiction, these being the so-called "twilight zone" cases. Id.; see also *Wells v. Industrial Commission*, 277 Ill.App.3d 379, 660 N.E.2d 229 (1st Dist. 1995). However, the parties apparently concur that this matter would not be such a case, and for reasons set forth below, the Arbitrator finds no significant ambiguities sufficient to deem this matter "twilight" in nature.

On December 8, 2008, the petitioner was cleaning the interior of and performing maintenance on the MV Chicago's Little Lady. Maintaining and repairing equipment

essential to maritime activities has been found to constitute traditional maritime activity. See *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989); and *Uphold*, supra. Keeping ships in good condition and repair is vital to prevent deterioration and damage to their components. The claimant's activities at the time of his injury were consistent with traditional maritime activity.

The MV Chicago's Little Lady was undoubtedly a vessel within the meaning of the LHWCA. While it was moored to the pier at the time of the claimant's injury, the Little Lady was afloat, not in dry dock, and was fully seaworthy. The Arbitrator notes that "it is generally accepted that 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.'" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 373 (1995), internally citing *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (CA1) (en banc), cert. denied, 506 U.S. 827, 121 L. Ed. 2d 50, 113 S. Ct. 87 (1992).

Moreover, the Arbitrator finds that the marina in which the Little Lady was berthed was a navigable waterway. Captain Agra credibly testified as to the location of the marina and the river charts showing it connected to waterways. Moreover, the Chicago's Little Lady was brought there under its own power on the river, not towed or put on a trailer, supporting the conclusion that the waterways were navigable from Lake Michigan and not a self-contained lake or small local creek.

The petitioner's reliance on *Boomtown Belle Casino, et al. v. Jerry Kate Bazor*, 313 F.3d 300 (5th Cir. 2002), is unpersuasive. That matter involved an exclusion of recreational activities from the LHWCA, as the employer was a berthed floating casino. A casino operation is one wherein the ship is effectively irrelevant to the essential function of the casino. Here, the maritime action of the employer is part and parcel of its activities. Expanding the "recreational activities" exception to the extent proposed by the petitioner would exclude tourism, charters, fishing, passenger transport, educational activities, and other trades which are fundamentally associated with commercial maritime action. The Arbitrator declines to read the exception as broadly as the petitioner requests.

Considering all evidence adduced, the Arbitrator concludes there is no ambiguity of the petitioner's activities. The Longshore and Harbor Workers' Compensation Act has exclusive jurisdiction over petitioner's December 8, 2008, work injury. Consequently, the Illinois Workers' Compensation Act lacks jurisdiction in this matter.

Issues as to temporary total disability, maintenance, and the nature and extent of the injury are moot given the above findings.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
MADISON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHANDELA ANDERSON,

Petitioner,

vs.

NO: 13 WC 23660
14 WC 02472

SAM'S CLUB,

Respondent.

15IWCC0270

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, medical expenses and prospective medical treatment, and being advised of the facts and law, modifies the Decision of the Arbitrator, pursuant to Section 19(b) of the Act, as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's decision in all respects, except for with regard to the award of prospective medical treatment. For the reasons set forth below, the Commission modifies the Arbitrator's decision and finds that the Petitioner is not entitled to prospective medical treatment.

The Petitioner had initially continued to work her regular job for Respondent following the May 5, 2013 accident until July 18, 2013. The Petitioner failed to seek any treatment after the accident for over ten weeks, while she continued to work her regular job. While she testified that Dr. Raskas provided work restrictions as of July 18, 2013, the record reflects that she did not see Dr. Raskas until September 17, 2013. While the Arbitrator's decision indicates that Petitioner worked light duty in May and June 2013, the Commission cannot locate any evidence in the record to support this finding. Instead, the evidence shows that Petitioner continued to work her regular cashier's job until she switched to a different Respondent store location in July 2013.

15IWCC0270

We also take note that the Petitioner testified that when she spoke to the Respondent's general manager Rich on May 7, 2013, he asked her not to complete and accident report and to avoid seeking treatment, as it would have been the sixth accident that year. However, Petitioner also testified that she didn't initially seek treatment because she didn't understand workers compensation, and: "I guess I was waiting for someone from (the employer) to tell me to go get it looked at". It is unclear why she would have been waiting for the employer to tell her to get her injury looked at if the employer had requested that she not claim a work related injury. These conflicting statements negatively impact the Petitioner's credibility in this case.

Based on the above, the Commission finds that the Petitioner has failed to prove the reasonableness and necessity of the prospective medical treatment recommended by Dr. Raskas, and modifies the Arbitrator's decision to find Petitioner is not entitled to prospective medical treatment.

Because no benefits were awarded as part of this decision, which incorporates the Arbitrator's decision except as noted above, the Commission notes that a bond is not required by Respondent should the matter be appealed to the Circuit Court.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as noted above.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 16 2015
TJT: pvc
o 2/17/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

ANDERSON, SHANDELA
Employee/Petitioner

Case# **13WC023660**
14WC002472

SAM'S CLUB
Employer/Respondent

15IWCC0270

On 5/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4551 LAW OFFICE KEITH SHORT
1801 N MAIN ST
EDWARDSVILLE, IL 62025

2593 GANAN & SHAPIRO PC
AMANDA WATSON
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF **Madison**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Shandella Anderson
Employee/Petitioner

v.

Sam's Club
Employer/Respondent

Case # **13** WC **23660**

Consolidated cases: **14 WC 2472**

15IWCC0270

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **3/26/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/5/13 and 10/24/13**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$11136.32**; the average weekly wage was **$214.16**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent children.

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

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

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

ORDER

The Arbitrator finds for the Petitioner and awards the physical therapy and treatment ordered by Dr. Raskas and HSHS medical group and all reasonable, necessary and related treatment flowing there from.

The Arbitrator denies the bill of Dr. Raskas in the amount of $170.00. Petitioner was referred to Dr. Raskas as part of an IME and Dr. Raskas's initial visit is not awarded. However, Petitioner was also referred by both Dr. Raskas and HSHS for physical therapy and, as such, this treatment and reasonable and necessary follow up evaluations and recommendations are approved.

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

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

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

Signature of Arbitrator

5/12/14
Date

ICArbDec19(b)

MAY 15 2014

Shandela Anderson v. Sam's Club
14 WC 2472 and 13 WC 23660 Consolidated

Issues in Dispute: Accident, Causal Connection, Notice, Medical bills and Prospective Medical treatment

Facts

Petitioner, a 42 year old female, testified that she injured her lumbar spine/low back during the course of her employment with Respondent, Sam's Club in O'Fallon, Illinois on 5/5/13.

Petitioner was asked by her supervisor, Stacia Williams, to go outside the store to round up shopping carts and flat bed carts from the parking lot. Petitioner had moved two sets of carts without complication. She then attempted to align four flat bed carts. The carts would not align properly causing her to have to pull/jerk the carts into alignment. When she did this she heard a pop in her lower back and had immediate onset of sharp pain. Petitioner had no history of back injury or treatment for over 20 years prior to this accident.

Petitioner testified that she immediately spoke to Stacia and told her that she had injured her back while moving the carts. Petitioner was crying. Stacia told her to clock out early and go home as the store was closed and Petitioner's shift was about to end anyway. Stacia did not have Petitioner complete an accident form.

The following morning, 5/6/13 Petitioner was still in significant pain when she arrived at work. She then spoke with Josh, one of the store managers. Josh had her complete an in- store incident form but did not have her complete a Form 45. He told her that the accident form had to be completed by General Manager, Rich Perkins. Petitioner was told by Josh that she could take extra breaks if needed. At one point, Stacia told her she could work in the Sam's Club gas station, where she could stand and sit as needed. However, later that day another supervisor, Avondus, told her she needed to go back to her cashier position.

On 5/7/13 Petitioner spoke with Rich Perkins (Rich) and told him how she was injured on 5/5/13. Rich asked her to not fill out an accident form because her injury would have constituted a 6th accident that year and that there would be consequences with the parent company due to all of the claims filed. Petitioner, who has never had a workers' compensation claim before, agreed not to complete the form. She asked Rich if she could see a doctor but was not directed to one. Instead, she was told she could take a few days off if she needed.

Petitioner testified that she had no idea how she should proceed since she did not have medical insurance with which to get treatment and her employer would not provide treatment. She then decided to retain counsel and was told by her attorney to immediately find a doctor who would see her. Petitioner's counsel also sent her to an orthopedic surgeon for an IME.

On 7/18/13 Petitioner was seen at HSHS Medical Group-Family and Internal Medicine Highland. She was seen by Robin Fischer, P.A. Petitioner gave a history of being injured on 5/5/13 while moving carts at work. She stated that she had been unable to receive medical care as she had no coverage and was later instructed by counsel to find a doctor somewhere. Upon physical examination she and review of films, Petitioner was diagnosed as suffering lumbosacral pain. She was given Naproxen and Skelaxin and was recommended to undergo physical therapy. Petitioner continued to receive treatment through HSHS through August, 2013. Respondent initially accepted this treatment and authorized the therapy but later refused payment. (Pet. ex 2)

Petitioner was placed on light duty by HSHS. The employer has accommodated her throughout and there are no claims for TTD.

On 9/17/13 Petitioner was seen for by orthopedic surgeon, Dr. David Raskas as a Petitioner's IME. Dr. Raskas took a history of injury consistent with that provided to HSHS. His exam revealed decreased reflexes and limited range of motion. Dr. Raskas diagnosed Petitioner with low back pain and possible SI joint dysfunction. He recommended restrictions on repetitive bending, twisting, turning, a need to change positions frequently and a 10 to 15 lb lifting restriction.

Dr. Raskas recommended a 6 week course of physical therapy to be followed by an MRI if there was no improvement. Dr. Raskas stated, "With regard to causation, the need for the aforementioned treatment is directly attributable to the patient's injury based upon the accuracy of history provided." (Pet. ex. 1). Dr. Raskas is the only expert who provided an opinion on causation.

On 10/17/13 Petitioner underwent an MRI at St. Joseph's Hospital. The film did not reveal a frank disc herniation, but did reveal "Neural foramen narrowing with locations and percentages as detailed above may cause patient's symptomology as detailed above."

On 10/24/13 Petitioner suffered another injury after she had been transferred to the Sam's Club facility in Glen Carbon, Illinois. On that date she was working as a greeter and was allowed to sit on a high stool near the store's entrance. She noticed a sticker on the ground and was going to get off of the stool to pick it up. As she stepped down her foot slipped off the stool and she felt a pop in her low back. She testified that she felt some pain, but that the increase was temporary and that she returned to a baseline of the pain and functional limitations caused by the 5/5/13 incident.

Petitioner testified that she reported the incident to Stacia, her immediate supervisor. Stacia had also transferred to the Glen Carbon Sam's Club. Stacia was not brought in to dispute Petitioner's testimony.

Petitioner testified that she continues to have low back pain and occasional leg pain. She has reduced range of motion and pain when bending or stooping. She cannot exercise, nor can she engage in sexual relations without significant pain. She continues to work but cannot work in an unrestricted manner as she did prior to the accident of 5/5/13.

Analysis

There is no dispute that Petitioner suffers a low back injury and requires medical care, including a six week course of physical therapy and all reasonable and appropriate follow up care suggested by Dr. Raskas. All of the medical records support her complaints. Respondent offered no medical information or medical opinion to refute Petitioner's testimony. Likewise, there is nothing to suggest Petitioner's complaints are not true or supported by exam findings. Thus, in regard to reasonableness and necessity of medical care, all of the evidence supports the Petitioner's claim.

The primary issues in dispute are whether Petitioner suffered the injury/injuries she alleges and whether she timely reported said injury. There is no dispute that Petitioner was doing the work she testified to (pushing 4 flat bed carts weighing approximately 75 lbs each)

On direct examination Petitioner testified that she was required to attend a new employee orientation program when first hired by Respondent. Respondent's policy requires employees to report injuries first to an immediate supervisor and then to a store manager and/or the general manager of the facility. The two witnesses called by Respondent, Gary Zimbelman and Jason Townsend, reiterated that policy. The also testified that they were never told by Petitioner or any members of management that Petitioner was injured on the dates alleged.

Rich, Stacia, Josh and Avondus are the supervisors and managers to whom Petitioner spoke about her injury. They are all currently employees of Respondent and all under the control of Respondent. Respondent failed to bring any of these four witnesses to testify. Instead Respondent brought two witnesses who had no knowledge of the actual accidents and no evidence pertaining to the accidents. The only thing Zimbelman and Townsend could testify to were: 1) the accident reporting procedures at Sam's club. The procedures require an employee to report the accident to her supervisor, then a manager and then the general manager, if necessary. These are the exact procedures followed by Petitioner. And, 2) that they had no information about the Petitioner's injuries and were not told that Petitioner was injured.

Neither Zimbelman nor Townsend mentioned interviewing Rich, Stacia, Josh or Avondus as part of their "investigation." Instead, they merely testified that they were not told by these four people that Petitioner suffered injuries. This is a distinction with a significant difference. One cannot know if they ever spoke to these four witnesses…and if they did…what the witnesses might have said. They offered no notes or evidence of their investigation. The Respondent had, in its control, four people who could have directly refuted the testimony of the Petitioner but did not call a single one. Respondent's decision to not bring any direct knowledge witnesses cannot be disregarded.

The Arbitrator finds the Petitioner's testimony to be consistent and credible. Her subjective complaints were substantiated by objective findings. Her history to the providers was consistent. Petitioner's testimony regarding the accidents, the times and persons to whom notice was given and her understanding of the reporting policies was credible and believable. As important, her versions of the accident and job activities were not disputed. Respondent offered no one to testify that Petitioner was not doing the heavy manual job she described at the time of the 5/5/13 accident. The activity she described could, by expert and lay opinion, be the type of work which would cause a lumbar injury. Respondent did not offer any evidence to refute this assertion.

Finally, it is important to recognize that Respondent agreed to place Petitioner on light duty in May and June, 2013 even when she had not yet found medical care and did not have written restrictions. As such, they must have known she was injured. The only people who could have refuted her testimony that she was injured or that her injury occurred at work were the four witnesses Respondent chose not to bring. The reasonable conclusion is that Respondent allowed Petitioner to work light duty in May, June and July because she had reported a work related back injury.

The only potentially viable defense presented by Respondent is notice. This defense fails for the reasons set forth above. As such, the Arbitrator finds for the Petitioner and awards the physical therapy and treatment ordered by Dr. Raskas and HSHS medical group and all reasonable, necessary and related treatment flowing there from.

The Arbitrator denies the bill of Dr. Raskas in the amount of $170.00. Petitioner was referred to Dr. Raskas as part of an IME and Dr. Raskas's initial visit is not awarded. However, Petitioner was also referred by both Dr. Raskas and HSHS for physical therapy and, as such, this treatment and reasonable and necessary follow up evaluations and recommendations are approved.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES CLENDENIN,

Petitioner,

15IWCC0271

vs.

NO: 10 WC 29027

AMERICAN COAL COMPANY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of occupational disease and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission agrees with the Decision of the Arbitrator that Petitioner, after approximately 27 years of work in mining, was continuously exposed to noxious particles and fumes that resulted in his contracting coal worker's pneumoconiosis (CWP). His condition of CWP was confirmed through a chest x-ray, one taken shortly after Petitioner left his mining career, and interpreted by Dr. Henry Smith, a B reader, as well by Dr. Parviz Sanjabi, an internal and pulmonary physician. The Commission, however, disagrees with the Decision of the Arbitrator as to the extent Petitioner has been affected by his condition.

The individual most familiar with Petitioner's condition, both at the time he left mining and presently, is Petitioner himself, and the Commission finds his claims concerning his condition, both past and present, to have been exaggerated. Petitioner testified his decision to retire from mining came about as a result of his experiencing shortness of breath. He testified that he arrived at this decision on his own and without advice of a physician. Per Petitioner, he never made his primary care physicians at the VA hospital in Marion, Illinois, aware that he was

experiencing shortness of breath and stated further that he never thought to make them aware of this condition. Petitioner's VA records both immediately before and after his last day of exposure, May 1, 2010, include him explicitly denying experiencing any shortness of breath. The Commission cannot reconcile Petitioner's experiencing shortness of breath severe enough that he leaves behind his mining career but not apparently so severe as to inform his treating physicians of it when he presented for his first post-retirement examination.

The Commission also has difficulty reconciling Petitioner's as-testified-to complaints concerning his diminished ability to perform activities of daily living with his as-testified to hobby of golfing. Petitioner testified that he could no longer work outside all day without having to stop to catch his breath, that he experienced shortness of breath when walking at a moderate pace on flat ground after about a half of a mile and that he could probably climb two flights of stairs before he would have to stop and rest. It is Petitioner's testimony concerning his ability to walk only about a half a mile without experiencing shortness of breath that the Commission finds most dubious in light of his testimony that he tries to golf every other day.

Petitioner testified that he walks the first nine holes and uses a golf cart for the final nine holes when he golfs. This testimony of walking the first nine holes would appear to conflict with Petitioner's claim of being short of breath after walking about a half a mile on flat ground. Though the pace of walking would likely be slower, Petitioner, over nine holes, would likely walk considerably more than a half a mile and do so over contoured ground. The Commission notes there was no attribution of Petitioner's use of a golf cart over the final nine holes being due to any shortness of breath.

The Commission finds Petitioner's claims of disablement were supported by only anecdotal evidence, evidence that was provided by Petitioner himself. Dr. Sanjabi, the only physician to have performed a physical examination of Petitioner, acknowledged he conducted tests of Petitioner's respiratory system but found no evidence of any obstructive lung disease. If the Commission was to rely on Petitioner's conflicting testimony and Dr. Sanjabi's findings alone, it would be hard pressed to find Petitioner suffered much, if any, disablement as a result of his having CWP.

The testimonies of Dr. Sanjabi and Dr. Christopher Meyer, one of Respondent's witnesses, however, convince the Commission the presence of CWP indicates that there are changes to the functioning of the lung, changes that might be too small to be measured. This would appear to be the situation in the present case. Petitioner's lungs, as evidenced by the positive chest x-ray, have changed, but those changes have resulted in a minimal diminishment of the functioning of Petitioner's lungs.

The Commission, after reviewing the evidence, concludes Petitioner to have been negatively impacted by his contraction of CWP to the extent of 7-1/2% loss of a man as a whole.

The Commission affirms and adopts the Decision of the Arbitrator on all other issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 37.5 weeks, as provided in §8(d)2 of the

15IWCC0271

Act, for the reason that the injuries sustained caused the 7-1/2% loss of a man as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 16 2015
KWL/mav
O: 02/17/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0271

CLENDENIN, CHARLES
Employee/Petitioner

Case# **10WC029027**

THE AMERICAN COAL CO
Employer/Respondent

On 7/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0755 CULLEY & WISSORE
BRUCE R WISSORE
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

15IWCC0271

CHARLES CLENDENIN
Employee/Petitioner

v.

THE AMERICAN COAL CO.
Employer/Respondent

Case # **10** WC **29027**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **April 3, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did a disease 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: Disease, exposure, causation, & OD Act Sections 1(d)-(f).

15IWCC0271

FINDINGS

On **May 1, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$91,249.60**; the average weekly wage was **$1,754.80**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

06/10/2014
Date

JUL 3 - 2014

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES CLENDENIN
Employee/Petitioner

15IWCC0271

v.

Case # 10 WC 29027

THE AMERICAN COAL CO.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Charles Clendenin, was born on January 20, 1948, and was 66 years old on the day of trial. Petitioner was an underground coal miner for approximately 27 years. During that time he was regularly exposed to coal dust, silica dust, roof bolting glue fumes, and diesel fumes. Petitioner last worked at Respondent, American Coal Company's Galatia, Illinois mine as an assistant mine manger. On May 1, 2010, Petitioner decided to leave the mines after he went underground, had difficulty breathing, and had a feeling he was not going to "make it out." Leaving mining was a difficult decision because he lost a substantial salary and had no pension. He sought no post-mining work because of his age, a desire to avoid mining exposures, and his decision to be paid on Social Security to obtain income.

Petitioner began his mining career as a bottom laborer at Zeigler Coal. He also roof-bolted. He then found work with Peabody Coal as a roof-bolter and face boss. He next worked for Old Ben Coal Company, and then for Inland Steel at its McLeansboro Mine #2. He then worked as a face boss for Kenellis Energy at its Brushy Creek Mine. Petitioner left coal mining in 1984 for about 14 years after he was laid off and could not find another mining job. Petitioner took courses in truck driving and became an over-the-road truck driver. Petitioner eventually returned to the coal mines, working for eight years with Respondent as a bottom laborer, mine examiner, and then assistant mine manager.

Petitioner began to notice shortness of breath while performing the walking required of a mine examiner. In that job he had to walk five-to-seven miles a day over rough terrain under time pressure. Lately his breathing problems have begun to affect his everyday activities. He used to work outside all day without trouble, but now he must stop and catch his breath as he works. He felt able to walk a half a mile on level ground before becoming short of breath. He can climb two flights of stairs before stopping to catch his breath.

Petitioner has never smoked. Petitioner stated that he weighed 310 pounds as a miner, but is now down to 265 pounds. (See Petitioner's Exhibit (PX) 6, p. 44). He would not take a mining job today if it were offered because of his breathing problems and not wanting to go back into the dusty environment.

On cross-examination, Petitioner stated that as a truck driver he sometimes had to unload the truck. He no longer has a CDL license. Petitioner golfs 18 holes every other day. He walks for 9 holes and rides for 9 holes. He also performs woodworking as a hobby at home.

At his attorney's request, Petitioner was examined by Dr. Parviz Sanjabi on November 15, 2010. Dr. Sanjabi has practiced internal and pulmonary medicine in Southern Illinois since 1975. (PX 1, p. 5). He was Medical Director of the Cardiopulmonary Laboratory at Carbondale Memorial Hospital and at Herrin Hospital. He also was the Director of the Respiratory Therapy School for the SIU School of Technical Careers. (PX 1, Dep. Exh. 1). Dr. Sanjabi spent 30 years as the Director of Black Lung Clinics in Southern Illinois, and has performed black lung examinations for the U.S. Department of Labor. (PX 1, p. 7). Dr. Sanjabi has been reading x-rays for Coal Worker's Pneumoconiosis (CWP) since 1975. In the mid 1970s he took the B-reader class and bought the films for which to study and compare x-rays. He did not take the test and merely tried to educate himself. (PX 1, pp. 19, 30-31).

Dr. Sanjabi noted that Petitioner's mine dust exposures included time at the mine face. (PX 1, p. 11). Dr. Sanjabi reported no significant shortness of breath with activities and no cough. He felt Petitioner's chest x-ray was positive for CWP category 1/0. Petitioner's chest exam was normal. Pulmonary function testing results were reflective of Petitioner's body habitus. (PX 1, Dep. Exh. 2).

Dr. Sanjabi discussed how CWP affects the lung tissue and stated there is an impairment of function where the lungs are damaged by CWP. The impairment may not be measurable on pulmonary function testing. Pulmonary function testing does not do a good job of measuring impairment in the small airways where CWP damage occurs. Dr. Sanjabi conducted research on that topic in his early years. (PX 1, pp. 13-14). Normal pulmonary function testing does not mean the lungs are free of damage or disease. One can lose a lung lobe and still test normally. (PX 1, p. 15). One can have radiographically significant CWP with normal pulmonary function and arterial blood gas testing, normal chest exams, and no symptoms. (PX 1, p. 17). Once CWP is diagnosed further coal dust exposure is medically contraindicated. (PX 1, pp. 18-19). Dr. Sanjabi provided that if Petitioner has CWP, then he has emphysema. (PX 1, p. 42). Dr. Sanjabi agreed that Petitioner was morbidly obese. (PX 1, p. 36). Dr. Sanjabi assumed there were functional limits caused by Petitioner's CWP, but the testing did not show it. (PX 1, pp. 40-41). He stated that obesity does not cause a cough, and that coal mine exposure should be considered as a cause of any cough. (PX 1, p. 42).

Petitioner introduced B-reader/radiologist, Dr. Henry Smith's interpretation of the May 17, 2010 chest x-ray. Dr. Smith read the film as positive for CWP, category 1/0 with opacities in all lung zones. (PX 2).

At Respondent's request, pulmonologist/B-reader, Dr. James Castle reviewed medical data and treatment records supplied by Respondent. Included were the reports of Dr. Christopher Meyer, who negatively interpreted the x-ray of May 17, 2010, and of Dr. Smith, who positively interpreted the film. Dr. Castle interpreted the same x-ray as showing no abnormalities consistent with CWP. (RX 2, Dep. Exh. C, pp. 1-2, 4). He noted that Petitioner was a life-long non-smoker who had sufficient coal dust exposure to develop CWP. Dr. Castle concluded that Dr. Sanjabi's pulmonary function studies showing restrictive abnormalities were caused by Petitioner's obesity. (RX 2, Dep. Exh. C, pp. 5-6). He felt that the prohibition against mine dust exposure for CWP victims was not absolute, but relative. Dr. Castle stated he agreed with the American Thoracic Society's view that an older miner with CWP may be at low risk of progression if works until he reaches retirement age. (RX 2, p. 36). On cross-examination he conceded that the American Thoracic Society also states that there is no safe level of exposure for those with CWP. (RX 2, p. 41). He agreed that the VA medical records he reviewed were of little help in determining whether Petitioner had radiographic CWP. (RX 2, pp.

41-42). Dr. Castle stated that there are no coal miners in Hilton Head, South Carolina, where he is now based. He quit practicing in 2007 and now works as a paid expert. (RX 2, pp. 42-43).

Dr. Castle agreed that by definition there is functional impairment in the lung areas damaged by CWP. A person can have CWP despite normal pulmonary function and arterial blood gas testing, normal chest exams, and no symptoms. When CWP does manifest itself clinically the most common complaint is shortness of breath. (RX 2, pp. 50-51). Dr. Castle agreed that a person can have normal pulmonary function testing despite losing a lung lobe. (RX 2, p. 56). A person can have impaired, injured, or diseased lungs with normal testing. (RX 2, pp. 57-58). There is no cure for CWP, and the best way to avoid progression is to cease mine dust exposure. The disease can progress even after exposure cessation, although Dr. Castle felt this is rare. (RX 2, p. 52). CWP is a chronic, latent, and progressive disease. (RX 2, p. 53). When CWP becomes measurable it is typically a mixed irreversible obstructive/restrictive condition, and rarely causes pure restriction. (RX 2. p. 55). He agreed that not all doctors take good patient histories and that most are concerned with the issue prompting the visit. (RX 2, p. 64).

As noted in the Dr. Castle records review, Respondent had B-reader/radiologist, Dr. Meyer, interpret Petitioner's May 17, 2010 chest x-ray. As also already noted, Dr. Meyer read the film negatively for CWP. (RX 1, pp. 40-41). Dr. Meyer stated that equally qualified B-readers can disagree on whether CWP is present on a film. (RX 1, p. 48). Dr. Meyer agreed that removal from any mine dust exposure is the only way to try and prevent progression of CWP. (RX 1, pp. 59-60).

Respondent also introduced x-ray reports from NIOSH which appear to be altered. The earlier films have no relevance to whether Petitioner had CWP at the time he left the mines. There also appears to be significant disagreement among the readers on film quality for the 2007 and 2003 films. (RX 3).

Both parties introduced medical records, many of which were duplicative. The VA medical records document denials of shortness of breath and cough, as well as some complaints of shortness of breath and cough. (PX 3; PX 5). On August 24, 2102, Petitioner had a pre-anesthesia consultation for a colonoscopy. Petitioner had dyspnea on moderate exertion. He was unable to climb one flight of stairs without shortness of breath. A history of bronchitis and COPD was noted. (PX 5, p. 121). Petitioner reported that he has some shortness of breath from black lung. (PX 5, p. 131). This was also noted on February 6, 2012, and September 6, 2013. (PX 5, pp. 235, 239; PX 6, p. 49).

A chest x-ray of February 11, 2008 for shortness of breath and wheezing showed no masses, lesions, or infiltrates. (PX 3, p. 104). On that date Petitioner went to the emergency room with complaints of increased shortness of breath, a productive cough, wheezing, and fever. He was given Amoxicillin, Codeine, and Pseudoephedrine. (PX 5, pp. 309-313). Rhonchi were noted in his lungs, and his ribs were sore from coughing. (PX 5, p. 314). A December 20, 2006 chest x-ray for cough showed increased pulmonary vascular congestion in the perihilar and lower lung field. Interstitial lung markings were noted. Early congestive heart failure was the impression. (PX 3, p. 105). A February 6, 2012 chest x-ray report for surgery noted infiltrate, atelectasis, or scarring changes in the lingular segment of the left upper lobe. Cardiomegaly was noted. (PX 5, pp. 1-2). Chronic, but stable sinus problems were also reported. (PX 3 pp. 75, 77; PX 5, p. 333). On July 21 and 22, 2009, Petitioner complained of sinus pressure and drainage and had a persistent cough productive of green/yellow phlegm. He was given antibiotics. (PX 5, pp. 281-282). In a pre-anesthesia consultation of September 6, 2013, it was noted that Petitioner denied dyspnea and can walk three blocks or climb three flights of stairs. (PX 6, p. 46).

CONCLUSIONS OF LAW

Issue (C): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator concludes that Petitioner had CWP caused by his employment with Respondent. The Arbitrator finds the opinion of Dr. Sanjabi to be candid and credible. His finding of CWP was backed by the opinion of Pennsylvania B-reader/radiologist Dr. Smith. Dr. Smith has been a B-reader since 1987 and a consultant to multiple occupational clinics. (PX 2, CV, pp. 2, 5). In contrast is Dr. Meyer, who is in Wisconsin, and Dr. Castle, who is in Hilton Head, South Carolina (though his resume still states he is in Roanoke, West Virginia). (RX 2, p. 12, Dep. Exh. A, p. 1). Dr. Meyer became a B-reader at the behest of Dr. Wiot, a prolific B-reader for coal companies. (RX 1, pp. 19-20). *See Lefler v. Freeman United Coal Mining Co*, 08 IWCC 1097 (Sept. 25, 2008). Dr. Meyer makes a substantial monthly income reading radiology for coal companies. Dr. Meyer charges $115.00 for an x-ray reading and does about 160 to 200 B-readings per month. He charges $275.00 for a CT interpretation and averages twenty-to-forty CT scans per month. His deposition rate is $500.00 per hour and he performs zero to four depositions each month. Generally, he is retained by the coal company. (RX 1, pp. 65-67). Dr. Castle has not practiced since 2007 and is now a professional witness. (RX 2, pp. 12-13, 42). Dr. Castle charged $1,300.00 for his records review and $1,800.00 for his deposition. (PX 7). Dr. Sanjabi receives a salary and does not personally profit from his exam or deposition. (PX 1, pp. 31-32).

The Arbitrator recognizes the treatment radiology, but the Commission has noted that while medical records warrant consideration as trustworthy evidence, they can be of little value when it comes to radiographic CWP. *Sims v. Freeman United Coal Mining*, 12 IWCC 413 (April 20, 2012), affirmed, *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (5th) 120564WC (5th Dist. 2013). This is certainly true regarding normal physical chest exams, a lack of symptoms, or normal testing. (PX 1, p. 17; RX 1, pp. 51-52; RX 2, p. 50). Dr. Meyer agreed that the x-ray interpretation of an average radiologist at a small community hospital who looks at a chest x-ray for purposes other than CWP is less valuable. If there were treatment records available that had fifty different chest x-rays and five different CT scans read by non-B-readers for purposes other than black lung, they would not affect what Dr. Meyer saw on the x-ray or his CWP opinion. (RX 1, pp. 49-50). He agreed that the VA medical records he reviewed were of little help in determining whether Petitioner had radiographic CWP. (RX 2, pp. 41-42).

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

The experts agreed that by definition, CWP-affected lung tissue can no longer function and causes impairment, whether measurable or not. (PX 1, pp. 13-14; RX 1, p. 55; RX 2, p. 50). A concurrence of three justices in a recent Appellate Court decision has recognized that even in the absence of measurable impairment, a CWP diagnosis equates to disability under the Act "as a matter of law." *Freeman United Coal Mining Co. v. Ill. Workers' Comp. Comm'n*, 2013 IL App (5th) 120564WC, ¶35 (concurrence). The Commission also has made such a conclusion. *See, e.g., Samuel v. FW Electric*, 08 IWCC 1296 (2008); *Cross v. Liberty Coal Co.*, 08 IWCC 1260 (2008); *Chrostoski v. Freeman United Coal Mining Co.*, 07 IWCC 226 (2007). Accordingly, Petitioner has suffered a functional impairment. Petitioner also cannot return to coal mining without risking progression of his CWP. (PX 1, pp. 18-19; RX 1, pp. 59-60; RX 2, p.52). The American Thoracic Society states that there is no safe level of exposure for a CWP victim. (RX 2, p. 41). The Appellate court has stated this health risk constitutes disablement in a coal miner. *Freeman United Coal Mining Co.*, 2013 IL App (5th) 120564WC, ¶25-26.

Dr. Sanjabi stated there is no way to be sure that CWP was not affecting Petitioner's shortness of breath due to the shortcomings of pulmonary function testing. (PX 1, pp. 23-25). He felt that there were functional limitations caused by CWP. (PX 1, p. 41). Petitioner also testified regarding his shortness of breath. The Arbitrator found Petitioner to be a very credible witness at trial. He testified in an open and forthcoming manner, and appeared to be endeavoring to give the full truth. He was a pleasant and candid witness.

Petitioner's CWP disability was also timely, as x-rays within the two year period showed disease, and Dr. Sanjabi's exam was within the same year that Petitioner ceased exposure.

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

Petitioner has work-related CWP. He has never been a smoker. His work-related breathing problems negatively affect his activities of daily living. He testified credibly regarding his disability. Based on the foregoing, Petitioner has suffered the 15% disability to the person as a whole as a result of his CWP.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Palamar,

Petitioner,

vs.

NO: 12WC 30587

15IWCC0272

Illinois State Toll Highway Authority,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical expenses, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 14, 2014 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2015
SM/sj
o-4/9/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PALAMAR, ROBERT
Employee/Petitioner

Case# **12WC030587**

IL STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

15IWCC0272

On 5/14/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0013 DUDLEY & LAKE LLC
TOM LAKE
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0210 GANAN & SHAPIRO PC
JEROME J WEBB
210 W ILLINOIS ST
CHICAGO, IL 60654

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

1024 ILLINOIS STATE TOLL HIGHWAY AUTHORITY
WORKERS COMPENSATION CLAIMS
PAULA ELEM
2700 OGDEN AVE
DOWNERS GROVE, IL 60515

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

MAY 14 2014

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

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

15IWCC0272

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

ROBERT PALAMAR
Employee/Petitioner

Case #12 WC 30587

v.

ILLINOIS STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on April 25, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☒ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On March 6, 2012, the respondent was operating under and subject to the provisions of the Act.

- On this date, an employee-employer relationship existed between the petitioner and respondent.

- At the time of injury, the petitioner was 52 years of age, *single* with no children under 18.

ORDER:

- All claims for compensation are denied and this claim is dismissed.

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

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

Robert E. Williams

Signature of Arbitrator

May 14, 2014

Date

MAY 14 2014

FINDINGS OF FACTS:

The petitioner, a toll booth worker and former avid weight lifter, began having left shoulder pain a few years prior to 2010. On November 14, 2011, the petitioner received medical treatment with Dr. Roger Chams, who noted a new onset of left shoulder and right knee pain that had worsened since the prior day. The petitioner reported increased left shoulder discomfort with any reaching activities away from his body. An x-ray of his left shoulder the same day demonstrated mild arthritic changes about the glenohumeral joint with mild acromioclavicular arthritis. A left shoulder MRI on November 15, 2011, revealed severe post-traumatic or osteoarthritic degenerative changes with marked chondromalacia, remodeling of the articular surfaces of the glenohumeral joint, a morphologically abnormal labrum and a suspicious extensive labral pathology, a small partial-thickness tear of the supraspinatus, mild subacromial or subdeltoid bursitis and a mild subacromial encroachment. On November 17, 2011, he received an injection to his left shoulder. He had right arthroscopic medial and lateral meniscectomies and a partial chondroplasty of his patellofemoral joint and medial compartment. On March 6, 2012, the petitioner followed up with Dr. Chams for his left knee and reported that he was involved in an altercation four days earlier while breaking up a fight. The same day, Dr. Chams prepared a separate treatment record for the petitioner's left shoulder complaints. Dr. Chams' diagnosis was left rotator cuff tear and he opined that it was related to the petitioner's active adult activities and his toll booth duties of extending his arm up and above to tractor trailers and passenger vehicles. The doctor continued the petitioner's home exercise program of para-scapular and Jobe strengthening. On March 20, 2012, Dr. Chams noted the petitioner's prior rotator cuff

tendinosis, his past cortisone injections into both shoulders and his continued pain in both shoulders. He received another left shoulder injection. On December 5, 2013, the petitioner requested a written statement that his left shoulder symptoms were due to his job activities, which Dr. Chams opined on March 29, 2014. On October 4, 2013, Dr. Biafora opined that the petitioner's activities as a toll booth collector did not aggravate his left shoulder condition.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT AND WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he sustained an accident on March 6, 2012, arising out of and in the course of his employment with the respondent and that his condition of ill-being with his left shoulder is causally connected to his duties as a toll collector. The petitioner had a pre-existing left shoulder condition that began a couple years before 2010, which waxed and waned but eventually led to medical treatment with Dr. Chams on November 14, 2011, and an MRI that revealed an osteoarthritic/degenerative left shoulder, chondromalacia, an abnormal labrum, a small partial-thickness tear of the supraspinatus, mild subacromial or subdeltoid bursitis and a mild subacromial encroachment.

The petitioner's complaints of some pain with reaching out and away from his body to receive and give money and receipts to motorists is not sufficient to prove a repetitive trauma injury to his left shoulder, especially in light of the petitioner's pre-existing left shoulder condition. Dr. Chams' opinion is speculation and conjecture and is of no probative value. His opinion has no medical basis and is not consistent with the video of the duties of toll booth collectors. Moreover, while it is clear that there is some

reaching involved with drivers of semi-trailer trucks, little or no reaching out and up is required by the toll booth operators for most of the other commercial and non-commercial vehicles because the drivers extend their arms close to the toll booth to pay and receive any change and/or receipt. All claims for compensation are denied.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

Pam Toliver denied that the petitioner informed her of a work injury to his shoulder on March 6, 2012, but only discussed his knee problems with her. She denied that she learned of the petitioner's claim of a shoulder work injury prior to being contacted for information by the workers' compensation supervisor in the latter part of 2012. Also, the petitioner, a 20-year employee, didn't prepare a written report of injury per the respondent's protocol. Moreover his Application for Adjustment of Claim was not filed until August 29, 2012. The petitioner failed to provide notice to the respondent of his left shoulder injury claim within 45 days of March 6, 2012. All claims for compensation are denied.

FINDING REGARDING THE AMOUNT OF WAGES:

Excluding overtime pay, during the 52 weeks from March 7, 2011, through March 4, 2012, the petitioner earned $48,854.97. His average weekly wage was $939.52.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Wesley Conkle,

Petitioner,

vs. NO. 13WC 13073

15IWCC0273

Golden Corral,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical expenses, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 22, 2014 is hereby affirmed and adopted.

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

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

No bond is required for removal of this cause to the Circuit Court.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2015
SJM/sj
o-3/26/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

CONKLE, WESLEY
Employee/Petitioner

Case# **13WC013073**

15IWCC0273

GOLDEN CORRAL
Employer/Respondent

On 5/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

LAW OFFICES OF FOLEY & DENNY
TIM DENNY
PO BOX 685
ANNA, IL 62906

3998 ROSARIO CIBELLA LTD
JANE RYAN
116 N CHICAGO ST SUITE 600
JOLIET, IL 60432

15IWCC0273

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Wesley Conkle
Employee/Petitioner

v.

Golden Corral
Employer/Respondent

Case # **13** WC **13073**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Belleville, IL**, on **March 21, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0273

FINDINGS

On the date of accident, **3/21/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$14,743.98**; the average weekly wage was **$294.88**.

On the date of accident, Petitioner was **28** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of **$11,884.74** for TTD, **$0** for TPD, **$0** for maintenance, and **$3,808.80 for medical bills paid** for other benefits, for a total credit of **$15,694.54**.

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

ORDER

Based on the Arbitrator's findings as to accident and causal connection, TTD benefits and future medical treatment are denied.

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

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

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

Signature of Arbitrator

5/19/14
Date

ICArbDec19(b)

MAY 22 2014

STATEMENT OF FACTS

Petitioner, Wesley Conkle, is a 29 year old meat cutter for Golden Corral. Petitioner was convicted of two felonies – burglary of a school or place of worship – in 2010 (Resp.Ex.4 and 5). He was sentenced to six years in prison and served two years and seven months. (T.21) He was "technically in prison" and hired by Golden Corral while on work release in 2011. (T.11) He was on parole until May 2013. (T.21)

He alleges that on March 21, 2013, he was lifting a case of meat from a dolly. He was on Vicodin for his back pain at the time of the incident. (T.23) He reported it to Ms. Schaffer.

Petitioner had a history of prior lumbar spine problems going back to 2007 (T.21) Petitioner testified he previously had three bulging discs. (T.11)

Petitioner was seen by Dr. Qi Liu of Rural Health on March 31, 2010. He complained of back pain which he had on and off for the last two years. He had severe back pain six months ago after cutting wood. It was "constant lower back pain." He was diagnosed with chronic lower back pain and was prescribed Naproxen and Tramadol. He was to avoid lifting.

An MRI was performed on April 8, 2010 at Union County Hospital. It was noted he had low back pain for two years. The Impressions were: (1) multilevel mild disc disease and facet arthropathy, (2) triangulation of the canal at L2-3, mild central canal stenosis at L3-4 and L4-5 and (3) multilevel foraminal stenosis (minimal/mild). (Resp.Ex.6 at F27-8)

Petitioner was seen by Dr. Li on April 14, 2010 in follow up for back pain. An MRI from April 8, 2010 was reviewed to show multilevel disc disease. Physical therapy and pain management were offered and decline. He was prescribed Vicodin. On May 14, 2013, Petitioner was seen by Dr. Li in follow up for back pain. He reported his pain was better with Vicodin which he was taking twice a day. His Vicodin was refilled. (Resp.Ex.6)

Petitioner was seen by Dr. Qi Liu of Rural Health on July 14, 2010. He was seen in follow up for back pain and rated his pain at a six out of ten. He denied radiation. He was diagnosed with chronic low back pain and arthritis. Physical therapy and pain management were recommended but were declined. He was prescribed Vicodin. (Resp.Ex.6)

Petitioner was seen on March 15, 2013 at Rural Health. He complained of a sore throat, sinus trouble, pain in his lungs, ear ache, headache, cough and fever. He stated that he "hurt his back at work lifting a heavy case of meat a couple of day ago and since that time he just kind of aggravated his back." The Arbitrator notes this statement was made before the date of alleged accident, March 21, 2013. (Resp.Ex.6)

It was further noted that he had a history of back problems including a bulging disc. His pain was on the right side of his back with no radiation or tingling into the legs but was having

trouble walking. He was prescribed Keflex, Flexeril and Vicodin. He was to follow up in two weeks. Petitioner testified he was seen on March 15, 2013 for the flu. (Resp.Ex.6)

After the alleged work injury, Petitioner was seen at Memorial Hospital of Carbondale. He stated he was "at work lifting 70-90 lbs boxes and threw his back out. Pt states he had 3 bulging discs in his lower back. Pt states he is out of his Vicodin and his dr is out of town." His pain level was an eight out of ten. It was noted he had back problems since 2007 and that he had a history of "chronic back pain" and MRI. He was kept off work for 2 days. He was prescribed Hydrocodone, Ultram and Medrol Dosepak. (Pet.Ex.1)

On March 29, 2013, Petitioner was seen by Dr. Qi Liu of Rural Health. Petitioner was seen in follow up for back pain. He reported that he injured himself lifting a heavy case of meat at work. He went to the emergency room and followed up with Halley Barke. He was prescribed Vicodin and Tramadol which he was taking three times a day. He reported his pain at a six to seven out of ten. He also reported right hip pain. There was no numbness and tingling. Petitioner wanted to return to work on April 2. His muscle strength was a five out of five. He was diagnosed with low back pain which was chronic in nature. He was prescribed Prednisone, Vicodin and Tramadol. He was told not to take Vicodin if he had to return to work. (Resp.Ex.6)

Petitioner was next seen by Dr. Liu and Dr. Christine Lucas on April 5, 2013. He reported pain in his right low back. He also had a new pain complaint of left hand pain which he stated was present since the date of accident. He reported numbness in his left hand. It was noted that he had a history of a bulging disc in his back seven years prior. Petitioner was diagnosed with right low back pain with difficulty to raise his leg. The doctor was "suspicious he had a pinched nerve by a bulged/herniated disc." He was also diagnosed with pain and numbness in the left hand, suspicious for neuropathy or a pinched nerve at cervical spine. X-rays of the cervical spine and lumbar spine were ordered and performed at Union County Hospital. It was noted that he complained of "LBP following an MVA." It was also noted "neck pain following MVA." The cervical spine x-rays showed no acute bony pathology and reversed AP curve and side bending to the right, suggestive of a prior spinal muscle spasm. The lumbar spine x-rays also showed no acute bony pathology and degenerative joint disease. He was told to be off work for two weeks and was prescribed Vicodin.

Petitioner was next seen on April 17, 2013 by Dr. Liu. He reported that his back pain was better until he had a coughing episode when he choked on water. At that time, his low back pain was six out of ten. He described it as a constant dull ache in the right low back which radiated into his right hip and upper leg. He stated there was no numbness or weakness in his legs. The pain in his left hand was the same. Doctor diagnosed Petitioner as having back pain, possibly musculoskeletal, and pain/numbness in the left hand in addition to pain at the neck. Regarding the neck, the doctor thought it may be a muscle strain. The Vicodin was refilled and he was kept off work through April 30. The doctor ordered an MRI of the lumbar spine which

was to be completed at Union County Hospital. The doctor also prescribed an EMG of the left arm and he was to follow up in two weeks.

The EMG was performed on April 18, 2013 at Union County Hospital. It was noted that he complained of dorsal hand pain since "hurting his low back with lifting heavy item at work." He also reported mild left sided neck pain a few days after the injury. Very mild carpal tunnel syndrome was noted. (Pet.Ex.2)

Petitioner was seen by Dr. Liu on May 1, 2013 complain of back pain and left hand pain. He stated he had constant back pain at a five to six out of ten. He denied radiation. He could not pick us his kids. He had pain over the left 2nd, 3rd and 4th knuckle. Swelling over the 4th knuckle was noted. He rated his hand pain at a four to five out of ten. He reported weakness and he could not open a jar. He had an EMG which showed "very mild abnormality." An x-ray of the hand was ordered. The possibility of physical therapy for the hand was suggested. He was prescribed Vicodin on the back and was taken off work for 1 month. They were waiting on the MRI of the back. (Resp.Ex.6)

An x-ray of the left hand was performed on May 14, 2013 at Union County Hosp. It was normal. (Pet.Ex.2)

The lumbar spine MRI was performed on May 20, 2013 at Union County Hospital. It revealed a mild bulge at L2-3, a mild bulge at L3-4, a mild bulge at L4-5 and a mild bulge at L5-S1. The Impression was degenerative disc disease, disc bulges and loss of disc height. It was compared to an April 8, 2010 MRI and the findings were similar to the findings at that time. (emphasis added) There was no central canal stenosis and no protrusions or herniation. There was a small dorsal annular fissure or tear seen at L2-3.

Petitioner was seen by Dr. Liu at Rural Health on May 23, 2013. He had back pain rated at a six to seven out of ten. He had left hand pain and was to have physical therapy. He was taking Vicodin three to four times per day. The May 20, 2013 lumbar spine MRI was reviewed. He was referred to Dr. Fonn. The Vicodin was refilled. (Resp.Ex.6)

Petitioner was seen by Dr. Liu at Rural Health on June 21, 2013. His back pain was a seven to eight out of ten. He also had pain in the left hand. He took three to four Vicodin per day. He was kept off work for two months and was told to see Dr. Fonn. (Resp.Ex.6)

Petitioner saw neurosurgeon Dr. Sonjay Fonn of Midwest Neurosurgeons on July 3, 2013. He complained of low back and neck pain as well as hand numbness. The MRI spine was reviewed and stated to show mild degenerative disc disease and loss of disc height with disc bulge. He was diagnosed with cervical and lumbar radiculopathy. He requested the lumbar spine MRI films and recommended a cervical spine MRI. He was to return in twp weeks.

An MRI of the cervical spine was performed on July 30, 2013 at Union County Hospital showing "mild degenerative changes."

Petitioner saw Dr. Fonn on July 31, 2013. A course of three epidural steroid injections at the L4-5 level bilaterally was recommended.

Petitioner was seen by Dr. Liu at Rural Health on August 20, 2013. He could not bend down or pick up his children. His pain was a seven out of ten. He was taken off work for two months. He was referred to an orthopedic for left hand pain. He was refilled Vicodin. He was prescribed medication for high blood pressure.

Petitioner was seen at Rural Health by Dr. Liu on October 18, 2013. He reported constant low back pain at a six out of ten level. He could not walk steadily or bend down. He wanted to take pain medication 4 times per day. His diagnosis was "chronic back pain with mild bulging disks." He was prescribed Lortab and he was prescribed a cane.

On November 14, 2013, Petitioner was seen by board certified orthopedic surgeon Dr. Kevin Rutz, at Respondent's request. He reported taking four 7.5 mg of Vicodin per day. He stated that he was "unable to walk without using a cane because of his discomfort." Dr. Rutz described his gait as "extremely slow" and that he took "several minutes to walk approximately 50 feet." Petitioner required a cane to stand up. On physical exam, he noted breakaway weakness which meant Petitioner was giving a poor effort and "faking weakness." (Resp.Ex.1 at 36)

Dr. Rutz reviewed the April 2010 lumbar spine MRI which revealed a left sided L4-5 dis herniation. He further reviewed the May 2013 lumbar spine MRI which showed reabsorption of this herniation. Dr. Rutz opined that the post-injury MRI "actually looks better than his old MRI, as the old MRI demonstrated a disc herniation which is resorbed on his new MRI." Dr. Rutz testified: "The new MRI had less pathology on it than the old MRI." (Resp.Ex.1 at 13)

Dr. Rutz stated that there were "no changes on the MRI that could clearly account for his focal area of pain." Given the March 15 pre-accident back treatment and his review of the pre and post MRI studies, he opined that Petitioner's back problem "clearly pre-existed the alleged date of injury." He also stated the Petitioner's cervical complaints were not related to the work injury. (Resp.Ex.1 at Exhibit No. 2)

Dr. Rutz opined that epidural steroid injections were not needed. (Resp.Ex.1 at 15-6, 39-40) Petitioner did not have radiculopathy and did not have nerve impingement or a focal area. Dr. Rutz stated that there was "nothing on his MRI that can account for" the level of disability Petitioner was demonstrating. He opined: "even if he has discogenic back pain from disc degeneration and a possible aggravation of that having seen hundreds of patients with discogenic pain none of them have this level of disability from simply discogenic back pain. The only things that cause this level of pain and physical incapacity are acute fractures, tumors or massive disc herniations crushing his nerves and none of these things are present on his MRI." There was no

such evidence on Petitioner's MRI study. (Resp.Ex.1 at 17) The doctor opined that if a new MRI did not show any of these severe findings, that Petitioner was malingering. Dr. Rutz stated that Petitioner could return to work full duty with respect to the work injury. (Resp.Ex.1 at 19)

He testified: "I believe at the time I saw him, based on his MRI imaging and the degree of discomfort that he had, that his current symptoms were not related to his work injury as there was nothing from the injury itself or from his x-rays or MRI that would actually give the type of symptoms that he was demonstrating in the office. (Resp.Ex.1 at 14-5)

On January 23, 2014, Dr. Rutz authored an addendum report after being provided with the ER records from Carbondale Memorial Hospital for the date of injury. Petitioner was already on Flexeril and Vicodin for back pain at that time (Resp.Ex.1 at 22) His opinions did not change after review of these records and it appeared to Dr. Rutz that Petitioner was out of Vicodin that was prescribed to him on March 15 and that his doctor was out of town. Dr. Rutz clarified that his suggestion Petitioner get a new MRI under his private insurance was in no way related to the work injury. (Resp.Ex.1 at Exhibit 3)

Petitioner testified that he attempted to return to work. He told his supervisor the "workers comp attorney said I was able to work. My doctor has still got me off work" and that he "never heard back from them." On cross examination, Petitioner admitted that he told Ms. Schaffer that he could only do a desk job and that he needed to use his cane at work. (T.26)

Chasity Shaffer, who was a manager at the Golden Corral and employed by the Golden Corral for five years, testified on behalf of the Respondent. (T.32) She testified that she was contacted by the Petitioner regarding a return to work on January 8, 2014. (T.33) She was told by Petitioner that "the workmen's comp doctor had released him but his home doctor didn't" and that he wanted to know if there was a desk job available for him and that he was walking with a cane. (T.34-5) He further said he couldn't lift anything or bend over too much. (T.35) Ms. Shaffer testified that had Petitioner said he could work in a full duty capacity, they would have had work for him. (T.36)

A private investigator with Nationwide SIU, Thomas Schmidt, testified that he took surveillance footage of the Petitioner in Dongola, Illinois on December 14 and 15, 2013. (T.37-41) He was licensed through the state of Illinois for over four years. (T.45) Mr. Schmidt identified the individual in the footage as the Petitioner at hearing. (T.41) Mr. Schmidt prepared a DVD of his footage and also authored a report based on his surveillance activity. (Resp.Ex.2 and 3) Petitioner was seen walking without a cane and filling and carrying a gas can filled with gas. (Resp.Ex.2 and 3) Petitioner was further seen bending over for two minutes while filling up his car and the can. (Id.) Petitioner also lifted the hood of his car and proceeded to lean over the car engine for eight minutes. (Id.)

CONCLUSIONS OF LAW

Accident

Petitioner reported to Rural Health on March 15, 2013 – one week before the alleged date of accident – and reported that he hurt his back lifting cases at work. The Arbitrator notes that this is the same history of accident given for the March 21, 2013 date of accident which is the listed date of accident on the Application. His condition was severe enough to warrant a prescription for Vicodin at that time.

Furthermore, the Arbitrator notes that the history in the x-rays stated that Petitioner was suffering from back and neck pain "following MVA." Petitioner never denied being involved in a car accident which could account for his back pain complaints. (Resp.Ex.6 at F24-5)

Based on the conflicting histories in the medical records, the Arbitrator finds that no accident occurred on March 21, 2013.

Causal Connection

Even if there was a finding of Accident, there is no evidence that a causal connection exists between Petitioner's current condition and the alleged work injury.

Petitioner was complaining of back pain one week before the date of accident on March 15, 2013. His condition at that time was severe enough to require Vicodin. Petitioner admitted to being on Vicodin for his back at the time of the alleged March 21, 2013 accident.

Dr. Fonn only saw the Petitioner on two occasions. Therefore, his opinions are held in similar regard to those of an IME. Dr. Fonn stated that he did not recall if he reviewed the 2010 MRI study. (Pet.Ex.9 at 16-7) Dr. Rutz reviewed the 2010 MRI in comparison to the 2013 MRI and opined that Petitioner's lumbar spine condition actually improved as the disc problem seen in 2010 was not seen on the 2013 study. Dr. Fonn did not comment on Petitioner's prior back problems nor did he comment on the 2010 MRI compared to the 2013 MRI. In addition, Dr. Fonn is not board certified while Respondent's IME, Dr. Rutz is board certified in orthopedic surgery. (Pet.Ex.9 at 5,14) Therefore, the Arbitrator adopts the opinion of Dr. Rutz that Petitioner's current condition is not related to the work injury as more credible than the opinion of Dr. Fonn.

In addition, the Arbitrator reviewed the surveillance footage and finds it to show Petitioner walking around with ease. He did not use his cane in the surveillance footage. The Arbitrator notes that the footage was taken within a month of Petitioner being seen by Dr. Rutz and at that time, he had such severe pain complaints that he could not bend over to put on his shoes and moved with an exceptionally slow gait. Petitioner also told Dr. Rutz that he could not walk without his cane. He also did not have his cane at the time of hearing and testified at hearing that sometimes he could walk without the cane (T.19). This testimony clearly conflicts

the surveillance footage showing Petitioner lifting the hood of his truck and bending over the engine for several minutes. The Arbitrator also notes that Petitioner was able to fill and then carry a filled gas can with ease. It is clear Petitioner's complaints and description of the level of his disability is not credible.

The lack of credibility as to Petitioner's complaints is further supported by the fact that he was recently convicted on two counts of burglary from a church or school. This convictions are crimes of dishonesty which further calls the Petitioner's credibility as to accident and pain complaints into question.

Based on the foregoing information, Dr. Rutz's thorough IME report, Petitioner's prior back problems and treatment, the surveillance footage and the Petitioner's lack of credibility, the Arbitrator finds no causal connection between Petitioner's current condition and any alleged March 21, 2013 work incident.

Furthermore, there was no testimony as to continuing complaints or medical evidence relating that Petitioner's cervical or left hand problems to the alleged work injury. Therefore, the Arbitrator finds no causal connection between Petitioner's cervical or left hand conditions and the alleged work injury.

Temporary Total Disability

Given the Arbitrator's finding of a lack of causal connection, the Arbitrator denies an award of TTD benefits and awards Respondent of credit of $11,884.74 for TTD benefits previously paid from March 22, 2013 to December 30, 2013.

Furthermore, the Arbitrator finds it significant that Petitioner made no attempt to return to work until Dr. Rutz found he was capable of doing so. While Petitioner did not present himself to be capable of working full duty work when he attempted a return to work in January 2014, his ability to work in some capacity further conflicts the level of disability he described to Dr. Rutz. Chasity Shaffer, testified work would have been offered to Petitioner had he been capable of working full duty.

Medical Expenses

Given the Arbitrator's finding of as to accident and a lack of causal connection, the Arbitrator denies an award of medical expenses and awards Respondent of credit of $3,808.80 for medical bills previously paid per the medical fee schedule. Should medical expenses be awarded, Respondent receives a credit for any and all medical bills paid. In addition, any medical bills awarded should be paid per the Medical Fee Schedule.

Furthermore, the Arbitrator notes that neither the cervical x-rays (Union County Hospital – April 5, 2013), nor the left hand x-rays (Union County Hospital – May 14, 2013) nor EMG study (Union County Hospital – April 18, 2013) were related to the work injury. Petitioner

presented no testimony nor a causal connection opinion that his cervical or left hand problems were related to the work injury of March 21, 2013.

Future Medical Treatment

Given the Arbitrator's finding of no accident and a lack of causal connection, the Arbitrator denies an award of future medical care. The Arbitrator again relies on the opinions that Dr. Rutz that lumbar spine epidural steroid injections were not needed for Petitioner's lumbar spine based on his MRI study.

Average Weekly Wage

The wage statement shows that Petitioner earned $14,743.98 from March 28, 2012 to March 20, 2013. During that time, Petitioner worked fifty weeks. Therefore, the Arbitrator finds the Petitioner's average weekly wage to be $294.88.

The Arbitrator rejects the Petitioner's suggestion that the weeks and parts calculation per method number two in *Sylvester* should be used in this case. The two weeks Petitioner did not work were properly removed and not counted against him. Petitioner consistently worked five or six days per week. Petitioner only worked forty hours or more in six out of fifty weeks of work. Notably, he only worked forty hours or more when he worked six or seven days per week. Therefore, it is clear Petitioner had no expectation that he would work forty hours per week as forty four weeks of the year he did not work forty hours per week. Therefore, Respondent's calculation was proper.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Melesha Bracey,

Petitioner,

vs.

NO. 09WC051421

15IWCC0274

Steak & Shake,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 1, 2014 is hereby affirmed and adopted.

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

No bond is required for removal of this cause to the Circuit Court.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 0 2015
SJM/sj
o-3/5/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BRACEY, MELESHA
Employee/Petitioner

Case# **09WC051421**

STEAK 'N SHAKE
Employer/Respondent

15IWCC0274

On 8/1/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3019 BRIAN T MORROW LAW OFFICE
63 W JEFFERSON ST
SUITE 201
JOLIET, IL 60432

1832 KLAUKE LAW GROUP LLC
GEORGE F KLAUKE JR
10 N MARTINGALE RD SUITE 400
SCHAUMBURG, IL 60173

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILL**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 15IWCC0274

MELESHA BRACEY
Employee/Petitioner

v.

STEAK 'N SHAKE
Employer/Respondent

Case # **09** WC **51421**

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **New Lenox**, on **July 2, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/7/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**13,577.72**; the average weekly wage was $**261.11**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of $**6,137.90** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**6,137.90**.

Respondent shall be given a credit of $40,487.77 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

ORDER

The Petitioner's current condition of ill-being is not related to her accident from 11/7/09 and therefore all benefits are denied.

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

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

Signature of Arbitrator

7/31/14
Date

AUG - 1 2014

FINDINGS OF FACT

This is a claim for injuries that Petitioner claims she sustained on November 7, 2009. Petitioner alleges injuries to both knees and her left ankle. Both parties stipulated that the issues in dispute are: accident, notice, causation, medical expenses, TTD, and the nature and extent of the Petitioner's injuries.

Melesha Bracey (hereinafter referred to as "Petitioner") testified that she sustained an injury to her left ankle. left knee and right knee as a result of an accident which occurred which she was working for Steak 'N Shake (hereinafter referred to as "Respondent" on November 7, 2009. Petitioner worked for Respondent for a year and a half prior to the claimed accident. At the time of the claimed accident, she was an overnight server.

Petitioner claims that, on the date of the accident, she was bringing shakes from "the window" on a tray to a customer, when she slipped in a puddle on the floor. She testified that, during the slip, her right leg went behind her and her "front leg" went in front of her as her body twisted. She did not know whether anyone witnessed her fall, even though she testified that she fell in the lobby of the restaurant and there were customers and other employees in the restaurant at the time. She continued to work for another 45 minutes after the fall. Petitioner thereafter went on her own to St. Joseph's Hospital.

While at St. Joseph's Hospital, Petitioner complained of pain in her left ankle and left knee. There was no mention of any pain in her right knee. Petitioner testified that, while at the Hospital, she advised the doctors honestly regarding every body part in which she was feeling pain. The examination of both Petitioner's left ankle and left leg at the Hospital yielded nearly normal results. X-rays of both the left ankle and left knee were negative. Petitioner was discharged with a left ankle sprain and a left knee sprain. Her right knee was not examined at the time of the visit. She was given a soft cast, ice and a prescription for pain medication. (PX 2)

On November 16, 2009, Petitioner next treated for her left leg and left ankle injuries with Dr. Komanduri. (PX 1) However, at that time, according to the doctor's notes, while she was primarily treating for an injury to her left knee and ankle, she was experiencing increased pain in her right knee. (PX 1) Petitioner testified that, at the time of that visit, her left ankle had "stabilized" and that she primarily was visiting Dr. Komanduri for pain in her right knee. Dr. Komanduri specifically noted in his November 16, 2009 examination note that Petitioner "[did] not exactly recollect the mechanism of the injury" to her right knee. Neither Dr. Komanduri nor Petitioner related her right knee injury to her claimed accident at work. Dr. Komanduri also did not provide a causation opinion regarding Petitioner's left ankle and left knee complaints. (PX 1). Petitioner was diagnosed with a bilateral meniscal tear in both knees superimposed on a nondisplaced distal fibular fracture of the left ankle. She was put in a short walking cast and MRIs were recommended for both knees, as well as physical therapy.

Petitioner continued to treat with Dr. Komanduri who continued to recommend conservative treatment. However, Petitioner was unable to complete the physical therapy recommended by Dr. Komanduri because she was "sick". (PX 1) As Petitioner was unable to complete therapy and her right knee condition had not improved, Dr. Komanduri recommended a right knee arthroscopy and medial menisectomy. (PX 1) Petitioner underwent this procedure on February 18, 2010. (PX 1).

Petitioner returned to Dr. Komanduri with continued complaints regarding her right knee on February 23, 2010. (PX 1) Dr. Komanduri performed an aspiration of her right knee at that time to rule out an infection. Doctor's notes from April 2, 2010 and May 10, 2010 reiterate Dr. Komanduri's aggravation with Petitioner's failure to comply with the recommended post-surgical physical therapy. She was released to sedentary work on April 10,

15IWCC0274

2010 and released from care on May 10, 2010. (PX 1). Petitioner did not receive any further medical treatment for her left foot, left knee or right knee until after a separate and unrelated work accident for a different employer on August 2, 2011.

Respondent accommodated Petitioner's sedentary restrictions and she returned to work for Respondent in April, 2010. She worked modified duty for Respondent until the date of her arrest at Respondent's place of business on May 28, 2010. (RX 6, RX 7). Petitioner did not return to work for Respondent after her arrest.

Petitioner testified that, on May 28, 2010, a policeman approached her at her car outside of Respondent's business and asked her to identify herself. She denied that the policeman was initially called to investigate a claim that she had taken money from Respondent's cash register. She stated that she initially gave the policeman a false name, but later gave the policeman her true name. After learning her true identity, the policeman attempted to handcuff her. Petitioner resisted arrest and was "beat up" and "pepper-sprayed".. She was eventually taken into custody. Petitioner testified that the arrest was due to an incident of identity theft which occurred in March, 2010 – a time in which she was still receiving TTD from Respondent. As a result of letting someone use her car for something involving drugs, Petitioner was given a stolen credit card and told to use it to "go Easter shopping." She proceeded to use the card illegally to purchase items at Target. Petitioner was convicted of a Class 4 felony of identity theft, served 49 days in prison and was given 2 years probation.

After Petitioner did not return to work at Respondent, she was sent notice of an IME to take place on June 29, 2010 with Dr. Gleason. She admits that she did not attend this IME due to a "conflict" with her workers` compensation attorney at that time.

Petitioner did not work in any capacity from the date of her arrest through May, 2011. In May, 2011, Petitioner began working at Red Robin as a host trainer and server. Her duties at that job involved seating people, bringing people their food and drinks, bussing tables and cleaning floors. . She was on her feet the whole time she worked and it was a full-time job. While working at Red Robin, Petitioner had two work-related accidents – on August 2, 2011 and August 15, 2011. Both of these accidents resulted in an injury to her left ankle. As a result of these injuries, Petitioner was diagnosed with a left malleolus fracture and began treating again for her left ankle and right knee. Id.

On September 15, 2011, Petitioner attended an IME with Dr. Kevin Walsh. (RX 1). Dr. Walsh reviewed all records of treatment from St. Joseph's Hospital, Dr. Komanduri and the films of the MRIs of Petitioner's right and left knees taken on November 24, 2009. He also conducted a thorough examination of Petitioner's left knee, right knee and left ankle. Dr. Walsh diagnosed status post right knee arthroscopy with debridement of the plica, arthroscopic chondroplasty and partial lateral meniscecotmy. He also diagnosed her as status post left distal fibular fracture, left ankle and knee sprain and tailbone pain.

Dr. Walsh opined that Petitioner's right knee condition was not causally related to Petitioner's claimed accident at Respondent on November 7, 2009. First, Dr. Walsh stated that Petitioner's right knee pain would have been listed in her complaints upon treatment at St. Joseph's Hospital if she had injured her right knee on the date of the claimed accident. Further, Dr. Walsh's opined that subsequent changes in the right knee were, more likely than not, related to degenerative changes seen in the MRI taken on November 24, 2009. Moreover, Dr. Walsh opined that any chondromalacia or maltracking was pre-existing and not caused by any accident. He also opined that there was no evidence that Petitioner tore her lateral meniscus as a result of the claimed accident. Finally, Dr. Walsh opined that the arthroscopic procedure performed on Petitioner's right leg was as a result of the

15IWCC0274

degenerative changes in Petitioner's leg which were not caused, aggravated or accelerated by any work accident.

With regard to Petitioner's left ankle, Dr. Walsh opined that there was no clear evidence that Petitioner sustained a distal fibular fracture on the date of the claimed accident. He based this opinion on the fact that xrays from St. Joseph Hospital were negative for a fracture and there was no imaging studies within Dr. Komanduri's records which distinctly showed a distal fibular fracture. He opined that Petitioner's left ankle complaints at the time of the examination were, more likely than not, related to her more recent work-related accidents. He also opined that her subjective complaints regarding her left and right knee were, more likely than not, unrelated to her claimed work accident with Respondent.

While Dr. Walsh opined that Petitioner's treatment at St. Joseph's Hospital subsequent to the claimed accident was reasonable and necessary, he opined that the majority of Dr. Komanduri's treatment was either for conditions that were preexisting or not related to the claimed accident. He opined that the MRI scans did not show any acute injuries and that the prolonged physical therapy was not reasonable or necessary.

After Petitioner left work at Red Robin, she held several jobs for short durations. After Red Robin, Petitioner worked at Little Lady Foods (a warehouse) for approximately 3 months. . At Little Lady Foods, Petitioner worked as a quality control inspector of pizzas. This job was a full time position and Petitioner worked over 40 hours a week. While working at this position, Petitioner was expected to go up and down ladders many times a day. She thereafter worked at Applebees as a server for a month. This was a part-time job and had essentially the same job duties as her position at Red Robin. After Applebees, Petitioner worked as an overnight manager at Hardees where her job duties included making the bread and running the front and back drive-thru. This was a full time job. After Hardees, Petitioner worked at Cracker Barrel and Six Flags.. Her position at Cracker Barrel was as a server and her job duties were the same as her duties at Red Robin. Id. While working at Six Flags, Petitioner was working in the entertainment department. As part of this position, she was required to walk the amusement park for up to 12 hours straight. Petitioner quit her job at Six Flags and currently works only at Cracker Barrel. Petitioner complained that, as of the date of the hearing, she continued to feel pain in her right knee and left ankle.

Officer John Byrne testified for the Respondent. He was a police officer for the City of Joliet, Illinois for 13 years. He was called to Respondent's place of business on May 28, 2010 as there was an issue between the manager and Petitioner regarding cash in the register that was "not accounted for". After Mr. Byrne spoke with the manager regarding the issue, he approached Petitioner. After the officer asked for her to identify herself. Petitioner gave the officer several different false names. Petitioner was placed in the back of the police car by the officer in order for him to review the names he was given and for him to determine her true identity. Once the officer ascertained her true identity, he realized that there was an outstanding warrant for her arrest for credit card fraud and identity theft. At this point, the officer attempted to remove Petitioner from the police car and place her in handcuffs. Petitioner resisted arrest which resulted in a "physical fight" between the officer, Petitioner, and another officer on the scene. During this "fight", Petitioner struck the officer in the face, resisted the attempts to put her in handcuffs and had to be pepper-sprayed twice before the officers were able to handcuff her. Petitioner did not complain of any pain in her right knee, left ankle or left knee during the "fight" or after the "fight".

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has met her burden of proof. Petitioner's testimony as to the events of November 7, 2009 appear to be credible and not rebutted by any of the

evidence presented at the hearing. On that day, Petitioner slipped and fell in a puddle of water while delivering shakes to customers. The hospital records from that day show that she sustained injuries to her left ankle and left leg from that fall.

2. Petitioner has failed to meet her burden of proof on the issue of causation. In support of this finding, the Arbitrator relies on the medical evidence and the Petitioner's own testimony that she sustained a subsequent accident involving her left ankle and right knee for which she was still undergoing treatment at the time of this hearing. The only causation opinion entered into evidence in this hearing was that of Respondent's IME, Dr. Walsh. Petitioner's treating physician, Dr. Komanduri, did not provide a causation opinion with regard to any of Petitioner's claimed injuries. It is noted that Petitioner's exhibit 1, contains the MRI of the right knee dated November 24, 2009 and the findings do not identify a tear of the meniscus but do reveal degenerative changes and fraying. Dr. Komanduri diagnosed a tear of the lateral meniscus but the MRI specifically identified the lateral meniscus as being normal. The left knee MRI dated November 24, 2009 revealed some degenerative findings but was likewise negative for any tears of the medical and lateral menisci. These MRI studies do not support the prior diagnosis of Dr. Komanduri on November 16, 2009 wherein he diagnosed bilateral meniscal tears.

The Arbitrator finds persuasive the opinions of Dr. Walsh on this issue. With regard to Petitioner's right knee condition, Dr. Walsh opined that it was not causally related to Petitioner's claimed accident on November 7, 2009. (RX 1) First, Dr. Walsh opined that Petitioner's right knee pain would have been listed in her complaints upon treatment at St. Joseph's Hospital if she had injured her right knee on the date of the claimed accident. In addition, he opined that subsequent changes in the right knee were, more likely than not, related to degenerative changes seen in the MRI taken on November 24, 2009. Further, Dr. Walsh stated that any chondromalacia or maltracking was pre-existing and not caused by any accident. He also opined that there was no evidence that Petitioner tore her lateral meniscus as a result of the claimed accident. Dr. Walsh opined that the arthroscopic procedure performed on Petitioner's right leg was as a result of the degenerative changes in Petitioner's leg which were not caused, aggravated or accelerated by any work accident. He opined that she had reached MMI with regard to this injury and did not require any additional treatment. Regarding Petitioner's left ankle condition, Dr. Walsh opined that there was no clear evidence that Petitioner sustained a distal fibular fracture on the date of the claimed accident. He based this opinion on xrays from St. Joseph Hospital which were negative for a fracture. There were also no imaging studies within Dr. Komanduri's records which distinctly showed a distal fibular fracture. He opined that Petitioner's left ankle complaints at the time of the examination were, more likely than not, related to her more recent work-related accidents (her accidents while working at Red Robin). He also opined that her subjective complaints regarding her left and right knee were unrelated to her claimed work accident with Respondent. While Petitioner complained of pain in her left knee at St. Joseph's Hospital and upon her first visit to Dr. Komanduri, she received little to no treatment for this knee. Dr. Walsh opined that her left knee condition was not related to her claimed work accident.

The Arbitrator also notes the Petitioner's testimony that after left her employment with Respondent and before her subsequent injury with a different employer, she was able to do a number of physically demanding jobs, for which she did not describe any difficulty in performing. Given all these factors, the Arbitrator concludes that the Petitioner's current condition of ill being is not related to her November 7, 2009 accident.

3. Based on the Arbitrator's finding with regard to the issue of causation, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Kennedy,

Petitioner,

vs.

NO. 12WC 19837

Dynegy Midwest Generation, Inc.,

Respondent.

15IWCC0275

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 23, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,900.00.

15IWCC0275

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 0 2015
SJM/sj
o-3/26/2015

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KENNEDY, JOHN
Employee/Petitioner

Case# **12WC019837**

DYNEGY MIDWEST GENERATION INC
Employer/Respondent

15IWCC0275

On 6/23/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0368 WIMMER & STIEHL
WILLIAM L WIMMER
2 PARK PL
BELLEVILLE, IL 62226

0299 KEEFE & DePAULI PC
NEIL GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOHN KENNEDY
Employee/Petitioner

v.

DYNEGY MIDWEST GENERATION, INC.
Employer/Respondent

Case # 12 WC 19837

15IWCC0275

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 22, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0275

FINDINGS

On **May 22, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$83,200.00**; the average weekly wage was **$1,600.00**.

On the date of accident, Petitioner was **53** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$8,990.48** for other benefits, for a total credit of **$8,990.48**.

Respondent is entitled to a credit of **$13,826.10** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 6 (and as discussed in the Memorandum of Decision of Arbitrator), as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given credit of $13,826.10 for medical benefits that have been paid by its group insurance carrier, and Respondent shall hold Petitioner harmless from any claims by any providers of the services and the subrogation claim of Blue Cross Blue Shield of Illinois for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,066.67/week for 8 3/7 weeks, commencing June 27, 2012 through August 24, 2012, as provided in Section 8(b) of the Act. Respondent shall be given credit of $8,990.48 for salary continuation that was paid to Petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 51.25 weeks, because the injuries sustained caused the 12.5% loss of use to each hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

06/13/2014
Date

JUN 23 2014

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

15IWCC0275

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOHN KENNEDY
Employee/Petitioner

v.

Case # 12 WC 19837

DYNEGY MIDWEST GENERATION, INC.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, John Kennedy, was hired by Respondent, Dynegy Midwest Generation, Inc., in 1998 and worked as a shift technician from 1998 until the present. He testified that this job requires him to work on coal feeders, pumps, valves, conveyors and scrubbers. These activities often require the use of hand tools, small impact wrenches, air ratchets, various grinders, jackhammers, chain falls, pry bars and hammers.

Between 2011-2012, Petitioner began experiencing problems with numbness and pain in his hands and fingers. On January 3, 2012, Petitioner presented to his family doctor, Dr. Patrick Zimmerman, who ordered electro diagnostic testing. (Petitioner's Exhibit (PX) 4). Petitioner stated at trial that he complained to Dr. Zimmerman of having problems waking up at night with pain, tingling, and numbness in both hands. Bilateral upper extremity nerve conduction studies on March 27, 2012 showed right cubital tunnel syndrome and very mild right carpal tunnel syndrome. Dr. Zimmerman referred Petitioner to Dr. Harvey Mirly for surgical consultation. (PX 4).

Dr. Mirly first saw Petitioner on May 22, 2012, and diagnosed him with bilateral carpal tunnel syndrome. (PX 1). An operative report dated June 27, 2012 outlines Dr. Mirly's surgery for right carpal tunnel release. A nearly identical procedure was performed to the left wrist on July 16, 2012. (PX 1; PX 2). Following these procedures, on August 21, 2012, Petitioner was placed at maximum medical improvement and released to return to full unrestricted duty as of August 25, 2012. (PX 1; PX 5, p. 12).

Petitioner testified that on May 22, 2012, he discussed the results of the nerve conduction studies with Dr. Mirly, discussed his job duties, job activities, tools he used in his work and concluded that his medical condition was connected to his work activities. Petitioner informed Respondent through Jason Reynolds, its safety director, and Randy O'Keefe, its production manager, of his claim for a work related injury in late May 2012, just after his visit with Dr. Mirly.

Dr. Mirly was asked a hypothetical regarding Petitioner's job duties with Respondent, which included a list of tools purported to be used and stated that the jobs required substantial or repeated use of the hands and

exposure to vibration from hand tools. (PX 5, pp 12-14). Dr. Mirly gave his causal connection opinion in Petitioner's favor based upon this hypothetical. (PX 3, p. 15).

Respondent offered a report of Dr. Richard Katz that was prepared following an examination on January 8, 2014, pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). (RX 1). In his report, Dr. Katz stated that Petitioner "does have significant exposure to vibratory power tools. Vibratory power tools are a well documented correlate of work related CTS. Both the patient's work related history (as noted in the occupational section above) and the physical demands analysis support such exposure. If this is correct then the vibratory exposure would be a reasonable aggravant, exacerbant, or cause of CTS in this patient." (RX 1, p. 6). Neither party offered an impairment rating.

Petitioner testified that since returning to work for Respondent, he notices a loss of grip strength in both hands, some loss of range of motion in both hands and that his hands tend to tire. Petitioner currently earns the same rate of pay as he did before his claimed date of accident.

CONCLUSIONS OF LAW

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

Issue (D): What is the date of accident?;

Issue (E): Was timely notice of the accident given to Respondent?; and

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

Petitioner was diagnosed by Dr. Zimmerman on January 3, 2012 with bilateral carpal tunnel syndrome. Dr. Mirly testified that it was his opinion that Petitioner had bilateral carpal tunnel syndrome that was work-related. Dr. Katz, Respondent's examining physician, confirmed this diagnosis and its causal relationship to Petitioner's job duties with Respondent.

Based on the foregoing, the Arbitrator finds that Petitioner suffered carpal tunnel syndrome that arose out of and in the course of his employment, and that said condition is causally related to his work duties with Respondent. Petitioner also alleged that he gave oral notice to Respondent concerning his injuries via its safety director and its production manager within mere days of the claimed manifestation date of his injuries. No evidence was presented to the contrary, and therefore proper notice was given. Further, May 22, 2012, is an appropriate manifestation date of Petitioner's injuries.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner underwent treatment for bilateral carpal tunnel syndrome, including surgical releases by Dr. Mirly. The charges incurred for the treatment of the carpal tunnel syndrome contained in Petitioner's Exhibit 6 are found to be reasonable and necessary and are awarded as compensable under the Act. The parties stipulated to the fact that Respondent is entitled to a credit under Section 8(j) of the Act for $13,826.10 in medical benefits paid by Respondent's group health carrier.

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner was taken off work for his first surgery on June 27, 2012, and was released by Dr. Mirly to full unrestricted duty on August 25, 2012. Temporary total disability (TTD) benefits for this period are appropriate and awarded. The parties stipulated to the fact that Respondent paid Petitioner $8,990.48 in salary continuation for which Respondent is awarded a credit toward the TTD award.

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

Petitioner's manifestation date of his carpal tunnel syndrome falls after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning the permanent partial disability (PPD) award being issued. No PPD impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

Concerning Section 8.1b(b)(ii) of the Act (Petitioner's occupation), Petitioner is a shift technician for Respondent. This job requires the repetitive use of various hand tools. He therefore must use his hands and wrists on a daily basis at work. Great weight is placed on this factor when determining the PPD award.

Regarding Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of the injury), Petitioner was 53 years old on the manifestation date of his injuries. Petitioner is an individual approaching middle age, and likely has some more working years ahead of him. He will therefore likely work and live with his disability slightly longer than that of an older individual. Some weight is afforded this factor when determining the PPD award.

Concerning Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), Petitioner testified that he earns the same rate of pay as before the injury. The injury therefore appears to have had no impact on Petitioner's future earning capacity, and some weight is given to this factor when assessing the PPD award.

With regard to Section 8.1b(b)(v) of the Act (evidence of disability corroborated by Petitioner's treating medical records), Petitioner underwent bilateral carpal tunnel releases and was returned to full duty work. Since returning to work for Respondent, Petitioner has experienced a loss of grip strength in both hands, some loss of range of motion in both hands, and notices that his hands tend to tire. Petitioner testified credibly regarding his current disability. He was a forthcoming and open witness at trial. The Arbitrator places great weight on this factor when determining the permanency award.

The determination of PPD is not simply a calculation but an evaluation of all five of the aforementioned factors stated in Section 8.1b of the Act. In making a PPD evaluation, consideration is not given to any single factor as the sole determinant. Based on all of the foregoing factors, the Arbitrator finds that Petitioner has sustained the 12.5% loss of use to each hand pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diane A. Abbott,

Petitioner,

vs.

NO. 12WC042723

Seaton Corp/Staff Management,

Respondent.

15IWCC0276

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 7, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2015
SM/sj
o-3/26/2015
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ABBOTT, DIANE A
Employee/Petitioner

Case# **12WC042723**

SEATON CORP/STAFF MANAGEMENT
Employer/Respondent

15IWCC0276

On 5/7/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0246 HANAGAN & McGOVERN PC
BRIAN McGOVERN
123 S 10TH ST SUITE 601
MOUNT VERNON, IL 62864

0445 RODDY LAW LTD
R ZENZ
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

15IWCC0276

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DIANE A. ABBOTT
Employee/Petitioner

v.

SEATON CORP / STAFF MANAGEMENT
Employer/Respondent

Case # **12** WC **042723**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin**, on **March 12, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
X - TPD ☐ Maintenance X - TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 8(a) and 12 mileage; Respondent's hearsay objection to Petitioner's Exhibit 14**

FINDINGS

- On **03/26/2012**, the Respondent ***was*** operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship ***did*** exist between the Petitioner and the Respondent.
- On this date, the Petitioner ***did*** sustain an accident that arose out of and in the course of employment.
- Timely notice of this accident ***was*** given to the Respondent.
- The Petitioner's current condition of ill-being ***is*** causally related to the accident.
- In the year preceding the injury, the Petitioner earned **$18,891.60**; the average weekly wage was **$363.30**.
- On the date of accident, The Petitioner was **26** years of age, ***single*** with **1** dependent child.
- The Petitioner ***has*** received all reasonable and necessary medical services.
- The Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.
- The Respondent shall be given a credit of **$4,501.57** for TTD, **$0** for TPD, **$0** for maintenance, and **$328.01** for other benefits (mileage).
- The Respondent is entitled to a credit for any medical bills it has paid.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $253.00/week for 52-1/7 weeks, for the periods of 03/27/2012-05/30/2012; 08/07/2012-10/18/2012; 12/03/2012-06/09/2013; and 07/15/2013-08/25/2013, as provided in Section 8(b) of the Act. Respondent is to receive credit for amounts, if any, it has paid.
- Respondent shall pay Petitioner temporary partial disability benefits of $24.04/week for 6-2/7 weeks, for the period of 10/19/2012-12/02/2012, as provided in Section 8(a) of the Act
- Respondent shall pay reasonable and necessary medical services of $51,873.98 to Petitioner, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts, if any, it has paid.
- Respondent shall pay Petitioner permanent partial disability benefits of $253.00 per week for 50 weeks, because the injuries sustained caused the loss of 10 percent body-as-a-whole, as provided in Section 8(d)2 of the Act.
- Respondent shall pay the further sum of $1,034.71 for mileage expenses as provided in Sections 8(a) and 12 of the Act. Respondent to receive credit for amounts, if any, it has paid.
- Petitioner's Petition for Penalties and Attorney's Fees is denied.
- Respondent shall pay Petitioner compensation that has accrued from March 26, 2012 through March 12, 2014 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator — May 3, 2014 (Date)

MAY - 7 2014

Diane A. Abbott v. Seaton Corp / Staff Management
Case No. 12 WC 042726

Findings of Fact and Conclusions of Law

At the commencement of the case as the Request for Hearing form was being reviewed the parties indicated there was dispute as to the amount of credit Respondent should receive for temporary total disability benefits. Respondent believed it should be $4,501.57. The attorneys agreed to advise the Arbitrator of their positions prior to the submission of proposed decisions. On March 19, 2014 the Arbitrator received an e-mail from Petitioner's attorney (with Respondent's attorney properly copied in) advising her that Petitioner agreed with Respondent's claimed credit of $4,501.57 and, further agreed Respondent was due a credit of $328.01 for mileage previously paid. This e-mail was printed, marked as "AX 5" and made a part of the record herein.

The Arbitrator finds:

Of significance to this case is the fact Petitioner had a previous injury to her right shoulder in 2003 secondary to a motor vehicle accident. Following that accident Petitioner had persistent pain in her right shoulder and she eventually began treating with Dr. Houle and underwent right shoulder surgery on May 1, 2008. According to the operative report, Petitioner underwent an arthroscopic procedure with resection of frayed edges off her labrum and burning of the bursal sac under the acromion. Post-operatively, Dr. Houle noted (May 9, 2008) that she could do whatever she felt comfortable with "[b]ecause there was no structural damage that needed to be fixed [during surgery.]" She was released to return as needed on June 20, 2008 and returned again on August 15, 2008 after sustaining a recurrence of shoulder pain in the scapular area. Petitioner reported more of a tingling, burning sensation at the posterior aspect of her shoulder blade into her hand and Dr. Houle was concerned there might be a cervical problem. A cervical MRI was ordered and came back with no evidence of an obvious problem within the cervical spine. When Petitioner continued to show lack of improvement Dr. Houle referred her to a neurologist. That was in September and October of 2008. There are no further visits or reports with Dr. Houle or the neurologist found in the record until March 26, 2010 when Petitioner returned to see Dr. Houle. (RX 4)

After examining Petitioner on March 26, 2010 Dr. Houle authored a letter to Dr. Jenkins. In it, he described Petitioner's right shoulder problem as a "challenging" one noting her complaints included pain starting in the clavicle, radiating into the shoulder blade posteriorly and then down into her arm and fingers. He described the arthroscopic procedure performed in 2008 as showing evidence of a mild recalcitrant bursitis and some mild fraying of her labrum -- otherwise, normal. Physical therapy had made her worse. Medication was of no help. A full neurological workup revealed nothing of significance in her shoulder or neck. Petitioner complained of a constant sharp, dull, throbbing, aching, stabbing, and burning pain worse with activity and she felt she was getting worse gradually. According to Petitioner it was associated with swelling, numbness, popping, weakness, and giving way and worse with lifting, exercise, twisting, bending, lying in bed, riding in a car, driving a car, overhead reaching, pushing, and pulling. Petitioner denied any new injuries. On examination Petitioner displayed full range of motion in forward flexion and

internal and external rotation that was tender to the extremes. Her pain was diffuse and located in the shoulder blade, clavicle and anterior hand. It did not seem to follow a dermatomal pattern. An MRI showed some focal change to her humeral head and there was a question about a glenoid labral injury. Given she had no locking or catching, Dr. Houle found it hard to explain her generalized pain within the entire shoulder girdle. He could find no orthopedic cause for her pain complaints and suggested she see another shoulder surgeon for possible assistance. (RX 4)

Petitioner testified she was involved in a motor vehicle accident in 2007 that resulted in a 2008 surgery to her right shoulder. She testified she did well following that surgery, and from 2008 until this injury, experienced only occasional soreness if she overworked it but "nothing major." Petitioner testified she worked full duty from 2008 until the injury of March 26, 2012 and received no additional treatment, such as shots, surgery, or physical therapy from 2008 until this injury.

Respondent is a placement service / temporary employment agency. Petitioner began working at Nascote in August of 2011 as a general production worker.

On March 26, 2012, Petitioner was involved in an undisputed accident when she grabbed a wheeled parts cart with her right hand and the cart suddenly jerked into the opposite direction wrenching her right arm and shoulder. Petitioner testified she immediately felt pain in her right shoulder.

The next day Petitioner completed an accident report (PX 1) and went to the emergency room at Washington County Hospital in Nashville, Illinois. Petitioner reported reaching for a part at work and feeling a pop in her right shoulder. Petitioner was prescribed pain medication and taken off work until she had appropriate follow-up with her primary physician. (PX 2)

On March 28, 2012, Petitioner followed up with her primary care physician, Dr. Keith Jenkins, at the Nashville Clinic. (PX 3) Dr. Jenkins diagnosed Petitioner with right shoulder pain possibly consistent with "stinger from over extension [right] shoulder." He took Petitioner off work till April 2, 2012 and ordered physical therapy and an MRI. (PX 3)

Petitioner followed up with Dr. Jenkins on March 30, 2012. He noted she was using both arms during their visit but continued to favor her dominant arm. There were no changes in the treatment plan. He continued her off work status until April 6, 2012. (PX 3)

In a Work Release Form dated April 3, 2012 Dr. Jenkins released Petitioner to light duty (office) work. (PX 3)

Petitioner underwent a right shoulder MRI on April 4, 2012. The MRI was read as showing possible supraspinatus tendonosis. The labral was noted to be normal as imaged and the bicipital tendon was properly positioned. Petitioner's AC joint had very minor early degenerative changes with very minimal arthrosis. (PX 4)

Petitioner followed up with Dr. Jenkins on April 6, 2012. At that time he noted Petitioner was working light duty and "so far ok." He noted they would treat her shoulder with ice, over the

counter medications for "most likely diagnosis bicipital tendonitis." He noted the MRI was negative. He kept Petitioner off work until April 20, 2012 due to "medical issues." (PX 3)

Petitioner presented for physical therapy on April 12, 2012. Petitioner reported a history of undergoing a right shoulder arthroscopy "to clean it up" due to a slope on her acromion. Petitioner denied any difficulty using her arm but indicated she was unable to hold her arm out in a sustained position. Petitioner reported working at Nascote when she reached out to move a cart and was jerked in the opposite direction and felt a pop in her shoulder with immediate pain and difficulty using it. Ice was helping but the pain was interrupting her sleep. She was able to do most self care activities but reported increasing difficulty as the day progressed and difficulty with undressing. Petitioner continued with physical therapy and reported gradual improvement but not complete resolution of her pain complaints. (PX 2)

Dr. Jenkins re-examined Petitioner on April 20, 2012. Petitioner denied much improvement with physical therapy but then said there was "possibly" some improvement. On examination Petitioner appeared much more comfortable with movement than in previous visits. Her exam that day was noted to be "essentially benign" and they agreed to continue physical therapy for two more weeks with some changes in medication due to side effects from the Naprosyn. Dr. Jenkins kept Petitioner off work until April 21, 2012 due to "medical issues." In different handwriting someone noted "right shoulder pain." The note also has restrictions of no lifting over five pounds indicated. At the bottom of the form it says (again, in different handwriting) "This was revised on 4/23/12." (PX 3)

At the April 23, 2012 physical therapy visit Petitioner reported participating in a 5K over the weekend without any right shoulder pain complaints. She reported "discomfort" with some therapy activities. (PX 2)

As of April 30, 2012 Petitioner reported gradual improvement in physical therapy. She seemed well motivated. As of May 2, 2012 she was sleeping well and able to do her hair in a ponytail. The next day she noted more pain but didn't know why. (PX 2)

Petitioner returned to see Dr. Jenkins on May 3, 2012. She reported good benefits with Arthrotec and Flexeril. She primarily complained of anterior shoulder pain but had good range of motion of the shoulder itself. She also reported she wasn't working. Petitioner was continued on her medications and the doctor recommended an orthopedic referral. Petitioner was taken off work until June 3, 2012. (PX 3)

Petitioner did not attend physical therapy on May 8th or May 10th as scheduled. (PX 2)

Petitioner testified she returned to work on a light duty basis on May 30, 2012.

Dr. Jenkins' physicians-assistant, Amy Knepp, examined Petitioner on June 4, 2012. Petitioner stated physical therapy wasn't helping and described her pain as a "7/10." Petitioner was reporting some mild neck pain and periodic tingling in her right hand. On examination she had good cervical range of motion, mild tenderness over her right paracervical and trapezious musculature, point tenderness over her right anterior shoulder joint and normal rotator cuff

muscle testing. Impingement signs were negative. Ms. Knepp discussed possible further evaluation for cervical issues. Petitioner was given a return to work slip with restrictions of no lifting. An x-ray of Petitioner's right shoulder was also taken that day and showed no evidence of an acute fracture or dislocation. There was evidence of lateral downsloping in the distal acromion with slight narrowing of the subacromial space. An MRI might be obtained to further characterize that, if clinically indicated. (PX 3)

Physical therapy was discontinued as of July 2, 2012 because Petitioner had failed to return for her scheduled appointments on May 8th and May 10th. (PX 2)

Petitioner testified she was still having problems and pain in her shoulder during this time and chose to see a specialist.

Petitioner saw Dr. Richard Lehman on July 5, 2012. After the visit he authored a report to Gallagher Bassett, Respondent's workers' compensation carrier. Petitioner reported having undergone right shoulder surgery in 2007 during which time her shoulder was "cleaned out" but she could not remember any specifics. Dr. Lehman was of the opinion Petitioner had pre-existing instability in her shoulder and had a manifestation/exacerbation of her instability tearing her glenoid labrum and creating an instability pattern. He believed the majority of her instability pre-existed her work accident. "The labral pathology or the popping and grinding is a direct result of the abduction episode at work creating subluxation of her shoulder and damaging her labrum." He felt her instability pattern appeared to be substantial on exam with signficant laxity being noted. He recommended an arthroscopic procedure with a glenoid labrum repair and enhancement of the anterior and posterior capsule. He recommended continued light duty with no use of the right arm until after surgery. (PX 5)

Respondent sent Petitioner to a Section 12 examination with Dr. Michael Milne on July 23, 2012. At the time of the exam Petitioner completed a questionnaire. She listed her hobbies as golf, tennis, hockey, bowling, hiking, volleyball, field hockey, and swimming. While he had minimal medical records to review, he diagnosed Petitioner with right shoulder pain and a possible labral tear. He recommended a high field MRI arthrogram to further delineate the condition of her labrum and a surgical opinion would follow. He also wished to see the operative report from Petitioner's earlier surgery, noting that Petitioner described it as "just a diagnostic arthroscopy and clean up." (RX 1) He felt Petitioner's care and treatment, to date, had been reasonable, necessary and related to her work accident and that Petitioner could continue working light duty. Finally, he noted a decision as to when she would be at maximum medical improvement was premature. (RX 1)

Petitioner testified she received mileage for the July examination with Dr. Milne. She also testified that her light duty was terminated on August 7, 2012.

Petitioner traveled back to St. Louis for the MRI arthrogram on August 20, 2012 and then had a follow-up visit with Dr. Milne on August 23, 2012. In his written report Dr. Milne described Petitioner's complaints as a "lot of popping and pain in the right shoulder that wakes her up at night." Petitioner was currently out of work. Dr. Milne interpreted the MRI as showing some degenerative fraying in the anterior labrum. His diagnosis was recorded as right shoulder anterior

labral fraying, right shoulder biceps tendinitis, and right shoulder acromioclavicular joint arthrosis. (RX 1) He recommended a glenohumeral injection or possible diagnostic arthroscopy with labral debridement or repair. Dr. Milne assured Petitioner she was in good hands with Dr. Lehman. (RX 1)

Petitioner testified she did not receive mileage for the travel on August 20th or 23rd.

By letter dated August 24, 2012 Petitioner's attorney requested mileage for Petitioner's treatment indicating there was no local treatment available for Petitioner. He further requested a copy of Dr. Milne's report. (PX 9)

Dr. Lehman re-examined Petitioner on September 18, 2012. He noted she had been initially seen and evaluated and then sought a second opinion. Her symptoms of popping and grinding and potential instability continued. On exam her range of motion was noted to be very good and she had no difficulty with it but there was a definitive pop which had not improved. A scan he reviewed showed some fraying of her labrum. He continued to recommend surgery. Petitioner wished to undergo an injection but he didn't think that was a reasonable way to proceed at that time. He continued her on no use of the right arm with surgery being scheduled for October 3, 2012. (PX 5)

On September 21, 2012 Petitioner's attorney wrote Respondent's carrier regarding their recent phone conversation in which the adjuster advised counsel she would reconsider her decision regarding paying mileage to Petitioner. Counsel formally requested that she reconsider her position and he requested additional mileage. He also indicated he had been informed that day that the surgery recommended by Dr. Lehman was not being approved. (PX 12)

Petitioner testified she had a medical card through the State of Illinois and attempted to return to Dr. Lehman but was refused because she had an outstanding balance.

By letter dated October 8, 2012 Respondent advised Petitioner that it had been notified that her doctor had released her to return to work. Petitioner was advised to report to the Salvation Army Thrift Store on October 19, 2012 to work 27 hours per week. Petitioner was to receive $12.12 per hour. Petitioner's job duties and guidelines for dress were included in the letter. (PX 13) A similar letter was sent to Petitioner's attorney's office by the carrier on October 19, 2012 and confirmed Petitioner had reported for light duty that day. (PX 13; RX 2)

Petitioner testified that she was not paid temporary partial disability benefits after she began working at Salvation Army.

Petitioner presented to the emergency room at Washington County Hospital on November 14, 2012. In triage she reported her "primary complaint" was right shoulder pain, "old work injury. Labrieum tear. Woke up from sleeping this morning with pain becoming worse throughout the day." Petitioner also gave a pain score of "10" and the following information was charted -- "Pain lasting for 9 months. Reports pain is chronic. Occurring constantly. Sharp intensity. The pain is related to the primary complaint." On the Physician's Report and Order Sheet, Petitioner's history indicated she was complaining of right shoulder pain after a work related accident.

"Awaiting surgery. Has MRI and is [illegible] Vicodin." On the following page, it states she is already on Vicodin. In the "Disposition" section of the report, it is noted that she has surgery scheduled and is to continue her medications. (PX 2)

On November 27, 2012 Dr. Milne issued an Addendum report after receiving and reviewing additional medical records pertaining to Petitioner. Most notably, these included the medical records surrounding her care and treatment in 2007 and 2008 with Dr. Houle, along with a letter sent to Dr. Jenkins in which Dr. Houle recommended a second opinion[1]. Based upon his review of those records, Dr. Milne opined that Petitioner's pre-existing shoulder complaints were the "primary cause" of her current complaints and he did not think her work-related injury was a "significant factor" in her complaints "given the abundance of medical records prior to this." He noted that the recent MRI arthrogram had showed only minimal degenerative fraying. He also felt a cervical spine work-up might be appropriate as he didn't believe there was a structural abnormality in her shoulder which would explain her current complaints. (RX 1)

Petitioner testified that on December 3, 2012 Respondent terminated her light duty, cut off her medical treatment, and refused to pay temporary total disability benefits. Petitioner testified she continued to request light duty work but none was provided. She filed for unemployment.

Petitioner signed her Application for Adjustment of Claim on December 4, 2012. (AX 2)

Petitioner presented to Dr. Dawn Miesner on April 2, 2013, "because her attorney wanted her to obtain a referral to Dr. Stiehl, an orthopedist." Petitioner reported on her exam with Dr. Lehman and her scheduled shoulder surgery which was then cancelled when the insurance company deemed it unnecessary based upon her examination with Dr. Milne. Her workers' compensation case was then "closed" and Petitioner had retained an attorney who recommended she see Dr. Stiehl. Dr. Miesner noted that Petitioner did not request any pain medication during their visit. Petitioner reported she had been given Vicodin in the past but found she was taking increasing amounts of it to achieve the same effect and was never pain free so she went without. She had one tablet remaining which she was "hanging onto in the event she does have some severe pain." Percocet was also giving her better results but she didn't want any of those as she was managing "ok" with ice when her shoulder is painful. Petitioner also reported being given Flexeril but finding it very sedating for a day or two so she never really took it. Petitioner reported going to the emergency room at Washington County Hospital and getting two injections but denied receiving any medication prescription and was surprised at what it cost after she received the bill. Petitioner was referred to Dr. Stiehl. (PX 3)

Petitioner presented to Dr. McIntosh on June 4, 2013. Petitioner reported popping and grinding in her shoulder that had begun with her work accident in March of 2012. Petitioner brought her records from Dr. Lehman and her prior shoulder surgery report with her. Based upon his examination Dr. McIntosh recommended arthroscopic surgery which Petitioner advised him had been previously recommended but not yet performed. He believed there was a direct causal relationship between her pathology and her injury noting "She did have a previous injury to her right shoulder but she did well from that, and this was really without too much discomfort prior to her injury." (PX 6)

[1] The 2010 letter/report (see RX 4).

On June 9, 2013, Petitioner began working for Road Ranger. She found this employment on her own.

Petitioner underwent a pre-operative exam on July 12, 2013 at Nashville Family Health Center. Petitioner reported constant pain and difficulty getting comfortable at night, thereby interrupting her sleep. Petitioner reported being chronically tired and working at Road Ranger and raising a six year old daughter. Petitioner had been hospitalized in the spring for a strep throat infection during which she was diagnosed with bronchospasms and given Advair. Her triggers seemed to be "exercise" and cleaning products at work. She reported muscle cramps in her legs for which she was told to eat a banana daily. Petitioner was cleared for surgery. (PX 3)

Petitioner testified that she continued working at the Road Ranger until her surgery. She was paid $8.25/hour and her light duty restrictions were accommodated. Petitioner testified that prior to her surgery she was having intense pain that would travel into her neck and down into her right hand and fingers along with numbness and tingling. She would occasionally "lose control" and drop things.

Surgery was performed on July 15, 2013. Intra-operative findings included a labral tear, a chondral injury to the anterior glenoid, a partial rotator cuff tear, an inflamed biceps tendon, and a fair amount of bursitis. Dr. McIntosh performed a debridement of the glenoid labral tear, biceps tenotomy, and bursectomy. (PX 7)

Petitioner testified that she felt good after her surgery. She followed up with Dr. McIntosh post surgery. Her surgical wound healed nicely, she steadily improved and progressed through formal therapy. (PX 2, 6)

Petitioner testified that Dr. McIntosh took her off work from the surgery date until August 25, 2013.

Dr. McIntosh's deposition was taken on September 24, 2013. Dr. McIntosh testified he was aware of Petitioner's prior shoulder surgery from which "She did well." (PX 8, p. 6) Dr. McIntosh testified that he ordered no new imaging studies when he initially examined Petitioner as he felt her earlier imaging studies, combined with her clinical exam, indicated possible torn labral cartilage and rotator cuff irritation in her shoulder. (PX 8, p. 8) Dr. McIntosh further testified that he had reviewed Dr. Houle's records from 2007 and 2008 along with Petitioner's more current treatment records from Drs. Jenkins, Lehman, and Milne. (PX 8, p. 8) Since Petitioner had told him she had done well from her earlier surgery and "[s]he had not had any symptoms, really, prior to the injury that she sought medical attention for...and given her mechanism of injury" he felt her shoulder condition was related to her work accident. (PX 8, pp. 9, 15-16)

Dr. McIntosh testified that when comparing Dr. Houle's operative report with his own findings, there were some differences: Dr. McIntosh found a labral tear while Dr. Houle found her labrum was pretty good albeit with some fraying; Dr. McIntosh found a rotator cuff tear while Dr. Houle noted it was intact. (PX 8, pp. 10-12) Dr. McIntosh felt Petitioner had recovered from her earlier

injury as it appeared to him she really wasn't having problems with her shoulder thereafter. (PX 8, p. 12) Dr. McIntosh testified he was unaware of any treatment or injuries to Petitioner's right shoulder between 2008 and 2012 (PX 8, p. 12) Dr. McIntosh testified that even if he assumed Petitioner had a pre-existing condition in her right shoulder the accident of March 26, 2012 aggravated that condition. (PX 8, p. 16)

On cross-examination Dr. McIntosh acknowledged that he only looked at Petitioner's MRI reports and not the films. The April 4, 2012 MRI showed minimal joint effusion and there was no clearly defined partial rotator cuff tear. Petitioner's labrum appeared to be normal and her bicipital tendon was properly positioned. (PX 8, pp. 21- 23) He further testified that the August 20, 2012 MRI was performed with contrast which helps better visualize the labrum and it revealed mild marginal fraying, normal bony structures, and degenerative changes at the acromioclavicular joint. (PX 8, p. 25) The fraying mentioned in the report, according to the doctor, correlated with his physical findings. (PX 8, p. 26) The doctor also acknowledged that since he did not examine or treat Petitioner in 2008 it would be unfair for him to compare what he did in 2013 with what was done in 2008. (PX 8, p. 27)

As of October 23, 2013, Dr. McIntosh's records indicate Petitioner was doing very well and had excellent range of motion and minimal complaints of pain. She had been working without too much difficulty with a 20 pound weight restriction and wished to return to full duty. She was released full duty and told to return as needed. (PX 6)

Petitioner testified she was involved in a motor vehicle accident in 2007 that resulted in a 2008 surgery to her right shoulder. Petitioner testified that she recovered from that surgery in 2008 and she had no new injuries or treatment (shots, physical therapy or surgeries) to her right shoulder between 2008 and 2012. According to Petitioner from 2008 to 2012 her shoulder did "pretty good" but she would note occasional soreness if she overworked it "but nothing major." Petitioner testified that she worked full duty during that time and never missed any work because of her right shoulder. Petitioner testified that her shoulder was much worse after March 26, 2012.

On cross-examination, Petitioner testified that her right shoulder wasn't a hundred percent after her 2008 surgery but it was better than before the car accident. She did not recall when she last saw Dr. Houle. When asked about a visit with him in March of 2010 she acknowledged her shoulder still hurt but that was just with certain motions. She further acknowledged complaining that it worsened with activity. She also acknowledged complaining to him about a sharp, dull, throbbing, aching, stabbing and burning pain in her shoulder which was associated with swelling, numbness, popping, weakness, and giveaway problems and worse with lifting, excessive exercise, twisting, bending, lying in bed or driving/riding a car. She also acknowledged problems with overhead reaching and activities of pulling and pushing. She did not recall if she told the doctor she believed her shoulder was getting worse. When asked if the foregoing complaints ever really went away, Petitioner initially testified it got better. Upon additional questioning, Petitioner then testified, "No, it did not get better."

On redirect examination Petitioner was asked additional questions about her prior shoulder condition. She did not recall any other visits with Dr. Houle between 2008 and March 26, 2010. She occasionally mentioned her shoulder to her regular doctor because her shoulder was sore;

however, it had gotten better. Petitioner testified that Dr. Houle recommended no treatment in 2010. When asked to describe how much worse her shoulder was after her March 26th accident, Petitioner testified it was very bad and got to the point where she wasn't sleeping, couldn't play with her daughter, and the pain became constant.

Petitioner testified she lives in Okawville, Illinois, and there is no physical therapy facility or orthopedic surgeon located there. Her mileage requests are found in PX 10 and PX 11.

Petitioner testified she still works full-time at the Road Ranger. Petitioner testified that her right shoulder is much better now than before her surgery. It's not perfect (like her left shoulder) as she gets occasional pain in it and it tires easily. She acknowledged having almost full strength in it.

Petitioner's medical expenses are contained in PX 15.

The Arbitrator concludes:

1. **Issue F - Whether Petitioner's current condition of ill being is causally related to the injury.**

Petitioner's current condition of ill-being in her right shoulder is, in part, causally related to her undisputed accident of March 26, 2012. This conclusion is based upon a chain of events (specifically, a lack of medical treatment to her shoulder immediately preceding the accident and the mechanism of the injury, followed by the nature of her complaints and her receipt of prompt medical attention) as well as the opinion of Dr. McIntosh based upon a hypothetical set of facts and the final report of Dr. Milne, Respondent's Section 12 examining physician.

At the outset, the Arbitrator addresses Petitioner's credibility which was a major factor/pivotal issue in this case, especially with regard to the condition of her right shoulder after her surgery with Dr. Houle and prior to her March 26, 2012 accident. Petitioner was not forthright with her doctors regarding the condition of her shoulder after her surgery with Dr. Houle. She represented to them that she did well. She did not tell them about her 2010 visit with Dr. Houle. Reviewing RX 4 indicates Petitioner's right shoulder recovery was not at all as "well" as she has suggested (to them or this Arbitrator during her direct examination testimony). It was only upon cross-examination and when confronted with her actual complaints from her 2010 visit with Dr. Houle that she reluctantly admitted that her shoulder did not get better. Thus, in September of 2008 Petitioner's arm "felt like it was in a vise" and she had occasional numbness and tingling. She was given Vicodin for pain management. Then, in March of 2010 her shoulder was described as a "challenging problem." Her September of 2008 complaints still persisted. According to her doctor, her arthroscopy had shown mild recalcitrant bursitis and, "maybe," some mild fraying of her labrum. Petitioner reported pain with activity, she was certain she was gradually getting worse, and she had complaints associated with most activities of daily living. While Petitioner may not have received any treatment at that time, it wasn't because she didn't necessarily need it; rather, Dr. Jenkins was at a loss as to how to treat the shoulder. What he recommended was that she take a copy of his records and go get a second opinion. Petitioner did not explain why she never sought a further opinion.

While Petitioner worked full-time and apparently had no further treatment to her right shoulder before March 26, 2012 Petitioner has not been completely honest and forthright about her prior shoulder condition with her physicians. With Dr. Lehman, she could simply not recall any specifics regarding her prior treatment except for the procedure itself. The same may be said for Petitioner's first examination with Dr. Milne. When she initially presented to Dr. McIntosh in June of 2013 she did not bring all of her prior records with her -- only the surgical report from 2008. He was under the impression from Petitioner that she did well after that first surgery.

The medical records contain some "red flags" which have given this Arbitrator momentary pause on the issue of causation. Petitioner's sometimes assertions to the contrary, physical therapy did help. She was participating in a 5K run in April of 2012, sleeping well as of May 2, 2012, and showing signs of general improvement. Thereafter, she returned to Dr. Jenkins' office, was seen by his PA-C, and reported new and different complaints (cervical pain and periodic tingling in her right hand -- similar to her complaints in 2010). One month later she was seen by Dr. Lehman regarding her complaints of popping and grinding in her shoulder. And it is the popping and grinding complaints that the Arbitrator has focused on to tip the evidence in Petitioner's favor, despite any credibility concerns.

While Petitioner mentioned some popping to Dr. Houle in March of 2010, there was no mention of "grinding" in her shoulder. Dr. Lehman, Dr. Milne, and Dr. McIntosh have all focused in on those complaints, recognized them as consistent with her mechanism of injury, and associated them with a labral injury and need for surgery. While Petitioner's April 2012 MRI was essentially negative it was done without contrast. The August 2012 MRI was done with contrast which Dr. McIntosh acknowledged aids in ascertaining labral injuries, and it picked up on a labral injury. Surgery was performed and Petitioner has had a good recovery. No one has questioned the veracity of Petitioner's complaints of popping and grinding in her shoulder. Additionally, when Petitioner first presented for physical therapy after the accident she was fairly candid about her right shoulder limitations prior to the accident -- she acknowledged having no difficulties with her shoulder but having problems holding her shoulder out in a sustained fashion.

In sum, the Arbitrator concludes that Petitioner has proven that her right shoulder was aggravated by her March 26, 2012 accident. This conclusion is based upon Dr. McIntosh's aggravation opinion as set forth in his deposition. The Arbitrator further notes that Dr. Milne's addendum report states that Petitioner's pre-existing shoulder complaints were the "primary" cause of her current complaints and that her current injury is not a "significant factor" in her current complaints. An injury need not be the sole causative factor, nor even the primary causative factor, so long as it was a causative factor. Sisbro v. Ind. Comm'n, 207 Ill.2d 193, 205 (2003). Petitioner has sustained a labral tear which necessitated the surgery she underwent on July 15, 2013. Any neck/cervical or numbness/tingling complaints in her right hand are not related to the March 26, 2012 accident.

2. **Issue J - Whether all medical treatment provided was reasonable and necessary and related to the injury, and whether Respondent is liable for payment of the medical bills associated therewith.**

Respondent is to make payment of the medical bills identified in Petitioner's Exhibit 15 directly to Petitioner and her attorney as provided in Section 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall have a credit for any charges that it has paid and shall hold Petitioner harmless from any claims of any providers for any services for which Respondent is receiving this credit. Bills paid by others, specifically, but not limited to, the Illinois Department of Healthcare and Family Services shall be paid as set forth above; i.e., to Petitioner as per the fee schedule. Otero v. Khatib Financial Services, Inc., 09 I.W.C.C. 0235, 2009 WL 1064531 (March 6, 2009).

3. **Issue K - Whether Petitioner is entitled to temporary total disability (TTD) benefits from March 27, 2012 to May 30, 2012; August 7, 2012 to October 18, 2012; December 3, 2012 to June 9, 2013; and July 15, 2013 to August 25, 2013 and whether Petitioner is entitled to temporary partial disability (TPD) from October 19, 2012 to December 2, 2012, or 6-2/7 weeks under Section 8(a).**

Petitioner claims entitlement to TTD benefits from March 27, 2012 through May 30, 2012; August 7, 2012 through October 18, 2012; December 3, 2012 through June 9, 2013; and from July 15, 2013 through August 25, 2013. The parties stipulated that Respondent paid TTD benefits in the amount of $4,501.67 and that she was temporarily totally disabled from March 30, 2012 through May 30, 2012 and August 7, 2012 through October 18, 2012. (AX 1) Respondent disputed its liability for TTD benefits thereafter.

Based upon Petitioner's testimony (which was unrebutted on this issue), the medical records, Dr. McIntosh's testimony, and the previous conclusions regarding causation, Petitioner is awarded temporary total disability benefits for the following periods: March 27, 2012 through May 30, 2012; August 7, 2012 through October 18, 2012; December 3, 2012 through June 9, 2013; and July 15, 2013 through August 25, 2013, a period of 52 1/7 weeks.

Temporary partial disability (TPD) benefits represents two-thirds of the difference between the average amount that Petitioner would be able to earn in the full performance of her duties with Respondent and the gross amount which she earned in the Salvation Army job. This is based on Petitioner's Exhibit 13, which is Respondent's letter accommodating Petitioner's light duty at the Salvation Army but only for 27 hours per week at $12.12 per hour, which yields a gross weekly wage of $327.24. Petitioner did not offer any evidence that the average amount she would have earned in the full performance of her duties is any different than the stipulated average weekly wage of $363.30. Thus, her weekly TPD amount is $24.04 per week and Respondent shall pay Petitioner temporary partial disability benefits of $24.04/week from October 19, 2012 through December 2, 2012, a period of 6 2/7 weeks.

4. **Issue O - Whether Petitioner is entitled to mileage under Sections 8(a) and 12 and Respondent's hearsay objection to Petitioner's Exhibit 14.**

Mileage.

Petitioner claimed mileage after Dr. Milne recommended an MRI arthrogram, as well as for another visit to Dr. Milne to go over the results. The Arbitrator concludes that Petitioner is owed mileage for 2 more trips directly associated with Dr. Milne's IME. Those total mileage charges amounted to 243.3 miles. At 55.5 cents per mile, the current travel rate for 2012, Petitioner is owed $135.06 for those two trips.

With regard to mileage for trips to her treating doctors, Petitioner claimed a total of 622.6 miles at 55.5 cents per mile for those trips in 2012 (total - $345.50). In addition, Petitioner had a total of 989.8 miles for trips in 2013 at the rate of 56.5 cents per mile, the then current mileage rate. That total was $554.15. (PX 10, 11) Under Section 8(a) of the Act, Petitioner can recover mileage as long as it is not local. Petitioner lives in a very small town in southern Illinois and she testified that, to the best of her knowledge, there is no orthopedic surgeon or physical therapy facility in Okawville or anywhere nearby. Therefore, the Arbitrator concludes that Petitioner's travel for therapy and treatment with her orthopedic physician was not local and awards the mileage as claimed by Petitioner. Total mileage to be paid to Petitioner is $1,034.71. Respondent is entitled to credit for mileage paid in the amount of $328.01.

Admissibility of Petitioner's Exhibit 14.

Petitioner's Exhibit 14 is a letter written by Petitioner's attorney to Jean Marie Hoffmann of Gallagher Bassett Services, Inc., which is the administrator or insurer of Petitioner's claim again Respondent. Respondent rendered a hearsay objection to those instances in the letter where Petitioner's attorney is relating what Ms. Hoffmann said. Petitioner replied that the statements were not hearsay because they were not being offered "to prove the truth of the matter asserted" and / or they constituted an admission by a party-opponent.

Respondent's objection is sustained. An admission by a party-opponent is a statement offered against a party and is made by the party's authorized agent concerning a matter within the scope of the agency made during the existence of the relationship. Illinois Rule of Evidence 801(2). No evidence was presented showing that Respondent had control over Ms. Hoffman or that she had been designated as its agent.

5. Issue L - Nature and Extent of any Permanent Injury.

Section 8.1b of the Act provides for the determination of permanency partial disability. Since the accident herein occurred after September 1, 2011, permanent partial disability shall be established using the following criteria:

a) The reported level of impairment as assessed pursuant to the current edition of the AMA *Guides to the Evaluation of Permanent Impairment*;
b) The occupation of the injured employee;
c) The age of the employee at the time of the injury;
d) The employee's future earning capacity; and
e) Evidence of disability corroborated by the treating medical records.

The Act provides that no single enumerated factor shall be the sole determinant of disability. With respect to these factors the Arbitrator notes:

a) Petitioner's reported level of impairment. Neither party submitted an impairment rating.

b) Petitioner's occupation. At the time of the accident Petitioner was a factory worker earning $363.30 per week. After the accident Petitioner testified that she was earning $8.25 per hour. For a 40 hour week that amounts to $330.00. However, no evidence was presented to show how and/or if Petitioner's injury impaired her ability to return to work and engage in her usual occupation.

c) Petitioner's age at the time of her injury. Petitioner was 26 years old. No evidence was presented as to how Petitioner's age might affect her injury.

d) Petitioner's future earning capacity. No evidence was presented as to how Petitioner's future earning capacity has been affected by her injury.

e) Disability as corroborated by the treating medical records. The medical records show that Petitioner was doing well as of her last visit with Dr. McIntosh. She had excellent range of motion and minimal pain complaints. Petitioner was released to full duty work at her request and discharged from care. She has not returned to see Dr. McIntosh.

Petitioner has undergone one surgical procedure followed by physical therapy and a full return to work. Her testimony at arbitration regarding any ongoing complaints was credible and corroborated by Dr. McIntosh's records.

After considering all of these factors, the Arbitrator concludes that Petitioner has sustained a permanent partial loss of use of her right shoulder to the extent of 10% loss of use of the whole person (an award pursuant to Section 8(d)2 being appropriate pursuant to *Will County Forest Preserve*).

6. Issue M - Whether Petitioner is entitled to penalties and attorney's fees.

The Arbitrator notes the parties first appeared for trial on February 13, 2014, and Respondent still had not provided Dr. Milne's addendum report to Petitioner. The Arbitrator notes that Respondent may have failed to comply with Section 12 of the Act in not providing Dr. Milne's addendum report to Petitioner "as soon as practicable," and there is no evidence of compliance with Commission Rule 7110.70(b). Nevertheless, Petitioner's request for penalties under Sections 19(l) and 19(k) and attorney's fees under Section 16 is denied. The causation issue in this case was as challenging as Petitioner's right shoulder condition in 2010. By no means was the determination a "slam dunk." Petitioner's medical records are rifled with entries which gave this Arbitrator cause to pause, especially when considered in light of Petitioner's lack of forthrightness concerning her pre-existing right shoulder condition.

Looking at the evidence Petitioner did not establish causation until this case was arbitrated and the Arbitrator had an opportunity to review all of the evidence. Dr. McIntosh's causation opinion based upon Petitioner's representations to him by Petitioner would not have sufficed to establish causal connection herein. Petitioner wasn't upfront and honest with him about her condition. He did, however, go on to opine, based upon an assumption that she had a pre-existing condition in her right shoulder, that she suffered an aggravation. That opinion is credible. Dr. Lehman was also misled by Petitioner as to the nature of her prior shoulder injury and its condition thereafter as he was completely unaware of the 2007, 2008, and 2010 treatment records. As for Dr. Milne's last report, it does not foreclose any possibility that Petitioner's condition of ill-being is in no way causally related to the accident. Indeed, the doctor opines that the "primary" cause of her current condition was her pre-existing shoulder condition and her current accident was not a "significant" cause of her complaints. He also goes on to discuss how the MRI arthrogram showed only minimal degenerative fraying and he did not feel any further medical treatment was necessary. While the Arbitrator has not agreed with all of Dr. Milne's opinions, Respondent's reliance on same was reasonable, especially given the entirety of the issues in this case. Respondent's procedural conduct, while disappointing and not always in accord with the Act and the Rules, did not rise to the level of being without good and just cause nor was there evidence of bad faith, improper purpose, or frivolous defenses being raised.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Scott Kiesecoms,

Petitioner,

vs.

NO. 10WC004298

15IWCC0277

Willow Lake Mine,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,000.00.

15IWCC0277

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 0 2015
SJM/sj
o-3/26/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KIESECOMS, ANDREW SCOTT
Employee/Petitioner

Case# **10WC004298**

WILLOW LAKE MINE
Employer/Respondent

15IWCC0277

On 3/21/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1580 BECKER SCHROADER & CHAPMAN PC
TODD SCHROADER
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0180 EVANS & DIXON LLC
ROBERT HENDERSHOT
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SCOTT ANDREW KIESECOMS
Employee/Petitioner

v.

WILLOW LAKE MINE
Employer/Respondent

Case # 10 WC 4298

15IWCC0277

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **January 16, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0277

FINDINGS

On **January 21, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is in part*** causally related to the accident. (See Memorandum of Decision of Arbitrator).

In the year preceding the injury, Petitioner earned **$59,999.34**; the average weekly wage was **$1,176.46**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$46,274.29** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$46,274.29**.

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

ORDER

Respondent shall pay outstanding medical bills from Alexander Family Practice in the amount of $330.00, pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 75 weeks, because the injuries sustained caused the 15% loss of use to the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

03/16/2014
Date

MAR 21 2014

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

15IWCC0277

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SCOTT ANDREW KIESECOMS
Employee/Petitioner

v. Case # 10 WC 4298

WILLOW LAKE MINE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, a former miner for Respondent, testified that on January 21, 2010, he was involved in a vehicular accident while in the mine which resulted in injuries to his head and face. Specifically, Petitioner was operating a diesel-powered Tomcar when he lost control of the vehicle, which subsequently struck a concrete retaining wall. (Petitioner's Exhibit (PX) 28). At trial, Petitioner testified he has very little memory of the accident although he was able to recall efforts made to resuscitate him.

Petitioner was seen in the emergency department of Harrisburg Medical Center, and underwent suturing of a left parietal scalp laceration as well as CT scans of the head and cervical spine, which did not reveal any acute changes. Dr. Kolli of Harrisburg Medical Center noted Petitioner wanted to avoid opiate pain medication, as at the time of the accident he had been undergoing treatment for opiate dependence with Dr. Kahn. Petitioner was further noted to admit he had consumed two cans of beer the night prior to his admission to the hospital. Petitioner was admitted with assessments including motor vehicle accident with head injury, left parietal scalp laceration, cerebral concussion with loss of consciousness, and history of opiate dependence. Petitioner was discharged from the hospital at his own request the next day, although Dr. Kolli indicated if Petitioner had persistent neurological symptoms, he would benefit from a neurological evaluation. Petitioner's final diagnoses at the time of his discharge were cerebral "concussion, resolved at the time of the discharge" and "scalp laceration, sutured in the emergency room." (PX 1).

Petitioner came under the care of a neurosurgeon, Dr. David Kennedy, to whom he had been referred by his attorney. (PX 29, pp. 5, 23). When Petitioner first presented to Dr. Kennedy on January 29, 2010, the doctor performed a neurological examination, which "really was normal in terms of cranial nerves, motor, strength, and coordination," and removed the sutures from the scalp laceration as it had healed. (PX 29, p. 7). Dr. Kennedy testified his working diagnosis was "post-concussive syndrome," and he ordered an MRI of the brain, a CT scan of the cervical spine, and noted Petitioner would require a neuro-psychiatric evaluation. (PX 29, p. 8; PX 4).

Petitioner subsequently underwent treatment including occupational therapy and speech pathology. Petitioner was also evaluated by neurologist Dr. David Peeples. Dr. Peeples noted Petitioner's complaints as

including memory and forgetfulness, anxiety, dizziness with rapid head movements, irritability, and neck soreness. The past medical history provided to Dr. Peeples was notable for Petitioner's report of "3 or 4 previous concussions at various stages of his life with brief loss of consciousness." Following a records review and a neurological examination, Dr. Peeples indicated Petitioner had sustained a concussion, scalp laceration, and cervical strain, and noted Petitioner's symptoms of irritability were "consistent with post-concussive neurobehavioral abnormalities." Dr. Peeples indicated "a formal neuropsychological evaluation is appropriate." Following a review of additional records, Dr. Peeples indicated a day treatment program for residual symptoms of traumatic brain injury was appropriate. (PX 6).

Petitioner also underwent physical therapy for his cervical sprain diagnosis at the direction of his primary care physician, Dr. James Alexander. On February 24, 2010, Dr. Alexander noted the physical therapist felt Petitioner had reached maximum medical improvement (MMI) for his cervical spine, and Dr. Alexander discontinued treatment for that condition. Dr. Alexander also noted Petitioner's complaints of memory problems, for which he ordered evaluation and treatment for memory, mood, and cognition due to traumatic brain injury. (PX 3).

When Petitioner returned to Dr. Kennedy on April 13, 2010, he was noted to report problems with speech and memory. (PX 29, p. 10). Dr. Kennedy found Petitioner's overall neurologic examination to be normal. (PX 29, p. 10). Dr. Kennedy testified he believed Petitioner had post-concussive syndrome and possibly an element of "posttraumatic syndrome"; although he acknowledged he could not definitively make such a diagnosis and would make a referral to a psychologist or psychiatrist for evaluation and treatment of such problems. (PX 29, pp. 10-12). Dr. Kennedy did indicate his expectation that Petitioner "should improve over time," and by May 25, 2010, was noting Petitioner "seemed generally better; was more alert" with fewer memory problems reported. (PX 4; PX 29, p. 9). Although on July 29, 2010, Petitioner was noted to complain of several episodes of severe anxiety since abruptly stopping some medications, Dr. Kennedy indicated he "did not detect any obvious neurologic deficits." (PX 29, p. 13).

On August 14, 2010, at Respondent's request, Petitioner was evaluated by board certified clinical neuropsychologist Dr. Michael Oliveri. (RX 1, pp. 4-5, 7). Petitioner reported continued struggles with anxiety and "almost panic like episodes where he would have acute symptoms of anxiety." (RX 1, p. 17). Petitioner also reported "feeling quite depressed at that point although there had been some subtle improvement." (RX 1, pp. 17-18). Although Petitioner did report improvement with sleep, attention, and concentration, he continued to complain of memory problems and struggles with double vision. Dr. Oliveri noted Petitioner's pre-existing symptoms of anxiety, evidenced by his history of opiate dependence, as well as Petitioner's history of prior head injuries which included injuries from an ATV accident and a physical fight. (RX 1, pp. 19-21). Dr. Oliveri also had the opportunity to interview Petitioner's mother, who indicated Petitioner was having greater difficulties in handling stress, was exhibiting more over-anxiety symptoms than he had previously, and was having problems with attention span, concentration, and speech. (RX 1, p. 20).

Dr. Oliveri performed a neuropsychological examination with testing, and found Petitioner had "multiple indices of his performance being significantly discrepant from brain injured patients who otherwise provide good effort," meaning Petitioner "was performing significantly below patients with severe brain damage, with injuries that markedly exceeded the severity of his injury." (RX 1, pp. 28-29). Dr. Oliveri also found Petitioner did not do well on cognitive tests in which brain-damaged people perform well on, while on some questionnaires Petitioner was found to be "endorsing more memory problems at a level of severity in excess of patients with documented neurologic conditions that affect brain function and affect memory." (RX 1, p. 33). Dr. Oliveri explained Petitioner's neuropsychological testing results were atypical, meaning "the results

were inconsistent with organic brain damage." (RX 1, p. 36). Dr. Oliveri concluded Petitioner's assessment was "most reflective of some anxiety, and that in all probability, sort of a chronic anxiety condition," although he did acknowledge Petitioner's anxiety was exacerbated by the January 21, 2010 accident. (RX 1, pp. 36, 40).

On December 20, 2010, Dr. Michael Jarvis, the Director of Inpatient Psychiatry at Washington University School of Medicine, performed an evaluation of Petitioner at the request of Respondent pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"). Dr. Jarvis reviewed Petitioner's medical and psychiatric treatment records then to date, and obtained a lengthy history from Petitioner. The history obtained by Dr. Jarvis was notable for Petitioner's rating of his anxiety at eight or nine on a scale of ten, while Dr. Jarvis indicated Petitioner did not appear that anxious; Petitioner's history as an "accomplished" boxer in high school; and Petitioner's pre-injury problems with prescription painkiller addiction. However, Dr. Jarvis found Petitioner's history of the opioid addiction to be inconsistent with the medical records he reviewed. Notably, Dr. Jarvis found Petitioner did not volunteer any symptoms consistent with post-traumatic stress disorder (PTSD). Petitioner complained to Dr. Jarvis of experiencing memory problems, yet Dr. Jarvis indicated Petitioner told a detailed story and was consistent. (RX 2).

After performing a mental status examination, Dr. Jarvis assessed Petitioner with "[History Of] opiate dependence (preexisting)" and "Anxiety disorder NOS (preexisting)," as well as "[History Of] concussion age 13 and 36 years old and possibly more." Dr. Jarvis noted Petitioner "can list many complaints, however, they do not fit any particular diagnostic syndrome," nor did his complaints "fit any particular pattern." Dr. Jarvis indicated Petitioner's "complaints of anxiety are of the same ilk as his complaints of memory impairment," in that he reported being anxious but did not appear so and reported cognitive impairment but did not show any deficits. Dr. Jarvis concluded that Petitioner's current condition was "entirely contributable to his pre-existing anxiety, substance abuse and other problems," as documented in the medical records, as Petitioner had "no documented sequelae of a traumatic brain injury." Dr. Jarvis stated Petitioner did not require any further psychiatric treatment and could return to work. (RX 2).

Petitioner had continued to receive treatment from Dr. Kennedy, who on September 21, 2010, had documented Petitioner's complaints of "problems with short-term memory and concentration" and other systems which he thought could be manifestations of post-concussive syndrome for which he recommended psychiatric evaluation. (PX 29, pp. 13-14). On January 11, 2011, Dr. Kennedy noted Petitioner's history of having fallen while at a roller-skating party when the strobe lights were turned on and suffering an injury to his right foot. (PX 29, p. 16). Dr. Kennedy continued to recommend Petitioner undergo a formal psychiatric evaluation and on April 6, 2011, specifically recommended a referral to Dr. Wayne Stillings. (PX 29, p. 17). At that point, Dr. Kennedy felt Petitioner was doing much better physically, and did not feel Petitioner required any restrictions from work due to any physical problems. (PX 29, p. 17).

Pursuant to Dr. Kennedy's recommendation, Petitioner was evaluated by Dr. Stillings. In his report of March 22, 2012, Dr. Stillings indicated he reviewed Petitioner's treatment records then to date, as well as the report of Dr. Jarvis and the depositions of Dr. Kennedy and Dr. Oliveri. Dr. Stillings performed testing; however, he noted the MMPI-2 results had "little to no validity due to [Petitioner's] exaggerated report of subjective complaints, some of which were quite unusual," while the MCMI-III results demonstrated "exaggeration of subjective complaints and an inclination to complain," leading Dr. Stillings to state Petitioner "exaggerates his subjective complaints." Dr. Stillings also noted Petitioner's response style was "to significantly over-report his subjective complaints." Dr. Stillings diagnosed Petitioner with chronic, pre-existing depression, pre-existing generalized anxiety disorder, and pre-existing substance abuse, as well as significant pre-existing emotional problems. Dr. Stillings concluded the January 21, 2010 work accident "did not cause or aggravate his

metal state from a psychiatric perspective," and felt Petitioner did not require any additional psychiatric treatment as a result of his accident. (RX 3).

At trial, Petitioner testified he continues to experience problems with double vision, anxiety, loss of sleep, loss of balance, and poor memory. Petitioner testified he has significant anxiety issues every day, and denied any anxiety problems prior to the accident. Petitioner also denied ever sustaining a concussion prior to the accident.

CONCLUSIONS OF LAW

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

Having reviewed the evidence and hearing testimony, I find Petitioner has failed to meet his burden of proof on the issue of causation for his right lower extremity and psychiatric conditions of ill-being.

With respect to Petitioner's right ankle/lower extremity condition, there is no evidence Petitioner suffered any right lower extremity injuries in the original January 21, 2010 accident in the mine. The first reference to a right lower extremity injury is on November 19, 2010, almost eleven months after the accident, when Petitioner presented to the emergency department of Heartland Regional Medical Center and was diagnosed with an acute right ankle fracture. (PX 2). The specifics of the injury are found in the reports of Dr. Jarvis and Dr. Kennedy, both of whom received a history of Petitioner fracturing his ankle at a roller-skating party after he became dizzy. (See RX 2; PX 29, p. 16). However, there is no evidence Petitioner attributed this dizziness to his accident; instead, he attributed the dizziness to the strobe lights coming on. Further, none of the treating or examining physicians associate the roller-staking accident to the January 21, 2010 accident. Dr. Kennedy, who was asked if there was a causal relationship, testified he did not have an opinion on this issue. (PX 29, p. 16). Based on the foregoing, the condition of ill-being in Petitioner's right lower extremity is not causally related to the January 21, 2010 work injury.

Dr. Kennedy did attempt to express an opinion with respect to a causal relationship between Petitioner's psychiatric condition of ill-being and the January 21, 2010 injury; however, that opinion is not as credible as those provided by Dr. Oliveri, Dr. Jarvis, and Dr. Stillings. Dr. Kennedy acknowledged, unlike those evaluators, he did not perform any individual testing to verify Petitioner's complaints of short-term memory loss and mood swings. (PX 29, p. 24). Instead, Dr. Kennedy testified his diagnoses, including that of post-concussive syndrome, was primarily made based upon Petitioner's subjective statements and complaints. (PX 29, p. 26). Although Dr. Kennedy acknowledged Petitioner had some preexisting problems with anxiety, he further acknowledged he did not review any prior medical records with respect to Petitioner's pre-existing anxiety, nor have any records allowing him to determine the degree of Petitioner's pre-existing anxiety. (PX 29, pp. 24-25). Dr. Kennedy acknowledged he could not definitively make a diagnosis of a condition like post-traumatic syndrome, and testified he would defer to a psychiatrist on diagnoses and treatment of conditions like PTSD. (PX 29, pp. 12, 27, 31).

Given Dr. Kennedy's inability to definitively make a diagnosis and his willingness to defer to a psychiatrist, the findings and conclusions reached by the neuropsychologist and the psychiatrists consulted in this case become paramount to a determination of causation. All of those professionals are in agreement with their opinions – that Petitioner's complaints and symptoms are inconsistent with the objective examination and testing data, and that his current psychiatric condition of ill-being pre-exists the January 21, 2010 accident. Dr. Oliveri found Petitioner's neuropsychological testing results to produce findings inconsistent with organic brain

damage; in fact, Petitioner's testing performance was worse and inconsistent with patients who had actually suffered severe brain damage, with injuries much more severe than those sustained by Petitioner. These findings were echoed by Dr. Jarvis, who found that although Petitioner could list many complaints, those complaints and reported symptoms did not fit any particular pattern of injury and were not supported by any examination. It was Dr. Jarvis' opinion Petitioner's condition was "entirely contributable to his preexisting anxiety, substance abuse and other problems," and Dr. Oliveri endorsed Dr. Jarvis' conclusions. (RX 2; RX 1, p. 43). Even Dr. Stillings, to whom Petitioner was referred by Dr. Kennedy, found his testing results invalidated by Petitioner's exaggerated reports of subjective complaints, and produced diagnoses echoing those produced by Dr. Jarvis. Thus, even if Dr. Kennedy had not testified he would defer to the opinions of Dr. Oliveri and Dr. Jarvis, his opinions on causation would still be invalidated by the opinions of the psychiatrist he himself recommended. Further, the findings of these experts serve to demonstrate Petitioner's own testimony regarding his complaints is not credible and cannot be relied upon to make a finding of causation. For these reasons, Petitioner's psychiatric condition of ill-being is not causally related to the January 21, 2010 injury.

As a result of the work accident, Petitioner suffered the following: a concussion with loss of consciousness; a cervical sprain/strain injury which resolved with conservative treatment; a parietal scalp laceration which resolved with suturing; vision problems for which Petitioner underwent rehabilitation and treatment with an optometrist; and a dental injury which resulted in extraction of a tooth. Petitioner's condition of ill-being regarding these injuries is causally related to the work accident.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner's Exhibit 30 alleges medical bills from various providers in the amount of $8,403.50 remain outstanding. However, given the above findings on the issue of causation for Petitioner's alleged right lower extremity condition and psychiatric condition, Respondent does not have any liability for bills resulting from treatment of those conditions. Of the remaining outstanding bills, with one exception, Petitioner failed to submit the records from those providers into evidence, and therefore Respondent does not have any liability for those bills. The exception is the bills from Alexander Family Practice in the amount of $330.00. Given the treatment provided by Dr. Alexander and the timing of that treatment, Respondent shall pay the bill of Alexander Family Practice, subject to the medical fee schedule, Section 8.2 of the Act.

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

The record shows on January 21, 2010, Petitioner was involved in a vehicular accident in Respondent's mine in which he suffered injuries to his face and head. Directly caused by the January 21, 2010 accident was a concussion with loss of consciousness, a cervical sprain/strain injury which resolved with conservative treatment, a parietal scalp laceration which resolved with suturing, vision problems for which Petitioner underwent rehabilitation and treatment with an optometrist, and a dental injury which resulted in extraction of a tooth. Petitioner has been released from care for all these injuries, placed at MMI, and is no longer under restrictions for any physical condition. Given the credible evidence in the record, Petitioner is awarded permanent partial disability benefits equal to 15% of the person as a whole pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Molly Aparacio Webb,

Petitioner,

vs.

NO: 10 WC 26926

15IWCC0278

State of Illinois/
Pinckneyville Corr. Ctr.,

Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the Decision of Arbitrator Lee finding that as a result of repetitive trauma accidental injuries arising out of and in the course of her employment manifesting on March 1, 2010, Petitioner was temporarily totally disabled from December 9, 2010 through January 25, 2011, a period of 5-6/7 weeks, that she is entitled to reasonable and necessary medical expenses outlined in Petitioner's group exhibit, that Respondent shall have §8(j) credit for all amounts paid by its group carrier and Petitioner shall be held harmless, that Petitioner is permanently partially disabled to the extent of 12.5% loss of use of her right hand and 12.5% loss of use of her left hand, a total of 51.25 weeks. The issues on Review are whether Petitioner sustained repetitive trauma accidental injuries arising out of and in the course of her employment, whether timely notice was given to Respondent, whether a causal relationship exists between those injuries and Petitioner's current condition of ill-being and if so, the extent of temporary total disability, the amount of medical expenses, the nature and extent of permanent disability and the admission into evidence of Px12 and Px24. The Commission, after reviewing the entire record, reverses the Decision of the Arbitrator finding that Petitioner failed to prove she sustained repetitive trauma accidental injuries arising out of and in the course of her employment manifesting on March 1, 2010 and failed to prove that a causal relationship exists and denies Petitioner's claim for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 41 year old correctional officer at the time of her claim, testified she was 44 years old at the time of the arbitration hearing. She is employed with Respondent and is a correctional officer at Pinckneyville Correctional Center (Tr 9). She started working for the State in July 1998 (Tr 9). Her entire employment has been at Pinckneyville Correctional Center (Tr 10). Her job title has remained the same throughout her employment (Tr 10). She had reviewed the depositions and videos in her case (Tr 10). She prepared a job description of her duties and a work history timeline (Tr 11). Petitioner does not have gout, hypertension or hypothyroidism. She has not lost 50 pounds in the last 2 or 3 years. She does not have diabetes. She has not been pregnant in the last 5 years (Tr 12). Prior to working at Pinckneyville Correctional Center, she drove for FedEx. Other than holding onto the steering wheel, that job did not involve any use of her hands or arms (Tr 13).

As a correctional officer at Pinckneyville Correctional Center, rotation of job assignments is supposed to be every 90 days. In reality, rotation is just whenever they feel like it (Tr 13). As a correctional officer, Petitioner opens cell doors. She described them as big, heavy steel doors and they have a chuckhole, a food slot (Tr 13-14). A chuckhole is a pass-through door on the outside of the door where laundry and food trays are passed through to the inmates inside a cell (Tr 14). Folger Adam keys are used to open the chuckholes. She also uses regular door keys (Tr 14). The Folger Adam keys are not easy to use because the chuckholes normally stick; there is food and all kinds of stuff stuck in the locks most of the time (Tr 15). Opening the chuckhole requires force, grip and strength. For all the doors, force, grip and strength are required to open them (Tr 15). All the inmates at Pinckneyville Correctional Center are male.

A wing check is where a correctional officer goes down and checks every cell door to make sure they are secure (Tr 15). During a wing check, Petitioner tugs on the door handle of every cell door, which requires force, grip and strength (Tr 15-16). Wing checks are performed every 30 minutes (Tr 16). It would be correct if the records show that there are 54 cell doors in each wing (Tr 16). Petitioner is pretty sure that in 2008, 2009 and 2010 she was stationed in the segregation unit R5 on the 3:00 p.m. to 11:00 p.m. shift (Tr 17). In the segregation unit, the inmates have to be escorted personally and cuffed, other than just the cell door opening and them coming out on their own (Tr 17). She cuffed and uncuffed inmates and if they resist, she would have to hold onto them (Tr 18). There are bars in the segregation unit. Petitioner believed she may have rapped bars in the beginning of her career (Tr 18). From 2005 until she filed her claim in 2010, Petitioner assumed she spent about a year in the segregation unit, but was not real sure (Tr 18). She was on the 3:00 p.m. to 11:00 p.m. shift, then she bumped to the day shift, but she could not remember what year that was (Tr 18-19).

There is a locksmith on duty at Pinckneyville Correctional Center. Petitioner had reviewed depositions and agreed with the testimony of her co-workers and the locksmith (Tr 19). She had reviewed the videos and stated the videos do not accurately depict the pace of or frequency at which she worked (Tr 19-20). The videos do not show any of the locks or chuckholes sticking or malfunctioning (Tr 20). The videos do not show any activity in the R5 segregation unit (Tr 20). When locks stick or fail to open, Petitioner had to tug on them to try and get them open. If the locks would not open, she would get the locksmith to fix them (Tr 20). Petitioner would use both her hands to unlock the locks (Tr 21). She is right hand dominant (Tr 21).

A property box is a big gray plastic box that holds the inmates' property. There is a large box and a small box for legal papers and correspondences (Tr 21). She has to do property box checks. She goes into a cell to make sure all the property is in the box and not laying all over the floor (Tr 21). She uses her hands to check property boxes (Tr 22). A shakedown is when correctional officers go into a cell looking for contraband; they open the property boxes and lift them, lift the mattresses, check behind vents and search the entire cell using their arms and hands; this requires use of both hands (Tr 22). There are food slot trays used in the segregation unit (Tr 22). To open a chuckhole, a Folger Adam Key is used. She would put the key into the lock and hold the chuckhole slot lid with the other hand. She would hold the Folger Adam Key in the lock, turn it and use her other hand to pull the chuckhole door down (Tr 23). Sometimes that is not easy (Tr 24). In her career at Pinckneyville Correctional Center, Petitioner figured she pulled cell doors thousands of times; she has turned Folger Adam Keys thousands of times; she has had problems with the locks in the doors thousands of times (Tr 24).

A lockdown is where all the inmates are secured in their cells and there is limited movement and all movement outside the cell would be cuffed (Tr 24). A lockdown doubles the duties of the correctional officers because they are constantly cuffing and uncuffing the inmates and have to hold their cuffs when escorting the inmates (Tr 25). This requires grip and force (Tr 25). The facility was in lockdown quite a few times in 2008 and 2009, but Petitioner could not give an exact number (Tr 25). In lockdown, the correctional officers have to carry the food trays up the steps to the top gallery and back down after the meal. It is the same for laundry (Tr 26). Laundry is carried up to their cells and passed out to the inmates (Tr 26). If she is on level 4, there are inmate workers when the facility is on lockdown (Tr 26). The duties of a correctional officer substantially increase with regard to use of arms and hands when the facility is on lockdown (Tr 26).

During the course of performing those job duties, Petitioner noticed that her hands and arms were becoming numb and tingling (Tr 27). She did not seek medical treatment at that time as she thought her problem of numbness and tingling was because she was doing overtime and thought she was just worn out (Tr 27). Petitioner kept working and as she did so, she noticed her arms and hands kept getting worse (Tr 27). Eventually, Petitioner sought medical treatment for this (Tr 28). The medical records Px3 through Px7 represent the doctors she saw for this and she gave her doctors an accurate history of her job duties and the nature of her symptoms (Tr 28).

Petitioner's attorney referred her to Dr. Brown, who examined her and provided some testing (Tr 28). Petitioner has read Dr. Brown's records and his deposition (Tr 29). She agreed that what she told Dr. Brown recited in his notes and what he said she told him in his deposition is accurate (Tr 29). Petitioner was not examined by Dr. Williams and she did not know him (Tr 29). She did read Dr. Williams' deposition (Tr 29). When she began developing these symptoms after seeing Dr. Brown in March 2010, Petitioner told her supervisor. She thinks Major Pickering was her supervisor at that time, but she was not sure (Tr 30). After March 1, 2010, Petitioner underwent further diagnostic testing (Tr 30). Following these tests, surgery was recommended (Tr 30). She sought approval for her surgery with Dr. Brown (Tr 30-31). Petitioner believes she was paid benefits while she was off work (Tr 31). She would not have had the surgery if she believed she was not going to get paid because she could not afford to take off work (Tr 31). She underwent surgery and it helped (Tr 32). She attended post-operative physical therapy (Tr 32).

Petitioner currently noticed that she still had soreness and does not have the grip strength she used to have (Tr 32). Opening bottles and stuff is hard for her (Tr 32). She does not often take medication for her symptoms (Tr 33). At the end of a shift, Petitioner notices she is just tired and her hands are still tired (Tr 33). Petitioner incurred the medical bills contained in Px1 as a result of her care and treatment in this case (Tr 33). She did review the Demands of the Job Form and it is inaccurate in that it states she never lifts 1 to 10 pounds, 11 to 20 pounds or 31 pounds (Tr 34). The rest referred to in that document would be rest between inmates and while they are in the shower; she just constantly keeps going (Tr 35). She has a 30 minute rest between forcefully pulling doors after a wing check, but in that 30 minutes she is doing other things (Tr 35). In an 8-hour shift, every 30 minutes there is a wing check and she gets no rest between each door (Tr 35).

On cross-examination, Petitioner testified she started at Pinckneyville Correctional Center in July 1998 (Tr 36). Pinckneyville Correctional Center was a brand new facility at that time (Tr 36). She would guess it was called a state of the art facility at that time (Tr 36). At that time, the locks, chuckholes and control pods were brand new (Tr 37). Everything worked well in 1998 (Tr 37). Petitioner did not remember what job post she worked on in July 1998 (Tr 37). She could have been on the walk at that time, but she was not sure (Tr 37). Then she was moved to the R5 segregation unit, but did not know the date (Tr 38). In total, Petitioner worked in segregation maybe a year and it was consecutive for a while, but she could not give an exact time (Tr 38). In the course of her employment at Pinckneyville Correctional Center from 1998 to the present, Petitioner has worked in R5 segregation unit approximately one year, potentially off and on (Tr 38). She could not remember when she was bumped from the 3:00 p.m. to 11:00 p.m. shift to the day shift (Tr 39). Petitioner thinks she did bump while she was in R5 segregation unit to get out of there (Tr 39). While on walk, Petitioner does not use Folger Adam Keys (Tr 39). She does not cuff and uncuff inmates unless there is an altercation (Tr 39). She is not bar rapping (Tr 39). On the walk, she is not pulling doors or doing wing checks (Tr 40). She did not spend very long on the walk (Tr 40).

Petitioner worked in the armory a few times. While working in the armory, she did not use Folger Adam Keys, was not cuffing inmates, was not rapping on bars, was not pulling on cell doors or doing wing checks (Tr 41). Petitioner believes she was assigned as a relief officer in dietary. Her duties in dietary were to check all the doors to make sure they were locked. There are 5 or 6 big heavy steel doors that separate the kitchen from the dining room and 2 doors that separate the kitchen from the dining room and the outside entrance doors (Tr 41). Regular small door keys are used for those doors when someone needs in or running a line in or out (Tr 43). When the inmates feed they just run a line in (Tr 43). There are 4 lines out of each house and there are 4 houses (Tr 44). She had to unlock it more than 4 times during a feed; it was closer to 10 times (Tr 44). In dietary, there is no bar rapping. Inmates are cuffed or uncuffed only if there is an altercation (Tr 45). Out of the 6 doors, only 2 are steel doors and the rest are glass doors (Tr 45). Petitioner is not sure of the exact date when she worked as a relief officer in dietary, but thinks it was around April 2009 (Tr 45).

Petitioner believes she worked as a relief officer in Inner Core II, but could not tell the dates (Tr 46). She thinks she worked every assignment of a correctional officer at Pinckneyville Correctional Center (Tr 46). As an Inner Core II relief officer, she would unlock padlocks for the gates. There are only two padlocks or two padlocked gates (Tr 46). The padlock keys were small. There was no bar rapping, no pulling doors and no wing checks and inmates would be cuffed and uncuffed only if there was an altercation (Tr 47).

Petitioner worked in the infirmary as a relief officer (Tr 47). Each door in the infirmary is locked and requires 2 spins of the key to get the doors open. She would have to open the door for the nurse or if the inmates needed to go to the shower, she would have to open their infirmary cell door (Tr 48). There are 3 wards in the infirmary and 3 isolation cells, 6 cells in total (Tr 48). The keys to those cells are a little larger than a regular key (Tr 48). The isolation cells have chuckhole/food slots and Folger Adam Keys are used for those (Tr 49). The chuckholes in the infirmary are only used to feed the inmates (Tr 49). In the infirmary, there is no bar rapping. She did wing checks, 6 doors every 30 minutes (Tr 50). The doors are big and steel. A wing check log is kept (Tr 50). If the door is unlocked, she had to lock it (Tr 51). If locked, a door takes a couple seconds to check (Tr 51).

Petitioner was assigned to the control pod frequently. She did both in the wing houses and in R5 segregation unit (Tr 51). In the regular cell houses in the control pod, most of the control pods are operated by touch screens, but a mouse is used because the touch screens do not work anymore (Tr 52). In 2010, a mouse was used. There is little, if any, keying done by the control pod officer (Tr 52). Petitioner was not bar rapping while assigned to the control pod (Tr 52). She was not doing the feeds as a control pod officer (Tr 53).

Petitioner was a wing officer in a cell house (Tr 53). In a cell house, the feeds are done in mass movement where the cell doors are opened by a control pod officer (Tr 53). She was not feeding inmates through a chuckhole as a wing officer unless they were on lockdown (Tr 54). Only when there is a lockdown would a feed in a wing house be done via chuckholes (Tr 54).

Unless there is a lockdown, Petitioner was not using Folger Adam Keys in a wing house. She was not bar rapping in a wing (Tr 54). The only place there are bars at Pinckneyville Correctional Center to rap are in the segregation unit (Tr 54). Working in R5 segregation for approximately a year was not little segregation (Tr 55). In R5 segregation, Petitioner worked the 3:00 p.m. to 11:00 p.m. shift (Tr 56). She did not believe she worked with Jimmy Phillips and she thinks he was at a different house at that time (Tr 56). Petitioner did work in the control pod in R5 segregation a few times (Tr 56). She worked R5 B wing the majority of the time (Tr 56). She did only one feed during her shift in R5 segregation (Tr 57). When she worked in R5 segregation, there were no inmate porters at that time (Tr 57). The officers would generally help each other with feeds in R5 segregation; the A & B wing officers usually worked together and the C & D wing officers usually worked together (Tr 57-58). One of the wing officers would go around and unlock the chuckholes and the other would pass food and drink and shut the chuckholes (Tr 58). The chuckholes would stick. She would personally request a locksmith maybe once a month. Eventually the locksmith would repair or replace the lock (Tr 58-59). Close to 50% of the chuckholes would stick (Tr 59).

Petitioner was required to do one shakedown per shift, which would take up to 20 minutes (Tr 60). R5 segregation inmates only have correspondence boxes in their cells, which weighed 30 pounds at maximum, but could weigh a lot less (Tr 60). A shakedown of a cell in R5 segregation would take about 10 minutes as they do not have much property in their cells (Tr 61). Property boxes are lifted onto the bed and inspected (Tr 62). Petitioner did not remember what days she worked in R5 segregation (Tr 63). She was not typically off weekends (Tr 63). Petitioner has worked with Lieutenant Thompson. She has reviewed Lieutenant Thompson's key estimation study and on some days it is accurate, but when on lockdown it is inaccurate, but it is a fair approximation (Tr 63-64). The key estimation shows that on the 3:00 p.m. to 11:00 p.m. shift Monday through Friday, Petitioner was using 110 large keys and 20 small keys. On Saturday and Sunday, Petitioner was using 245 large keys and 70 small keys, due to inmate showering (Tr 64). In R5 segregation, correctional officers assigned would take the inmates to the shower. Showers were available every other day (Tr 65). It is possible Petitioner worked in R5 segregation prior to 2005 (Tr 66). Petitioner believed she had bumped to day shift in 2010 (Tr 66). Petitioner would not agree with Officer Phillips' testimony that he opened less than 10 cell doors a day in R5 segregation, not on the 3:00 p.m. to 11:00 p.m. shift (Tr 66). A R5 segregation cell door is opened for showers, call pass or a need to go to medical (Tr 67).

There are different levels of lockdown. At certain times a portion of the facility could be on lockdown and other portions not (Tr 68). If there is a lockdown, that might not affect her job (Tr 68). R5 segregation is considered locked down all the time (Tr 68).

Prior to seeing Dr. Brown, Petitioner filled out a patient intake form dated March 1, 2010 (Tr 68-69). Petitioner identified her signature on the patient intake form of Dr. Brown (Tr 69). She put down that she was being seen for a work-related injury (Tr 69). At that time, March 1, 2010, Petitioner had not been evaluated by a physician for her condition (Tr 70). Petitioner did

not know at that time that she had carpal tunnel syndrome (Tr 70). She just thought she was having problems and that it was related to her job (Tr 70). Petitioner identified Rx3 as the Notice of Injury Form and acknowledged it is written in her handwriting (Tr 70). She had signed Rx3 and it is dated July 23, 2010 (Tr 71). Petitioner believed she told her supervisor Major Pickering in March 2010 that she was being tested (Tr 71). Petitioner identified Px9 as her Work History Timeline and Job Description that she wrote (Tr 71). She acknowledged that it states, "Major Pickering was not my supervisor at this time. Don't even think he was at Pinckneyville at the time that I was on the 3:00 to 11:00 shift." (Tr 72). Petitioner was asked if he was not your supervisor, how would she have told him that she had this injury (Tr 72). Petitioner stated he was not her supervisor when she was working R5 segregation and that when she bumped to day shift, he was her supervisor (Tr 72). Petitioner did not know why in his Supervisor's Report, Billy Pickering stated he received a report from her of this work-related injury on August 5, 2010 (Tr 73). Petitioner stated she did tell the Workers' Compensation coordinator in March 2010. She then stated she just told the coordinator and that it went through the chain of command after that (Tr 74). She then stated it could have been the coordinator or the supervisor. Petitioner thinks she verbally told them she was being treated in March 2010, but is not sure (Tr 74). The report she filled out was in July 2010 (Tr 74).

Prior to working at Pinckneyville Correctional Center, Petitioner worked for FedEx driving a little truck, not a big truck. She did lift and handle packages with a maximum weight of 10 pounds (Tr 75-76). Most of her packages were letters (Tr 76).

Petitioner believed her symptoms started in 2008 and 2009 (Tr 76). It would be inaccurate if Dr. Brown recorded that she only had a month-long history of onset of symptoms of numbness and tingling in her hands (Tr 76). She had symptoms longer than a month (Tr 77). Originally there was some question whether or not she had carpal tunnel syndrome (Tr 77). That question was because some of her test results showed an underlying hereditary familial peripheral neuropathy (Tr 77-78). Dr. Phillips had noted that Petitioner's mother and sister had numbness in their extremities; Petitioner stated this is inaccurate and all she said to Dr. Phillips was that they were still alive and she never discussed any numbness or tingling of their extremities (Tr 78). Dr. Phillips recommended Petitioner have some testing for potential underlying neuropathy and she stated she had this testing with primary care physician Dr. Warner of blood work and then a repeat nerve test (Tr 78-79). Petitioner did not know why that test for underlying neuropathy is not in her records (Tr 79). On the Patient Intake Form she filled out in January 2010, Petitioner wrote she first noticed her symptoms a month before (in December 2009) and that is when they started getting worse (Tr 80).

When asked about hobbies, Petitioner stated she liked to garden as a summertime hobby (Tr 81-82). She has a real big garden and a small garden (Tr 82). In the summertime, Petitioner is usually out in the garden 4 or 5 hours a day (Tr 82). She acknowledged that gardening sometimes requires pinch, grip and force of her hands, mostly her right hand (Tr 83). Depending on the job she is on, she could be constantly lifting 1 to 10 pounds up to 100 pounds (Tr 84).

At various times she lifts things with intermittent rest (Tr 84). Sometimes she may do more lifting than at other times (Tr 84). Petitioner no longer experiences any numbness or tingling (Tr 84-85). After driving a long time, she has a tired, aching feeling (Tr 85). Her main current complaint is loss of grip strength and that her hands get tired (Tr 85). Once every 2 weeks or a month, she takes over-the-counter Advil or Aleve for this (Tr 85). Petitioner continues to work her regular job (Tr 85). Petitioner did not treat for her elbows, although they were tested and the results were negative (Tr 86-87). Petitioner currently works relief post and she could potentially everyday work somewhere different (Tr 87). Petitioner worked at Dwight Correctional Center for maybe a month before Pinckneyville Correctional Center opened (Tr 88).

On re-direct examination, Petitioner testified that in March 2010, she believed she talked to the workers' compensation coordinator; she may have also mentioned it to Major Pickering, but she is not sure (Tr 88). She is confident she gave notice to the facility (Tr 88-89). When she was originally tested, there were recommendations for her to get re-tested (Tr 89). After the re-testing was done, Petitioner filled out a formal written report in July 2010 (Tr 89). She filled out that July 2010 report because she was never diagnosed until July 2010 (Tr 89). From March 2010 until July 2010, Petitioner was just going through tests to find out what it was (Tr 89).

On re-cross examination, Petitioner testified she believes the workers' compensation coordinator in March 2010 was Charlene Whitley (Tr 90). Petitioner believed she did fill out paperwork, then stated she cannot remember (Tr 90). Her testimony is that she filled out paperwork on July 23, 2010 because at that time she had been re-tested and had the symptoms (Tr 90). She did not see Dr. Brown until August 18, 2010. Petitioner had another nerve conduction test done by Dr. Alam. After that nerve conduction study, she followed-up with Dr. Brown (Tr 91). Dr. Brown then sent her to Dr. Phillips again (Tr 91). Petitioner is not sure the nerve conduction study with Dr. Alam was done on April 26, 2010 (Tr 91). Apparently Petitioner did not fill out the Notice of Injury until July 2010. Petitioner is not sure of all the dates (Tr 92).

On re-direct examination, Petitioner testified that the overwhelming majority of her work time from 1998 to the present was spent as a correctional officer (Tr 93). She has done everything at Pinckneyville Correctional Center (Tr 93).

2. Lieutenant Jason Thompson testified he was truthful and honest in giving his deposition testimony. Petitioner is a pretty good employee (Tr 95). He was present during Petitioner's testimony (Tr 95). Mr. Thompson testified that some of the chuckholes got stuck and got dirty and some of the locks were bad and that is why a locksmith is employed and a maintenance staff takes care of the doors (Tr 96). It is not accurate that 50% of the chuckholes stick (Tr 96). On average he would say one in R5 segregation and one to two per wing would be sticky to the point they needed a good deal of force to open, less than 5% of the cells (Tr 96). Concerning not getting rest, their job is 99% boredom and 1% sheer and utter terror or exhilaration (Tr 96-97). There is a lot of rest in between what correctional officers do. Correctional officers cannot watch what is going on around them if they are constantly doing things. At least 16 times a shift

correctional officers are checking doors and it takes 5 minutes to check every door in a cell house (Tr 97). There is not too much Petitioner said that he would disagree with as far as job duties go (Tr 97). Correctional officers would use their arms and hands anywhere from 5 to 6 hours a day with rest (Tr 97).

On cross-examination, Mr. Thompson testified that most of the cell doors at Pinckneyville Correctional Center are on fairly new hinges. In the yard the hinges are 100 + years old and still open. The door hinges are 15 or 16 years old and most of them open fairly easily (Tr 98). Some of the doors when going from the core into the wings are 400 pounds and require a little bit more force (Tr 98). The average child could probably open most of the doors (Tr 99). On re-direct examination, Mr. Thompson testified that no children work at Pinckneyville Correctional Center (Tr 99).

3. According to the medical records of The Orthopedic Center of St. Louis, Px3, Petitioner saw Dr. Brown on March 1, 2010. In a New Patient Questionnaire dated March 1, 2010, Petitioner noted her symptoms were in both arms from the elbow down to her fingers. Petitioner noted her arms go numb and she tended to drop things a lot. Petitioner noted that she first noticed symptoms about a month ago (January 2010). In describing her job duties, Petitioner noted: "I carry a large ring of keys and unlock many doors several times a day. Some lifting involved, not every day, lifting just occasional." The Questionnaire was signed by Petitioner.

In his Offices Notes dated March 1, 2010, Dr. Brown noted that Petitioner presented for evaluation and treatment for a problem of both upper extremities. Dr. Brown noted: "She explains to me she's worked as a correctional officer since July of 1998. She works 7.5 to 16 hours a day, 37.5 hours a week. Her job entails unlocking and locking cell doors repeatedly throughout the day. She has about a month history of gradual onset of numbness and tingling in both her hands. She could recall no specific traumatic injury." On examination, Dr. Brown found good active range of motion of both elbows, both wrists and all digits of both hands; negative Tinel's sign over the ulnar nerve at the right and left cubital tunnels; elbow flexion test was negative bilaterally; negative specific Tinel's sign over the right and left carpal tunnels; Phalen's test was negative bilaterally; two point discrimination is 5 mm in the digits of both hands; there was no intrinsic atrophy in either hand; grip strength right 20, 16, 20; left 14, 20, 19; key pinch right 5, 6, 9; left 7, 7, 8. It was Dr. Brown's impression that the cause of Petitioner's symptoms was not entirely clear. Dr. Brown noted that Petitioner did describe some symptoms consistent with a possible peripheral compression neuropathy. Dr. Brown recommended wrist splints on both wrists at night and ordered nerve conduction studies to be done that day.

4. According to the records of the Neurological & Electrodiagnostic Institute, Px4, Petitioner saw Dr. Phillips for nerve conduction testing on March 1, 2010 on referral from Dr. Brown. Dr. Phillips noted that this became a more complex evaluation than originally anticipated. Dr. Phillips noted that Petitioner reported gradually progressive bilateral hand numbness involving all fingers of both hands from her elbows distally since the end of

December 2009. Petitioner reported occasional pain in the same areas. Dr. Phillips noted that the physical examination and electrical diagnostic studies raised the question of an underlying hereditary familial peripheral neuropathy. Dr. Phillips noted that Petitioner's mother and sister both had numbness in the extremities, but she did not know the extent. On examination, Dr. Phillips found negative Tinel and Phalen at both carpal tunnels. After performing nerve conduction testing, it was Dr. Phillips' impression that the findings were consistent with a chronic underlying sensorimotor peripheral neuropathy, suspected hereditary familial neuropathy. Dr. Phillips noted that this could likely be confirmed by examining another family member such as her sister/mother if they also have extremity numbness. Dr. Phillips noted that while there was some evidence for potentiation of the neuropathy across the wrists, the differences were insufficient to confidently include that there was additional median neuropathy.

In an Addendum dated March 1, 2010, Dr. Brown noted that he had received and reviewed the nerve conduction studies done that day by Dr. Phillips, which were consistent with a chronic underlying sensorimotor peripheral neuropathy. Dr. Brown noted that Dr. Phillips opined this was suggestive of a hereditary familial neuropathy. A peripheral compression neuropathy such as carpal tunnel syndrome and/or cubital tunnel syndrome could not be confirmed. Dr. Brown recommended Petitioner discuss the results with her primary care physician. Dr. Brown noted that at this point, he could not confirm carpal tunnel syndrome or cubital tunnel syndrome. Dr. Brown noted that if Petitioner's symptoms fail to improve over the next 6 months to a year, he would be happy to re-evaluate her. (Px3).

5. On a referral from Petitioner's primary care physician Dr. Warner, an EMG/NCV was performed by Dr. Alam on April 26, 2010. In his report, Px5, Rx14, Dr. Alam noted that after performing the EMG/NCV, his impression was that the electrodiagnostic study was consistent with: 1) bilateral median motor and sensory neuropathy due to demyelination; 2) bilateral ulnar motor and sensory neuropathy due to demyelination; 3) bilateral radial motor and sensory neuropathy due to demyelination. Dr. Alam noted that these findings were consistent with more diffuse demyelinating polyneuropathies and were not related to entrapment neuropathies such as carpal tunnel syndrome or cubital tunnel syndrome.

6. In a Workers' Compensation Employee's Notice of Injury dated July 23, 2010, Px10, Rx3, Petitioner noted a date of injury of March 1, 2010. Under explanation for not reporting on the date of incident, Petitioner noted she was waiting for doctor's diagnosis. Petitioner noted her duties performed at the time of injury were turning/using keys, unlocking cell doors, working computers, etc. Under how injury occurred, Petitioner noted that over time, repetitive use of keys and computers. Petitioner noted that the body parts affected were both wrists, arms and hands.

7. In an undated Supervisor's Report of Injury, Px10, Rx4, the date of accident/incident is noted as March 1, 2010. It was noted that oral notice was received on August 5, 2010. It was noted: "C/O stated she had been tested for nerve damage by her physician. The test was positive." Injury was noted to both left and right arms.

8. In a Demands of Job dated August 5, 2010 by Petitioner's supervisor, Major Pickering, Px10, Rx10, it was noted that use of the hands for gross manipulation (grasping, twisting, handling) was from 0 to 2 hours per day. Use of hands for fine manipulation (typing, good finger dexterity) was from 0 to 2 hours per day. Wet work with the hands was less than 3 times per month. Wet work with the feet was less than 3 times per month. Dust, fumes, gases – respiratory, skin and allergic irritants was less than 3 times per month.

9. Petitioner saw Dr. Brown again on August 18, 2010. In his Office Notes, Dr. Brown noted Petitioner reported no improvement in her symptoms. She had continued working the same job. On examination, Dr. Brown found good active range of motion of both upper extremities; negative specific Tinel's sign over the ulnar nerve at the right and left cubital tunnels; direct compression test and elbow flexion test were negative bilaterally; there was mildly positive Tinel's sign over the median nerve at the right and left carpal tunnels; direct compression test was positive over the right and left carpal tunnels; Phalen's testing was negative bilaterally; two point discrimination was 4-5 mm in the digits of both hands; grip strength: right 36, 34, 36; left 25, 15, 17; key pinch right 7, 7, 10; left 7, 8, 10. It was Dr. Brown's impression that Petitioner continued to be symptomatic in spite of conservative treatment. Dr. Brown noted that on her examination that day, Petitioner did have clinical evidence of carpal tunnel syndrome with positive provocative testing. Dr. Brown ordered repeat nerve conduction studies with Dr. Phillips. Petitioner was to continue full duty work. (Px3).

10. Petitioner saw Dr. Phillips for repeat nerve conduction testing on August 18, 2010 on referral from Dr. Brown. Petitioner reported her symptoms were the same. Petitioner reported that she inquired with her family members and none had been diagnosed with neuropathy. On examination, Dr. Phillips found negative Tinel's sign at the cubital tunnels and condylar grooves; negative Tinel's and Phalen's signs at the carpal tunnels. Dr. Phillips noted that in summary, the pattern of the study was much the same as previously described. There were some differences, but these were largely accounted for by temperature variations during the testing. Once again, there was some evidence for potentiation across the wrists, but it was insufficient to confidently conclude that there was an additional component of median neuropathy at the wrists that would respond to carpal tunnel decompression. Dr. Phillips noted that nonetheless, there are certain patients with generalized neuropathic processes that do respond to carpal tunnel decompression. Dr. Phillips did not think it was unreasonable to offer Petitioner a carpal tunnel decompression on one side and see how she fares, as long as she understood that it may not be of benefit. (Px4).

In an Addendum dated August 18, 2010, Dr. Brown noted that he had received and reviewed Dr. Phillips' repeated never conduction studies. Dr. Brown noted that Dr. Phillips again noted some evidence of potential across the wrist consistent with carpal tunnel syndrome. Dr. Brown noted that Dr. Phillips felt it would be reasonable to offer carpal tunnel decompression surgery to Petitioner. There was also evidence of previously noted underlying chronic sensorimotor peripheral neuropathy. Dr. Brown's impression was bilateral chronic carpal tunnel syndrome that had failed conservative treatment. Dr. Brown noted that Petitioner's symptoms had failed to improve. Dr. Brown noted that he agreed with Dr. Phillips. Dr. Brown

opined that based on Petitioner's symptoms, positive provocative testing and nerve studies, it would be reasonable to proceed with a carpal tunnel release. Dr. Brown opined that Petitioner's work at Pinckneyville Correctional Center would be considered in part an aggravating factor in the need for treatment of her bilateral carpal tunnel syndrome. (Px3).

11. In his Initial Workers' Compensation Medical Report dated August 27, 2010, Dr. Brown noted that there was no specific history of injury, but repetitive work was noted. Dr. Brown noted that the nature and extent of injury was bilateral carpal tunnel syndrome. Dr. Brown noted Petitioner's last visit was on August 18, 2010 and he attached his office notes from that date. Dr. Brown noted that the prognosis was unchanged. (Px10).

12. In a letter to Dr. Brown dated December 2, 2010, Dr. Phillips noted that Petitioner's situation was complicated and unusual. Regarding the August 18, 2010 studies, Dr. Phillips noted: 1) Petitioner's study was abnormal; 2) there was evidence of carpal tunnel in addition to an underlying neuropathy; 3) Dr. Phillips thought it was clinically appropriate to offer Petitioner a carpal tunnel release. (Px4).

13. According to his Operative Report dated December 9, 2010, Dr. Brown performed a right carpal tunnel release. According to his Operative Report dated January 6, 2011, Dr. Brown performed a left carpal tunnel release. (Px3, Px6). According to the records of Hamilton Memorial Hospital, Px7, Petitioner attended post-operative Occupational Therapy from December 27, 2010 through January 10, 2011.

14. In his January 26, 2011 Office Notes, Dr. Brown noted Petitioner reported that the numbness and tingling had resolved. Petitioner reported she was doing very well. On examination, Dr. Brown found good active range of motion of the digits of both hands and good sensation in the digits. Petitioner was to continue a home therapy program for an additional 6 to 8 weeks. Petitioner was to be seen as needed. Dr. Brown noted Petitioner felt she could do her normal job. Dr. Brown noted that Petitioner could return to work on January 27, 2011 without restrictions. (Px3).

15. In a July 8, 2011 deposition in the case of Donna Jones a/k/a Correctional Officer v. SOI, Dept of Corrections, Pinckneyville CC 10 WC 38807, Px23, Rx13, Melanie Welch testified that she is a certified vocational counselor and a certified specialist in health ergonomics. She performs job site analyses. At request of CMS, Ms. Welch performed a job site analysis at Pinckneyville Correctional Center on December 17, 2010 and February 2, 2011 and prepared 2 reports for the correctional officer position. She identified her reports as Ex2 and Ex3 (Dp 12). Ms. Welch recited from her reports. She made no opinions in these reports. The Commission notes that these reports were not attached to this deposition, but were attached to Rx8, Dr. Williams' deposition. The Commission has read Ms. Welch's reports.

On cross-examination, Ms. Welch testified she was at Pinckneyville Correctional Center for 4 to 5 hours the first time and about the same the second time. She was generally questioned about her reports. Ms. Welch testified that the correctional officer job is classified as Medium by the Dictionary of Occupational Titles. She did think that segregation was videoed.

16. At Respondent's request, Dr. Williams performed a records review. In his August 1, 2011 Records Reviewed Report, Rx7, Dr. Williams reviewed and recited the CMS Employee's Notice of Injury, CMS Supervisor's Report of Injury, Demands of the Job and Roster Management Staff Assignments. Dr. Williams reviewed and recited Petitioner's medical records. Dr. Williams reviewed the job site analysis reports by Ms. Welch, written job description, the correctional officer video and Key Use Estimation Report. Dr. Williams opined he did not find any job duties would be contributory to the development of carpal tunnel syndrome. Dr. Williams opined that carpal tunnel syndrome could be related to the sensory peripheral polyneuropathy noted by Dr. Phillips, who noted no evidence of a real carpal tunnel syndrome. Dr. Williams noted that Dr. Phillips' examination was completely normal. Dr. Williams noted that Dr. Phillips only found positive findings on the second examination. Dr. Williams noted that when Petitioner first presented to Dr. Brown, she stated she had a one month history of numbness and tingling. Dr. Williams noted Petitioner is a smoker and opined that is significant for the development of carpal tunnel syndrome, as well as sensory motor peripheral neuropathy. Dr. Williams opined that the carpal tunnel syndrome for which Petitioner underwent surgery was not related or aggravated by her job duties. Dr. Williams opined that none of the duties performed by Petitioner involve any significant amount of repetitive work and there is no vibration or impact to her hands. Dr. Williams opined that there is a lot of rest between key turning and there is a significant amount of recovery in between cells. Dr. Williams opined that Petitioner's nerve studies never conclusively proved carpal tunnel syndrome.

17. In his October 5, 2011 deposition, Px12, Robert Schuchert testified he is the locksmith at Pinckneyville Correctional Center. He also has an outside business that he operates as a sole proprietor called Schuchert's Lock Shop in Chester, Illinois (Dp 3-4). He has had his locksmith license for 10 years. Mr. Schuchert began working for the State on September 9, 1981 as a guard at Menard Psychiatric Center, which was closed in 1997 (Dp 5). He worked at Menard Correctional Center from 1997 to 1998 as a correctional officer (Dp 5). Starting in 1993, he was a key control officer, keeping track of the keys in a computer (Dp 5-6). After Menard Correctional Center, he transferred to Pinckneyville Correctional Center on August 16, 1998 and has been there ever since (Dp 6). He is set to retire in 8 months. His job title is correctional locksmith (Dp 6). He was a correctional officer at Pinckneyville Correctional Center from 1998 until 2004 and then became locksmith. He never returned to a correctional officer position (Dp 6-7).

Mr. Schuchert had reviewed the DVDs, one from Menard Correctional Center and one from Pinckneyville Correctional Center (Dp 7). He also reviewed the job site analysis reports (Dp 8). Over 2 years ago, he suffered repetitive trauma injuries at work and had ulnar nerve surgery on both elbows (Dp 8). When he had the surgeries, his job was locksmith at

Pinckneyville Correctional Center (Dp 8). Respondent accepted his workers' compensation claim (Dp 8). Mr. Schuchert testified his repetitive trauma was from his work at Menard Psychiatric Center and Menard Correctional Center (Dp 9).

At Pinckneyville Correctional Center in 2008, 2009 and 2010, the locks in the segregation unit were a bigger electronic lock which used mogul keys called Folger Adams. In general population, Medeco locks used small house-key type keys (Dp 10). In segregation, a paracentric key is used in the chuckhole locks (Dp 11). Mr. Schuchert testified that through the years, the locks have gotten worse. When Pinckneyville Correctional Center first opened, the inmates had their own cell keys, so there was a lot of wear and tear on the cell door locks (Dp 12). It has been 6, 7 or 8 years since those keys were taken from the inmates (Dp 13). The chuckhole locks are keyed all the time in the segregation unit (Dp 13). A lot of the locks have been replaced over the years (Dp 13). Chuckhole locks cost $225 each (Dp 13). Overall, the condition of the locks at the facility are fair to poor, some worse than others (Dp 14). When he gets a work order about a lock, he will change out that lock for a reconditioned lock. A reconditioned lock is one he had fixed and there are no new locks (Dp 14). He will then fix that old lock (Dp 14). The armory officer hand cuffs and leg irons (Dp 14-15). A cell door not opening is a fairly common occurrence at Pinckneyville Correctional Center (Dp 15-16). The procedure is the same for replacement of chuckhole locks (Dp 17). Chuckhole keys are made of brass and get a lot of wear and tear (Dp 17). He has taken chuckhole doors apart and they have been encrusted in food spilled in them (Dp 18).

On cross-examination, Mr. Schuchert testified he has been the locksmith at Pinckneyville Correctional Center for about 7 years, since 2004 (Dp 19). His job duties are to repair or replace any of the locks at the facility and he is also the key control supervisor/coordinator. He takes care of pinning all the keys, cutting all the keys, doing all the key computer work, ordering, anything that needs to be done involving keys and locks, he is responsible for (Dp 19). He is the only locksmith at the facility and there are back-ups for key control (Dp 19). He works Monday through Friday, from 7:30 a.m. to 3:30 p.m. (Dp 20). His time is spent fully at repairing broken locks or broken keys. It takes a couple hours to replace a cell door lock (Dp 21). The number of locks he replaces in a week varies (Dp 22). In the last month he has had maybe 3 locks where the key broke off in the lock (Dp 22). The difference between Menard Correctional Center and Pinckneyville Correctional Center is huge. At Pinckneyville Correctional Center, all the cells are open. There are more violent inmates at Menard Correctional Center. The keys and locks are different (Dp 24). There is no bar rapping at Pinckneyville Correctional Center as far as he knows (Dp 25). There are only a half dozen Folger Adams key locks used at Pinckneyville Correctional Center (Dp 25). The chuckhole keys are similar (Dp 26). The cell door keys are the size of a house key, maybe a little longer, and some locks are hard to turn (Dp 27-28). What wears out in the cell door locks is where the key goes in (Dp 28). The force used to turn the key in the cell door lock depends on how the lock is working (Dp 29). Preventative maintenance is performed and WD40 will be sprayed into the locks ever month (Dp 30-31). Cell door locks cost $1,000 apiece (Dp 32).

18. Petitioner submitted a Work History Timeline and Job Description and these were admitted into evidence as Px9.

19. In his March 5, 2012 deposition, Px11, Dr. Brown testified he is board certified in plastic and reconstructive surgery and subspecialty board certification in hand surgery. Dr. Brown recited from his records, which are noted above. Dr. Brown testified that all of Petitioner's nerve studies were abnormal (Dp 19). Dr. Brown noted that on the third EMG/NCV, there was an increased abnormality or prolongation and abnormal conduction of the median nerve at the level of the carpal tunnel compared to the other nerve studies (Dp 19). Petitioner did not have diabetes (Dp 20). Petitioner went from an essentially negative examination to a positive examination (Dp 21). During the December 9, 2010 right surgery, Dr. Brown observed that the median nerve had a flattened appearance within the carpal tunnel. During the January 6, 2011 left surgery, the median nerve had a slightly flattened appearance within the carpal tunnel (Dp 22). Dr. Brown opined that if Petitioner's symptoms were related to the underlying familial hereditary peripheral neuropathy, releasing the median nerve would have been of no benefit to Petitioner (Dp 22). Dr. Brown noted that Petitioner had complete resolution of the numbness and tingling in her hands, which was consistent with her symptoms being due to some selective compression of the median nerve at the wrist as opposed to the familial hereditary peripheral neuropathy (Dp 22).

Dr. Brown testified he had received materials from Petitioner's attorney concerning her job duties (Dp 25). Dr. Brown reviewed 2 separate job site analyses, one from December 2010 and the other from February 2011 (Dp 25). He also reviewed two separate DVDs. He reviewed Dr. Williams' report. Dr. Brown also reviewed several depositions of Petitioner's co-workers. Dr. Brown opined that the activity which at Pinckneyville Correctional Center would be a potential work stressor or occupational factor for carpal tunnel syndrome would be forceful pinching due to key turning and wrist torquing or turning to the key turning and the repeated forceful gripping due to pushing and pulling on cell doors (Dp 26). Dr. Brown opined that the activities described in the job site analyses are an aggravating factor for the development of carpal tunnel syndrome (Dp 27-28). In the DVD, in looking at how frequently the key turning is performed, the first 5 minutes the correctional officer is turning a key every 20 seconds (Dp 29). Over the course of the 14 minute DVD, the correctional officer is turning a key approximately every 27 to 30 seconds, which Dr. Brown would consider fairly frequently (Dp 29). Over a prolonged period of time, Dr. Brown would consider the key turning to be an aggravating factor for carpal tunnel syndrome (Dp 30). In the 30 minute long DVD, the correctional officer is seen basically walking around to different sections and talking about duties; this is during a 2nd shift (Dp 30). Dr. Brown reviewed the key usage estimation study done by Lieutenant Thompson and noted that it was pointed out that keying goes way up during a lockdown (Dp 31). In 2010, lockdowns occurred about 25% of the time, about 90 days out of the year (Dp 32). The key usage estimation study estimated that with no combined posts and no lockdown, a correctional officer is keying locks 222 times per shift. Dr. Brown stated it was not clear whether that is just opening the lock or also closing the lock; that is 222 or double that if also locking the locks (Dp 32). Dr. Brown opined that over the course of many years, forceful

pinching and turning of Petitioner's wrists to open a cell door key lock 220 times or more per day would be considered an aggravating factor for carpal tunnel syndrome (Dp 33). Dr. Brown noted that in locksmith Robert Schuchert's deposition, he noted there is a lot of wear on the locks, that the condition of the locks were worsening with time at Pinckneyville Correctional Center and the chuckholes were difficult to open because of wear and being keyed so often (Dp 33). Dr. Brown noted that material gets stuck in the chuckhole and makes the doors and locks more difficult to open (Dp 34). Dr. Brown opined Petitioner's job duties were an aggravating factor in developing carpal tunnel syndrome (Dp 36). Petitioner had no hobbies that he was aware of (Dp 42).

On cross-examination, Dr. Brown recited his March 1, 2010 office notes. Dr. Brown did not know what Petitioner's body mass index was. Dr. Brown testified that obesity is a risk factor for carpal tunnel syndrome and so is being female (Dp 53). Petitioner was 5'8" and weighed 160 pounds and Dr. Brown opined that she would meet the threshold for increased body mass index (Dp 54). Dr. Brown opined that theoretically, smoking could have an effect on median nerve neuropathy and Petitioner is a smoker (Dp 55). Dr. Brown recited from his office notes of August 18, 2010 and January 26, 2011 notes.

20. In his July 18, 2013 deposition, Px22, Dr. Phillips testified he is a board certified neurologist certified in electrical diagnostics, EMG. Dr. Phillips recited from his reports, which are noted above. Dr. Phillips indicated that March 1, 2010 testing showed an underlying sensorimotor peripheral neuropathy, the most common for this particular pattern was hereditary familial neuropathy (Dp 22). There was also potentiation of the neuropathy across the wrists which was insufficient to confidently conclude there was additional median neuropathy, but it was certainly suggestive (Dp 22). Dr. Phillips performed repeat testing on August 18, 2010. Dr. Phillips stated that there was no confirmed familial neuropathy (Dp 23). The repeat test was largely the same as the March 1, 2010 test results (Dp 24).

On cross-examination, Dr. Phillips testified it is fair to say that after his testing on March 1, 2010 and August 18, 2010, he was not able to conclude that Petitioner had a diagnosis of carpal tunnel syndrome (Dp 34). Dr. Phillips did not review the other EMG done by Dr. Alam (Dp 36). The symptomatology associated with a peripheral neuropathy can be the same or similar to those generally associated with carpal tunnel syndrome (Dp 42). Petitioner had no evidence of cubital tunnel syndrome (Dp 42). Dr. Phillips could not conclude as to a diagnosis of Petitioner of carpal tunnel syndrome (Dp 44).

21. Petitioner submitted Dr. Williams Fiscal Report which noted amounts paid to Dr. Williams by Respondent for the fiscal years 2012 and 2013 and this was admitted into evidence as Px24. Medical bills and a Medical Bill Summary were admitted into evidence as Px1.

22. In his June 7, 2012 deposition, Rx8, Dr. Williams testified he is a board certified orthopedic surgeon. Dr. Williams recited from his August 1, 2011 report, which is noted above. Dr. Williams testified he visited Pinckneyville Correctional Center and performed some

correctional officer duties. He used small keys and large Folger Adams keys to open doors, pulled on a cell door, cuffed/uncuffed an officer, closed/opened a chuckhole and lifted a property box (Dp 22). Dr. Williams also viewed passing of ice to inmates through chuckholes and viewed the segregation unit (Dp 22-23). Dr. Williams opined Petitioner's diagnosis was bilateral sensorimotor diffuse polyneuropathy which was demyelinating in nature (Dp 23). Dr. Williams noted that Dr. Phillips found that the median nerve was slowed throughout the upper extremity, not compression of the nerve in just one spot, which is why he said he could not give a definitive diagnosis of carpal tunnel syndrome (Dp 23). Based on his understanding of Petitioner's job, Dr. Williams did not believe her job was aggravating or causative of the condition for which Dr. Brown performed surgery (Dp 24). From the records reviewed, Dr. Williams did not see anything that shows she had any evidence of any compression neuropathies, other than diffuse polyneuropathy (Dp 25). Dr. Williams opined that it was reasonable for Dr. Brown to perform the surgeries (Dp 27). Dr. Williams opined that a carpal tunnel decompression would assist with the symptomatology for her familial peripheral neuropathy (Dp 27). Dr. Williams opined that Petitioner's hobby of gardening could possibly aggravate her symptoms (Dp 28).

On cross-examination, Dr. Williams testified that he did not examine Petitioner. Dr. Williams noted that Petitioner maybe worked overtime and opined it would be important if she worked overtime (Dp 31). Dr. Williams opined that the only contributing factor Petitioner had for the development of carpal tunnel syndrome was she smoked (Dp 32). Prior to reviewing Petitioner's medical records, Dr. Williams felt that the job duties of a correctional officer did not contribute to the development of bilateral carpal tunnel syndrome (Dp 34). Dr. Williams did not have or review the deposition of locksmith Mr. Schuchert (Dp 35). Dr. Williams noted that Dr. Brown opined that the work stressor or occupational factor for carpal tunnel syndrome would be forceful pinching due to key turning and wrist torqueing or turning the key with forceful gripping due to pushing and pulling the cell doors. Dr. Williams opined that it is all dependent on how often, how frequently, how much rest there is between activities; otherwise, Dr. Williams had no disagreement with Dr. Brown's opinion (Dp 37). Dr. Williams was not aware that in the first 5 minutes of the DVD, the correctional officer is turning the key every 20 seconds (Dp 39). Over the entire 14 minute DVD, the correctional officer is turning a key every 27 seconds. Dr. Williams stated that it matters how much rest there is in between key turns (Dp 39, 41). The DVD did not show the segregation unit (Dp 47). Dr. Williams opined that if the condition of locks sticking and chuckholes being able to work and having to be slammed shut exists where the correctional officers have to repeatedly turn keys more than once, the increased force in performing those activities could cause or contribute to the development of bilateral carpal tunnel syndrome (Dp 48). There are 112 inmates per wing, one or two per cell (Dp 49). Correctional officers do have to forcefully pull on the doors to make sure they are secure (Dp 49). Dr. Williams opined that whether that activity causes or contributes to the development of carpal tunnel syndrome and cubital tunnel syndrome depends on how frequently that is done and how much rest in between doing that (Dp 49-50). The doors are heavy steel (Dp 51). Dr. Williams opined that Petitioner's treatment was appropriate (Dp 54).

On re-direct examination, Dr. Williams testified that the questionnaire Petitioner filled out at Dr. Brown's office indicated she worked 37.5 hours per week with no overtime (Dp 55). Dr. Williams noted that the correctional officers were constantly changing duties (Dp 56-57). They were turning keys, but there was significant rest between the cells as they moved from one cell to another (Dp 57). The job description Petitioner provided to Dr. Brown does not indicate she had any difficulty with chuckholes or turning keys in locks or with resisting inmates when they are being cuffed or forcefully pulling doors (Dp 58). While reviewing the job site analyses and DVDs, Dr. Williams saw nothing that would cause or aggravate the condition for which Petitioner treated with Dr. Brown (Dp 58).

Based on the record as a whole, the Commission reverses the Decision of the Arbitrator finding that Petitioner failed to prove she sustained repetitive trauma accidental injuries arising out of and in the course of her employment manifesting on March 1, 2010 and failed to prove that a causal relationship exists and denies Petitioner's claim. In cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. "Although medical testimony as to causation is not necessarily required, where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that claimant's work activities caused the condition complained of." *Nunn v. Illinois Industrial Commission*, 157 Ill.App.3d 470, 510 N.E.2d 502, 506 (1987).

Petitioner's testimony as to the job duties she performed was varied. Petitioner testified that she has held every correctional officer post at Pinckneyville Correctional Center and that the duties differed from post to post. There was no keying involved when she was assigned to the walk or control pod. The only keying required as a wing officer was when the facility was on lockdown. Minimal keying was required when she was assigned to dietary and assigned to Inner Core II. Petitioner did not remember the dates of her work assignments. For example, Petitioner testified that in 2008, 2009 and 2010, she was stationed in the R5 segregation unit of the 3:00 p.m. to 11:00 p.m. shift. However, Petitioner later testified that she only worked in segregation for a year and on cross-examination, she admitted that the year was not served consecutively.

The Commission finds the opinions of Dr. Williams more persuasive than those of Dr. Brown. Dr. Williams' testimony indicates he had an accurate understanding of the various job duties Petitioner performed. Dr. Williams reviewed Petitioner's medical records, the CMS Employee's Notice of Injury, CMS Supervisor's Report of Injury, Demands of the Job, Roster Management Staff Assignments, the job site analysis reports by Ms. Welch, written job description, the correctional officer video and Key Use Estimation Report. Dr. Williams also toured Pinckneyville Correctional Center and performed some correctional officer duties. He used small keys and large Folger Adams keys to open doors, pulled on a cell door, cuffed and uncuffed an officer, closed and opened a chuckhole, lifted a property box, viewed passing of ice to inmates through chuckholes and viewed the segregation unit. Dr. Williams opined that none of the duties performed by Petitioner involved any significant amount of repetitive work and

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there was no vibration or impact to her hands. Dr. Williams opined that there is a lot of rest between key turning and there is a significant amount of recovery time in between cells. Dr. Williams also opined that Petitioner's nerve studies never conclusively proved carpal tunnel syndrome. On the other hand, Dr. Brown focused on the key usage estimation study that a correctional officer is keying locks 222 times per shift. Dr. Brown's causation opinion is based on the assumption that Petitioner keyed that many times over a prolonged period of time, which Petitioner did not testify to. Petitioner held various posts over her employment with Respondent, not all involving keying. All other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove she sustained repetitive trauma accidental injuries arising out of and in the course of her employment manifesting on March 1, 2010 and failed to prove that a causal relationship exists, her claim for compensation and medical expenses is hereby denied.

DATED: APR 2 1 2015
MB/maw
o03/26/15
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Mario Basurto

Stephen J. Mathis

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ZBIGNIEW GARDEREWICZ,

Petitioner,

vs. NO: 12 WC 19544

BEST COURIER AND DELIVERY SERVICES, 15IWCC0279

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, causal connection, prospective medical, and temporary total disability (TTD) and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

The Commission modifies the Decision of the Arbitrator and finds that Petitioner's neck and back condition reached maximum medical improvement (MMI) as of November 5, 2013. The Petitioner is entitled to medical expenses relating to the neck and back through November 5,

2013, and TTD benefits from April 25, 2012 through November 5, 2013. The Commission finds Petitioner failed to establish that the proposed surgeries were reasonable and necessary. All else is affirmed and adopted. The Commission further affirms and adopts the Arbitrator's Decision as it relates to the hip.

The Commission finds little objective evidence in support of Petitioner's subjective complaints, and that the record significantly undermines Petitioner's credibility. The Commission is not bound by the Arbitrator's findings, and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n*, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991). It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n*, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).

Petitioner was found to have exhibited positive Waddell signs during Dr. Morris Soriano's November 5, 2013 examination. Dr. Soriano noted that Petitioner amended his story regarding the injury during this examination. Examination revealed no tenderness or spasms in the neck, shoulder or thoracic spine. He had normal flexion of the low back. The extension was performed to less than 10 degrees and lateral bending to 15 degrees, all due to subjective complaints of lumbar pain. Petitioner could remove and replace his shoes and socks without difficulty. Range of motion of the neck revealed that he could flex, extend, lateral bend and rotate to less than 5 degrees in all directions due to subjective low back pain. Dr. Soriano noted that Petitioner's subjective complaints were disproportional to any objective findings. His complaints were exaggerated and unexplained on the basis of any objective medical findings. Petitioner's low back diagnosis was consistent with symptom exaggeration as he had three positive Waddell findings. Dr. Soriano found Petitioner's current condition was in no way related to the accident. He was at MMI and could return to work. RX.5.

The Commission finds Dr. Soriano's November 5, 2013 opinion credible in light of Petitioner's actions immediately prior to this examination. The Petitioner testified that he could barely sit or stand for long periods of time and would avoid situations requiring him to do so. T.95. Even sitting at the dinner table or watching television required that he adjust himself. Petitioner further testified that he had not been anywhere since the accident. T.96.

However, Petitioner then admitted that he went to Poland for 3 weeks in the middle of September 2013 to October 2013, less than one month prior to Dr. Soriano's November 5, 2013 examination. Despite being unable to barely sit or stand for long periods of time and having to avoid situations requiring him to do so, Petitioner was able to take a three week trip to Poland. He was required to sit in an airplane for 8 to 9 hours, each way. The Commission finds that Petitioner's actions are in direct contradiction to his claimed limitations. Based on the lack of

objective findings during Dr. Soriano's November 5, 2013 examination coupled with Petitioner's lack of credibility, the Commission finds Petitioner reached MMI as of November 5, 2013.

The Commission further adopts Dr. Soriano's opinion that the proposed L4-L5 lumbar decompression and C6-C7 anterior cervical diskectomy and fusion are not reasonable or necessary. Dr. Soriano found an objectively normal lumbar examination with positive Waddell signs. He noted Petitioner's subjective complaints were distinctly disproportionate to any objective findings. Dr. Soriano further noted that all the radiological findings were degenerative in nature, and it was not possible that the cervical or lumbar calcifications and degenerative changes were aggravated by the injury. Therefore, the Commission finds the proposed surgeries are not reasonable or necessary, and not related to his work injury of April 17, 2012.

The Commission finds that Petitioner is entitled to TTD benefits from April 25, 2012 through November 5, 2013, representing 80 weeks of disability. The Petitioner is entitled to medical expenses relating to the neck and back only through November 5, 2013.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 2, 2014, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $726.46 per week for a period of 80 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses relating to the neck and back under §8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

15IWCC0279

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 1 2015

Michael J. Brennan

MJB/tdm
O: 4/7/15
052

Thomas J. Tyrrell

Kevin W. Lamborn

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

GARDEREWICZ, ZBIGNIEW
Employee/Petitioner

Case# **12WC019544**

BEST COURIER AND DELIVERY SERVICES
Employer/Respondent

15IWCC0279

On 9/2/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2234 CHEPOV & SCOTT LLC
MASHA CHEPOV
5440 N CUMBERLAND AVE #150
CHICAGO, IL 60656

2337 INMAN & FITZGIBBONS LTD
KEVIN DEUSCHLE
33 N DEARBORN SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Zbigniew Garderewicz
Employee/Petitioner

v.

Best Courier and Delivery Services
Employer/Respondent

Case # **12** WC **19544c**

Consolidated cases

15IWCC0279

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on July 18, 2014. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0279

FINDINGS

On **April 17, 2012,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned ***$37,774.38***; the average weekly wage was ***$726.43***.

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

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

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

Respondent shall be given a credit of ***$7,610.25*** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of ***$7,610.25.***

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

ORDER

Respondent shall pay Petitioner all reasonable and necessary medical treatment for Petitioner's injuries to his neck, upper and lower back and right shoulder, pursuant to Sections 8(a) and 8.2 of the Act. All treatment related to the Petitioner's left hip is not reasonable or necessary and said bills are not the responsibility of Respondent.

Respondent will be given a credit for any payments made regarding treatment for Petitioner's left hip.

Respondent shall pay Petitioner temporary total disability benefits of $726.43/week for 116 2/7 weeks, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule for prospective medical care, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

15IWCC0279

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical services; 4) temporary total disability; 5) prospective medical care; and 6) chain of referrals. *See,* AX1.

Zbigniew Garderewicz, ("Petitioner") testified that on April 17, 2012, he was 61 years old, married and had two grown sons. He testified that on the date of accident, he was employed as a truck driver for Best Courier and Delivery Services, ("Respondent") performing his regular job duties.

Petition testified that he had a prior worker's compensation claim approximately 20 years ago to his lower back but since made a full recovery. He further testified that he has never suffered any injuries or experienced pain in his neck, right shoulder or arm, left hip, left thigh or leg nor experienced any symptoms of radiculopathy into the upper or lower extremities.

Mr. Garderewicz testified that prior to his work accident he was in good physical health. He testified he was able to perform his regular activities of daily life and all of his work requirements without any difficulties or pain.

Petitioner testified that on March 12, 2012, he underwent a full CDL physical as required by the State of Illinois as well as by Respondent. He testified that the physical tested his range of motion in all extremities, his gait, his ability to squat, bend and lift weighted objects; and that he passed the physical and was able to perform all the tasks without difficulty or pain.

Petitioner testified he first began working as a CDL driver in Poland in 1979. He received his CDL license in the United States in 1993 and began working for various employers in the State of New York as a dump truck driver. Petitioner further testified that he began working for Respondent in 2010 as a truck driver, servicing the tri-state area and that his job duties varied greatly, depending on the type of delivery. Some required longer driving distances, some were "no touch" freight and others required a significant amount of unloading. He explained that many of his deliveries were medical equipment and supplies. H testified that these deliveries required very heavy lifting; many times climbing stairs as setting up the items. The set up would require opening the boxes and assembling the delivered goods. He further testified that the majority of his job duties required moving medical equipment and boxes that weighed between 300-500 pounds and that he would regularly have to push and pull pallets weighting in access of 1,000 pounds, using a hand truck.

Petitioner's Exhibit 22 represents Petitioner's job logs for the year prior to the accident. Petitioner testified at trial that the highlighted portions represent the jobs where he had to unload and set up the equipment. Petitioner testified that he was able to perform all his job requirements during this time without any difficulties.

On April 7, 2012, Petitioner testified he arrived at work at approximately 5:30 a.m. He had one scheduled delivery, to Northwestern Hospital ("Northwestern") in Chicago, Illinois. The job was scheduled to take approximately eight (8) hours. The delivery consisted of unloading and setting up numerous offices for an OB/GYN group of physicians. Petitioner explained that he received the job order the prior evening and went to the warehouse to pick up his load.

Petitioner testified that the warehouse staff loaded the truck, using an electronic forklift. The load consisted of five, regular-sized 4x4 pallets, weighing 150 pounds each; and five oversized 3x5 pallets weighing 350 pounds each. Stacked on the regular pallets were boxes filled with office chairs and tables, shrink wrapped together. Stacked on the oversized pallets were boxed examination tables that weighed approximately 350 pounds each. The job order required Petitioner to unload the pallets, open the boxes, assemble the equipment, deliver it to and set up the office suites.

Petitioner testified that the truck was loaded with the rear row containing two oversized pallets stacked on top of each other, on the right; and next, a regular pallet. The middle row had two oversized pallets also stacked on the left and a regular pallet on the right. The third row contained one oversized pallet on the right, one regular pallet on the left; and the front row had two regular-sized pallets.

Petitioner testified he arrived at Northwestern at approximately 7:00 a.m. and after pulling up at the loading dock, he met with a representative who showed him to the freight elevator and the suites where he was to deliver the equipment. She explained how everything was to be set up. Petitioner testified that he then began to unload the truck. He was using a hand pallet jack to take the pallets out of the truck and load them onto the dock; and a dolly to move the equipment into the office spaces.

He testified that the first pallets he unloaded were three (3) regular-sized pallets in the front of the trailer. Petitioner stated that he used the pallet jack to lift each of the pallets separately and then pushed and pulled the pallet onto the loading dock. Each pallet contained boxes shrink-wrapped together. He unwrapped the pallet, opened each box and assembled the various chairs and tables. This was done on the loading dock, then the equipment was loaded onto the dolly, onto the elevator and into the various rooms.

Petitioner testified he unloaded the first examination table off the oversized pallet the same way as the regular pallets. He testified that after assembling the table, he lifted it onto the dolly and rolled it into the office space. Petitioner then unloaded and delivered the items off the fourth regular-sized pallet.

Petitioner testified he then proceeded to unload the first double stacked oversized pallet, which was over his head, measuring approximately six feet. He stated that he first used the pallet jack to lift the pallets, then pushed and pulled them onto the loading dock. Petitioner stated that he turned the top pallet so that it was perpendicular to the one below; and began to move backwards, slowly sliding the

pallet down. While moving the pallet, it began to slip and Petitioner kept it from falling by lifting his hands and right leg, catching it between his upper body and right leg. Petitioner testified that he lost his balance, twist his neck and upper body to the left and fell to the ground. Petitioner testified that he braced his arms in front of him; fearing the pallet was going to fall on top of him. Petitioner further testified that he fell onto his left side, hurting his right shoulder and his buttocks. He testified that he felt pain, on the left side, from his backside to his ankle and in the two last fingers of his right hand. He further testified that after taking a few moments to calm himself, he stood up and shook off some of the pain he was having, then finished moving the pallet and completed his delivery. Petitioner testified that he was in pain throughout the day, as he continued to unload, push, pull and lift heavy objects.

He testified that the pain became sharper in nature and he began to feel very stiff and sore. Upon returning home that evening, Petitioner told his wife about his day at work, rested and took some over-the-counter medication for his pain.

Petitioner testified that upon waking the next morning, he had increased pain in the lower and upper back, neck, right shoulder; and that he was experiencing tingling in the right hand and pain traveling from the buttock into the left lateral thigh, stopping at the knee. Petitioner testified that he thought that the pain symptoms would get better with time and rest. Petitioner continued to work for the next week, and as detailed in Petitioner's Exhibit 22, his loads consisted of no touch freight.

Initially, the petitioner testified that he did not have pain in the front of his left knee. He then testified that his pain and symptoms continued to increase; and that over the next week, the pain going from his lower back and buttock area, became very sharp and shooting in nature, moving into the left thigh; then into the lower part of the leg, ankle and toe. The pain caused a burning sensation. Petitioner testified that the pain in the upper back and right shoulder and arm also increased in severity and it became difficult to sleep, stand or sit. He further testified that everything was painful with any movements of the left leg, most noticeably when trying to get up from a seated position. Over-the-counter medications did not alleviate the pain.

Petitioner testified that on the morning of April 25, 2012, he came into work and told his supervisor, Mike, about his accident the week prior; and that he was in pain and wanted to see a doctor. Petitioner testified he was directed to go to Occupational Work Clinic at Advocate Condell Medical Center ("Condell").

Petitioner presented to Condell on April 25, 2012, and x-rays were taken of his cervical and lumbar spine and of his chest. The history states the pain in the neck, low back and right shoulder pain from lifting a table. Petitioner's sign-in sheet indicates that the reason for this visit is back pain radiating down the left leg, pain radiating from right shoulder to the right hand and that this was a job-related injury. The cervical x-ray was read to indicate no acute fracture, spondylolysis or spondylolisthesis;

the lumbar x-ray was read to indicate diffuse lumbar spondylolysis most prominent at L4-L5 and L5-S1 levels. Also, five (5) views of the lumbar spine showed degenerative narrowing of the L4-L-5 level and at the L5-S-1 discs space, and spondylosis in the upper lumbar region, with osteophytes. The diagnosis was cervical strain, sciatica and lower back strain; and Petitioner was advised to return to the clinic the following day. Petitioner was also prescribed numbing ointment, Norco, Flexeril, a Medrol dose; and advised to stay off work. PX1 pgs. 14-16; PX1, pgs. 35-40.

On April 26, 2012, Petitioner was examined by Dr. Joshipura, at Condell, who noted a little improvement in the right arm, but continued tingling; and the left leg was still very painful. The diagnosis remained cervical/lumbar strain and sciatica. He advised Petitioner to remain off work, continue pain medications; and to return to Condell on April 30.

Petitioner testified that his pain continued to be so severe that he returned to Condell the following day. On April 27, 2012, Dr. Samuel, examined him and noted the petitioner stated that his shoulder pain had improved but his lumbar back pain was still present; and the medication was not helping. He gave him an injection of Toradol to alleviate his pain. Physical examination of the back was noted to be difficult due to the severity of pain and a straight leg raise was performed and noted to be positive on the left. Petitioner was advised to continue pain medications. He testified that his pain continued to increase and he had extreme difficulty walking. His wife bought him a cane and subsequently, a walker.

Petitioner returned to Condell on April 30, 2012, and was examined by Dr. Joshipura, who noted sharp, stabbing pain in the lower back, currently 10 out of 10. There is no mention of pain located in the hip, shoulder, mid or upper back, neck, hand, wrist, ankle, foot or knee. PX1 pg. 8. He was released from care, by this facility, unable to work and was referred for an emergency neurology consultation the next day, with a physician at American Institute for Spine and Neurosurgery. PX1 pg. 5-17.

Dr. Erickson, at American Institute for Spine and Neurosurgery, examined Petitioner, on May 1, 2012. History of the accident noted that Petitioner was injured at work and while in the process of moving a heavy examination table. That he fell in a twisting motion, hurting his back and left leg, as well as the neck and right arm. Petitioner was noted to be using a cane to ambulate. Physical examination was positive for limping on the left leg, straight leg raises and weakness in dorsiflexion; poor grip strength on the right side, with paresthesias affecting the last two fingers of the right hand. Dr. Erickson ordered MRIs of the cervical and lumbar spine as well as EMGs of the upper and lower extremities. PX2 pg. 7.

The MRIs were performed on May 1, 2012 and the EMG on May 17, 2012. Dr. Erickson reviewed the results at the follow-up appointment of May 17, 2012. Upon review of the cervical MRI, Dr. Erickson noted no abnormalities, spinal stenosis or foraminal narrowing as C2-3, 3-4, 4-5. At C5-6, there is a

posterior disc osteophyte complex, with central protrusion. There is also mild to moderate spinal canal and foraminal stenosis. At C6-7 the MRI was read as finding a posterior disc osteophyte complex, with moderate to severe spinal canal stenosis and foraminal narrowing. His impression was multi-level degenerative disc disease, most pronounced at C6-7.

His review of the lumbar MRI and EMG of the lower extremities noted a diffused disc bulge with superimposed left paracentral extrusion, which extends inferiorly by a few millimeters and obliterates the left subarticular zone, compressing traversing a nerve root. There was also mild to moderate facet arthropathy, ligamentum hypertrophy, spinal canal stenosis and left and right foraminal narrowing. Dr. Erickson opined that there was a direct correlation between the neurophysiologic studies, and the MRIs with Petitioner's intractable pain complaints. Dr. Erickson recommended an anterior cervical diskectomy and fusion at C6-C7, followed by lumbar surgery. The Arbitrator notes Dr. Erickson opined that the recommendation for surgery was a direct result of the work injury. PX2 pg. 1-9.

Petitioner testified that at this time his pain was severe and significantly impairing his ability to do routine activities of daily life. He wanted to move forward with the surgeries as recommended by Dr. Erickson. He waited and remained off work awaiting authorization from the worker's compensation carrier.

On July 31, 2012, Petitioner underwent an Independent Medical Examination ("IME") with Dr. Soriano. Arbitrator notes that the exhibits attached to the deposition transcript of Dr. Soriano and those admitted as Respondent Exhibit 5, are duplicative in nature.

Petitioner testified that Dr. Soriano took a history from him and that the entire examination lasted approximately five minutes. Petitioner stated he was not asked any questions regarding his job duties at the time of accident; or any details as to how his injury occurred. Petitioner further testified that he only told Dr. Soriano that he was injured while moving a large examination table that weighed 350 pounds. Petitioner further testified that he was asked to walk without the cane and that he tried, but was unable to.

Deposition of Dr. Morris M. Soriano, dated March 13, 2014

Dr. Soriano testified that he examined Petitioner on November 15, 2013 and asked the petitioner to walk without the cane, that he was compliant and did not need his cane at the time he was examined. Dr. Soriano's other findings on physical examination, included normal sagittal profile, normal, symmetrical reflexes in the arms, hands, feet and legs, no point tenderness of the trapezius muscles, mid-thoracic spine and low back muscles; lack of decreased range of motion in his neck because of mechanical limitations, not pain. Dr. Soriano testified that he examined Petitioner's pulse in his feet, nail beds and his skin pattern, which were all normal; negative straight leg raises, negative Spurling's, normal strength and non-anatomic decreased sensation; most of which are inconsistent with previous examinations by previous physicians. He further testified that he spent 10 to 15 minutes on

Petitioner's examination and that that was typical for him. Dr. Soriano found petitioner's subjective complaints to be out of proportion with his objective findings. He diagnosed Petitioner as having unverifiable soft tissue injuries, as a result of the work accident, i.e. a sprain/strain; and felt that the petitioner's multi-level, degenerative disc disease was the cause of his pain; and that the cervical and lumbar strains/sprains, caused by the accident, had resolved. He testified that the petitioner did not suffer any serve damage and therefore, did not require any further treatment. Contrary to Petitioner's testimony, Dr. Soriano testified that the petitioner told him how he was injured, i.e. that he was lifting a table that struck the front of his thighs, twisting him to the left and causing him to fall to the floor, injuring his right arm, left hip, lower back, left thigh and calf. Petitioner also complained of numbness in his great toe, on the left and he thought that all of his injuries were work-related.

Dr. Soriano testified that Petitioner could return to work in a full duty capacity, as there were no objective findings on his examination and no correlation between Petitioner's subjective complaints and his MRI findings and EMG results. Dr. Soriano further opined that Petitioner merely suffered a sprain/strain of the cervical and lumbar spine that resolved by the time of his examination. RX5 pgs. 4-9.

Pursuant to the opinions of Dr. Soriano, the surgeries recommended by Dr. Erickson were denied. Shortly following the denial Petitioner sought a second opinion to address his pain and symptoms with Dr. Mark Sokolowski, an orthopedic surgeon.

On October 12, 2012, Petitioner was examined by Dr. Sokolowski. Physical examination of the lumbar spine and lower extremities revealed 1) markedly positive sagittal profile with attempts to restore to neutral sagittal profile, reproducing concordant pain; 2) severe lumbar paraspinal tenderness to palpation bilaterally with radiation to left buttock and left sciatic notch tenderness to palpation. The doctor also found the petitioner to have 3) positive straight leg raises on the left at 30 degrees as well positive right-sided straight leg raises. This doctor also found 4) diminution of strength in left ankle dorsiflexors, EHL, and plantar flexors at a 3-5/5 ; 5) decreased left quadriceps strength and antalgic weakness at a 4/5; 6) decreased sensation in L4-S1 dermatomal distribution; 7) hyporeflexia, which was consistent with a lower motor neuron sign consistent with radiculopathy; and 8) pain with movement of the left hip in isolation. According to Dr. Sokolowski, his examination of the neck, upper back and upper extremities revealed 1) a positive Spurling sign on the right, decreased range of motion of the right shoulder by 90 degrees; 2) significant tenderness to palpation in the front of the shoulder in the anterior glenohumeral. Also, the petitioner was found to have 3) positive Neer and Hawkins impingements signs on right side, consistent with inflammation of the rotator cuff; 4) decreased strength in the right triceps and wrist flexor, which Dr. Sokolowski testified was consistent with C7 radiculopathy; 5) grip strength was diminished to a 4/5 on right, which Dr. Sokolowski testified is consistent with C8 radiculopathy. Petitioner also had 6) decreased sensation in the C8 dermatomal distribution which was checked against a Tinel sign. Dr. Sokolowski testified that the symptoms were originating from the cervical spine. PX4 at 44 & PX21 at 13-16.

Dr. Sokolowski also reviewed the diagnostic films and EMG results. His review of the cervical MRI showed a substantial disk herniation at C6-C7 with resultant severe spinal canal stenosis and bilateral foraminal narrowing and smaller herniation at C5-C6. This reading was consistent with that of the radiologist and Dr. Erickson. Dr. Sokolowski's review of the lumbar MRI was a large left sided disc extrusion with narrow impingement both in the spinal canal centrally and in the lateral recess at L4-L5. Again, this reading was consistent with that of the radiologist and Dr. Erickson.

Dr. Sokolowski performed an injection into the sacroiliac joint. He also referred Petitioner for an epidural injection at L4-L5 and refilled his pain medications. Petitioner was sent for an MRI of the right shoulder and x-ray of the left hip and pelvis. The working diagnosis was lumbar pain, lumbar radiculopathy due to extruded disc herniation on the left at L4-5, cervical pain, cervical radiculopathy at C6-7 due to severe stenosis, gait distribution, left hip pain and right rotator cuff tendinitis. Dr. Sokolowski advised Petitioner to remain off work.

On October 17, 2012, Petitioner completed the diagnostic tests ordered by Dr. Sokolowski. The MRI of the right shoulder was read to show supraspinatus tendinopathy and x-rays of the left hip and pelvis revealed mild degenerative changes and osteoarthritis. PX6

On this same date, Petitioner also underwent a left-sided transforaminal epidural steroid injection at L4-L5 performed by Dr. Bayran. Petitioner testified that the injection provided minimal relief that did not last.

On October 31, 2012, Petitioner again presented to Dr. Sokolowski, complaining of persistent, debilitating pain, trouble sleeping. Dr. Sokolowski reviewed the diagnostic films and agreed with the radiologist's reading. At this visit, Dr. Sokolowski added the diagnosis of left hip osteoarthritis exacerbated by the work injury. The Arbitrator notes that it is Dr. Sokolowski's opinion that the work injury aggravated Petitioner's pre-existing condition of osteoarthritis, and therefore was the cause of his need for further treatment to the hip. Dr. Sokolowski refilled Petitioner's pain medications, referred him to Dr. Benjamin Domb for an orthopedic evaluation of the hip and advised Petitioner to remain off work. PX 1 at 27-29; 39-40.

Deposition of Mark Sokolowski, dated April 10, 2013

Dr. Sokolowski testified at deposition that he believed the left hip required additional work up due to the pain elicited upon examination with internal and external rotation. Dr. Sokolowski further testified that upon his review of all the medical records leading up to his examination in October 2012, no physician had performed an orthopedic examination of the hip. Dr. Sokolowski opined that Petitioner's symptoms in the lower back, buttock region and into the left leg were a combination of both his lumbar radiculopathy caused by herniated disc at L4-L5 and hip pathology. PX21 pg. 20-21.

It is Dr. Sokolowski's opinion that Petitioner's work related injury of April 2012 is casually related to Petitioner's multiple diagnoses and need for ongoing treatment to the cervical and lumbar spine as well as the left hip. Dr. Sokolowski testified that Petitioner's subjective complaints correlated to objective findings on examination as well as objective findings on MRIs and his EMG. PX4 & PX21 pgs. 2-23; 31-38.

Deposition of Dr. Benjamin Domb. dated August 13, 2013

Dr. Domb testified that his specialties are arthroscopy and surgery of the shoulder, hip and knee. Petitioner first saw Dr. Benjamin Domb on November 5, 2012, describing pain in the lower back radiating to the lateral aspect of the thigh, anteriorly; and distally into the thigh and pain in around the hip that radiated into the quadriceps. According to the doctor, Petitioner's physical examination was positive for: 1) left antalgic gait; 2) leg roll and impingement; 3) painful and decreased range of motion in the left hip; 4) tenderness over the front of the hip in the area of the psoas and rectus; 5) pain in the greater trochanter on the piriformis; 6) and ischial tuberosity. Dr. Domb testified that although the petitioner had severe arthritis of the left hip and he suspected, degenerative changes preceded the injury, he stated that the petitioner's painful condition of his hip was caused by his injury of April 17, 2012; and stated that there was no pain prior to the accident. He also stated that the mechanism of injury was having the table fall on his leg and then him falling to the ground onto his left leg; and that it is not unusual for someone not to report an aggravation of a pre-existing, arthritic hip condition for six (6) months after the fact, because of the manner in which hip-spine syndrome affects the body. PX7 at 52-54.

Upon cross-examination, Dr. Domb admitted that his physician's assistant indicated in his records that they had an erroneous account of the accident; which he testified he disagreed with because "it seems that Julie's addendum contains some additional details of how it happened"; and that he did not see that there was any error unless it was an omission of details. He also testified that he did not utilized a Polish interpreter as he had no trouble communicating with the petitioner in English; and that he knew absolutely nothing regarding the height and weight of the table that fell of the petitioner, nothing regarding whether the petitioner was standing or sitting when the table fell. In addition, he testified that in determining causation, the mechanism of accident is less important than when the symptoms first present. PX19, pgs. 8-78.

After examination, Dr. Domb, opined that Petitioner was suffering from pathology in both the lumbar spine and the hip, consistent with the hip-spine syndrome. An injection into the hip was ordered and performed on November 16, 2012. At the November 19, 2012 follow-up, Petitioner advised that his symptoms remained unchanged. Dr. Domb believed surgical intervention was necessary. Both Drs. Domb and Sokolowski testified that after reviewing Petitioner's condition, they decided the best course of treatment would be to address the hip pathology surgically, then the spine condition.

On February 1, 2013, Petitioner underwent robotic hip replacement surgery with Dr. Domb. Following an inpatient stay, Petitioner was released home and underwent at home physical therapy with Accurate Care Home. Petitioner then underwent further rehabilitation for both the left hip as well as his lumbar spine at Accelerated Rehabilitation from March 5, 2013 through April 25, 2013.

Petitioner testified at the time of trial and Dr. Domb testified at deposition that Petitioner made a good recovery following surgery. Dr. Domb released Petitioner to work with permanent restrictions of 20-25 pounds for lifting, pushing pulling and to refrain from activities like jumping, running, bending, squatting and heavy lifting. PX7 & PX19 at 25.

Deposition of Dr. Kevin Walsh, dated January 7, 2014

Petitioner also underwent an IME regarding his hip with, Dr. Walsh. The first examination was on January 17, 2013 and the second on July 15, 2013. At his deposition, Dr. Walsh testified that he agreed with Dr. Domb's diagnosis as well as his treatment of Petitioner's hip, however, he did not believe that the need for surgery was related to the work injury and was merely a pre-existing arthritic hip condition. Dr. Walsh testified that in his opinion, the lack of treatment of the hip prior to Dr. Sokolowski as well as the specific lack of complaints of pain in the hip, suggest that the was not caused by the alleged accident. Dr. Walsh testified further that Petitioner's complaints of pain and symptoms in the anterior and lateral portions of the thigh and in the buttocks are consistent with symptoms of osteoarthritis of the hip.

Petitioner testified at hearing that he is eager to proceed with surgery and return to work and his daily life, without pain. He testified that authorization for the surgeries was requested but denied. During this time, Petitioner has continued treating with his treating physicians, taking significant amounts of narcotic pain medication to alleviate his pain and symptoms and doing home exercises for his neck, lower back and left hip.

Petitioner testified at hearing that his pain has remained persistently severe since April 2012. It has affected his quality of life and ability to perform even minuscule tasks of daily life. Petitioner testified that while his hip feels better, he still experiences severe pain in this lower back going into the buttocks and left leg to the ankle and toes as well as pain in the neck and upper back, which radiates into the right shoulder and arm, causing numbness in his fingers. Petitioner testified he is in constant pain, cannot stand, sit, walk or sleep without pain. Petitioner testified he wants to undergo surgery in order to return to his normal life without pain.

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CONCLUSIONS OF LAW

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

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

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).
It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

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

Under the provisions of the Illinois Workers' Compensation Act, the Petitioner has the burden of proving by a preponderance of credible evidence that the accidental injury both arose out of and occurred in the course of employment. *Horath v. Industrial Commission,* 96 111. 2d 349, 449 N.E. 2d 1345 (1983). An injury "arises out of the Petitioner's employment if its origin is in the risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *Warren v. Industrial Commission,* 61 111. 2d 373, 335 N.E. 2d 488 (1975). *Hannibal, Inc. v. Industrial Commission,* 38 111. 2d 473, 231 N.E. 2d 409, 410 (1967). It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *Marathon Oil Co. v. Industrial Comm'n, 203 III. App. 3d 809, 815-16* (1990). In addition, it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *Steve Foley Cadillac v. Industrial Comm'n,* 283 111. App. 3d 607,610 (1998).

The Arbitrator finds that Petitioner has proven, by a preponderance of the evidence, that he sustained an accident arising out of and in the course of his employment, that caused pain and symptoms in his right shoulder, neck, upper and lower back and in the two last fingers of his right hand. However, the Arbitrator does not find that the petitioner has proven, by a preponderance of the evidence that the symptoms in his left hip arose out of and in the course of his employment by Respondent. On this issue, the Arbitrator finds the opinions of Drs. Soriano and Walsh to be more persuasive than those of Dr. Domb and Sokolowski. The Arbitrator finds the surgery recommended by Dr. Erickson, to be reasonable and necessary however, the Arbitrator finds that the hip surgery performed by Dr. Domb and recommended by Dr. Sokolowski not causally related the accident of April 17, 2012.

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

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n,* 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n,* 283 Ill. App. 3d 607, 610 (1998).

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.,* 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.,* 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection

can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See, Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 356 N.E.2d 28 (1976). Furthermore, a causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. *See, Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 193 (1986).

The petitioner bears the burden of establishing, by a preponderance of credible evidence, all elements of his claim. Specifically, the Petitioner must establish that his current condition of ill-being is causally related to the work injury and not the result of the normal degenerative aging process. *Peoria County Bellwood Nursing Home v. Industrial Commission,* 115 Ill.2d 524 (1987). The requirement that the petitioner prove by a preponderance of evidence, all elements of his claim, means that he must present evidence which is more credible and convincing to the mind and when viewed as a whole, establishes the facts sought to be proved as more probable than not. *In Re: K.O.,* 336 Ill,App.3d 98 (2002).

The Arbitrator finds credible the opinions of Dr. Erickson, Dr. Sokolowski and Dr. Domb as detailed in their medical records and further testified to in their respective depositions that Petitioner's injuries to the lower back, neck, right shoulder are causally related to the work injury. The Arbitrator finds Dr. Soriano's testimony regarding positive Waddell signs and Dr. Walsh's testimony to be persuasive regarding the petitioner's hip condition. Therefore, the Arbitrator finds that the petitioner has established, by a preponderance of the evidence, that his current condition of ill-being regarding his cervical and lumbar conditions are related to the subject accident however, the left hip which was surgically repaired by Dr. Domb, is not causally related to the work injury of April 17, 2012.

J. Were the medical services provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Having determined that Petitioner's current condition of ill-being regarding his neck, upper and lower back and right shoulder are casually related to the work accident, the Arbitrator finds all of the treatment provided and bills submitted for these conditions were reasonable and necessary for the treatment of Petitioner's work-related injuries; and shall be paid by Respondent pursuant to Sections 8(a) and 8.2 of the Act. All treatment related to the petitioner's left hip is not reasonable and necessary and said bills are not the responsibility of Respondent. Respondent will be given a credit for any payments made regarding treatment for Petitioner's left hip.

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K. Is Petitioner entitled to any prospective medical care?

Based on Petitioner's ongoing subjective complaints, objective findings on exam, EMG and MRI results, Drs. Erickson and Sokolowski have recommended that Petitioner undergo an L4-L5 lumbar decompression and C6-C7 anterior cervical decompression and fusion. Petitioner testified at arbitration that he wishes to undergo this surgery to alleviate his pain and symptoms and to be able to return to his daily routines of life.

The Arbitrator, having found Petitioner's current condition of ill-being regarding the lumbar spine, lumbar radiculopathy, cervical pain and cervical radiculopathy to be casually related to his accidental injury of April 17, 2012, orders Respondent to authorize treatment and surgery, as recommended by Dr. Sokolowski as well as rehabilitative treatment necessitated by the recommended surgeries.

L. What temporary benefits are in dispute?

Petitioner claims he was temporarily, totally disabled from April 25, 2012 to the date of hearing, a total of 116 2/7 weeks. The Arbitrator finds that Petitioner was temporarily, totally disabled for conditions with his neck, shoulder, upper and lower back from April 25, 2012 until the date of hearing, i.e. July 18, 2014, 116 2/7 weeks.

O. Did Petitioner go outside the chain of referrals?

Arbitrator notes that Petitioner first sought medical treatment as directed by Respondent at Advocate Condell Medical Center. From there, Petitioner was referred to Dr. Erickson. Petitioner then used his choice of medical providers to see Dr. Sokolowski. Dr. Sokolowski referred Petitioner to Dr. Domb. The Arbitrator finds that Petitioner's treatment did not go outside the chain of referrals as outlined in the Act.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
12 WC 19544
SIGNATURE PAGE

Signature of Arbitrator

August 27, 2014
Date of Decision

SEP 2 - 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVEN SHORT,

Petitioner,

vs. NO: 13 WC 17213

SHAWN STAHLEY d/b/a
CHRISTIAN HOME IMPROVEMENTS and
STATE OF ILLINOIS
INJURED WORKERS' BENEFIT FUND,

15IWCC0280

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of employment relationship, accident, medical, causal connection, and wages and being advised of the facts and applicable law, reverses the Decision of the Arbitrator.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties. The Commission finds that Steven Short failed to establish an employment relationship with Shawn Stahley d/b/a Christian Home Improvements as required under the Illinois Workers' Compensation Act. Petitioner's claim for compensation is therefore denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. On April 9, 2012, Mr. Short was using lacquer thinner to clean a basement floor when it ignited and set him on fire. T.22. The Petitioner has 28 years of experience as a painter. He began working for Shawn Stahley in 2011 and has performed 5 jobs in total for Mr. Stahley. Petitioner was hired on this job to clean the floors, finish the drywall, and paint. T.14. Petitioner did not sign any written agreements and did not bid for the job. T.13. Petitioner did not have anything to do with the contract between Mr. Stahley and the homeowner, Janet Haarlow. *Id.* Mr. Stahley testified that Petitioner held himself out as a contractor. T.90.

2. Mr. Short testified that Mr. Stahley paid him $13.00 per hour. He could request to be paid every day. T.14. Petitioner set his own wages and was paid by check. Mr. Stahley testified that he did occasionally provide Petitioner with money for gas; however, this was deducted from the balance owed. T.110. Mr. Stahley testified that he provided Petitioner with a W9 and did not withhold taxes, Medicare, or Social Security. T.91.

3. According to Petitioner's W9 dated March 28, 2012, Mr. Short indicated that he was an individual/sole proprietor. RX.2. He signed the W-9 indicating that Mr. Stahley would not be withholding Medicare, Social Security or income tax from his check. T.55. He never received a W-2 from Mr. Stahley and represented to the IRS that he was an independent contractor. T.55. On cross-examination, Petitioner stated that he holds himself out as an independent contractor available for hire. T.50.

4. Mr. Stahley would tell Petitioner what days to work and what time to be at the project. T.76. Petitioner had to ask for a day off. Mr. Stahley would be at the job site in the morning and then leave and come back in the afternoon to check the work. T.19. Mr. Short testified that Mr. Stahley had rules that were to be followed. Mr. Stahley testified that the workers were not allowed to smoke, cuss, or talk to customers. T.113. Mr. Stahley could remove Petitioner from the job if he did not like the performance. T.18.

5. Mr. Stahley would advise Mr. Short of the work that needed to be done and Petitioner would take it from there. Mr. Stahley did not tell the Petitioner how to do his job and he did not control his work. T.93. Mr. Stahley contracted with a temporary agency to perform the demolition work. T.97.

6. Mr. Stahley testified Petitioner was free to go to other jobs and he did not set a schedule for the Petitioner. T.105. He only told Petitioner that the job had to be done within the timeframe set by the customer. T.101. Mr. Stahley testified that Petitioner told him he was going to bid on a job at Midas Muffler. This occurred while working at Ms. Haarlow's project. T.103.

7. Petitioner testified that Mr. Stahley provided scrapers, mops, a mob bucket, razors, brooms, rags, paint, and lacquer. T.17. Petitioner testified that he did not provide any of

the tools, but owns his own painting equipment and scrapers. *Id.* On cross-examination, however, Mr. Short testified that he was using his own scraper on the job. T.66.

8. Mr. Stahley testified that Petitioner used his own supplies including scrapers, paint rollers, paint roller heads, paint poles, and a step ladder. T.106. Mr. Stahley stated that Petitioner also used his own tools on prior jobs. T.95. Mr. Stahley only supplied the lacquer and epoxy. T.107.

9. Petitioner testified that both he and Mr. Stahley chose the lacquer. Mr. Stahley originally chose a citrus lacquer, but Petitioner then recommended a specific lacquer as it was faster. T.61. Mr. Stahley stated that he agreed to use the lacquer based on Petitioner's professional opinion. T.99. He did not supervisor the Petitioner while Petitioner was using the lacquer or instruct him on how to use the lacquer. T.65, T.100.

10. Janet Haarlow testified that she discussed with Mr. Stahley the basement project and told him what she wanted done. T.148. She stated that Mr. Stahley did not supervise the Petitioner's work. T.156. Petitioner indicated to her that it was his own idea to use the lacquer. T.161. She never saw Mr. Stahley tell Petitioner how to apply the lacquer. T.165. She stated that Mr. Stahley was not present when the fire ignited. T.168. Petitioner never mentioned that he was an employee of Mr. Stahley. *Id.*

11. Petitioner filed a Complaint at Law in the Circuit Court of Tazewell County on October 19, 2012. In paragraph 3, Petitioner indicated that he was an independent contractor and was treated as an independent contractor by Christian Home Improvements. RX.4. On cross-examination, Petitioner testified that he filed a personal action claim against Mr. Stahley and represented himself as an independent contractor. T.70. The case was dismissed. *Id.*

12. According to the Memorial Medical Center record dated April 30, 2012, Petitioner had one small burn area around both ankles that was open and crusted. PX.6.

13. Petitioner testified that his leg still hurts and stings at times. He cannot let the sun get on the burn. T.30. He had third degree burns near the ankles, second degree burns in the mid calf, and first degree at his knee. He has some discoloration. The scars at his ankles are more discolored than the scars on his calf. T.47. He has no raised scars. T.48. His feet are covered 99 percent of the time. *Id.* He has no loss of range of motion. *Id.* Petitioner has $13,012.39 in outstanding medical bills. T.33.

An employment relationship is a prerequisite for an award of benefits under the Act, *Roberson v. Industrial Comm'n,* 225 Ill. 2d 159, 174, 866 N.E.2d 191, 310 Ill. Dec. 380 (2007) quoting *O'Brien v. Industrial Comm'n,* 48 Ill. 2d 304, 307, 269 N.E.2d 471 (1971). In assessing whether an individual is an employee, Illinois courts have articulated a number of factors, including the right to control the manner in which the work is done, the nature of the work

performed by the alleged employee in relation to the general business of the employer, the method of compensation, the right to discharge, and the label the parties place upon their relationship. *Roberson,* 225 Ill. 2d at 175; *Ware v. Industrial Comm'n,* 318 Ill. App. 3d 1117, 1122, 743 N.E.2d 579, 252 Ill. Dec. 711 (2000); *Area Transportation Co. v. Industrial Comm'n,* 123 Ill. App. 3d 1096, 1100, 465 N.E.2d 533, 80 Ill. Dec. 421 (1984). Also relevant is whether the purported employer dictates the worker's schedule, whether income and social security taxes are withheld from the worker's paycheck, and whether the purported employer supplies the worker with materials and equipment. *Roberson,* 225 Ill. 2d at 175; *Ware,* 318 Ill. App. 3d at 1122; *Area Transportation Co.,* 123 Ill. App. 3d at 1100. While no single factor is determinative and the significance of the factors will change depending on the work involved, the right to control and the nature of the work performed by the alleged employee in relation to the general business of the employer are often regarded as the two most important factors. *Roberson,* 225 Ill. 2d at 175; *Ware,* 318 Ill. App. 3d at 1122.

Regarding the nature of the work performed, the Supreme Court has noted that "because the theory of workmen's compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Ware,* 318 Ill. App. 3d at 1124, quoting *Ragler Motor Sales v. Industrial Comm'n,* 93 Ill. 2d 66, 71, 442 N.E.2d 903, 66 Ill. Dec. 342 (1982).

The question whether an employer-employee relationship existed at the time of an accident is one of fact. *Ware,* 318 Ill. App. 3d at 1122. Where elements of both an employer-employee relationship and independent contractor status are present, the Commission is empowered to draw the inferences either way. *Area Transportation Co.,* 123 Ill. App. 3d at 1099.

The totality of the evidence supports that Mr. Short was an independent contractor. While the Petitioner was paid by the hour, the Respondent did not withhold taxes, Medicare, or Social Security. The Petitioner filed a W9 with the IRS indicating he was a sole proprietor.

There is little evidence that the Respondent exercised any control over Petitioner's work. The facts establish that Petitioner worked independently at the job site with no supervision or control from the Respondent. While the Respondent informed the Petitioner of the scope of the project and checked in on the project from time-to-time, there is no evidence that Mr. Stahley dictated how the work was to be performed, when the Petitioner was to take his breaks, or when he was to leave for the day. Petitioner was also free to work on other projects. Further, Ms. Haarlow testified that Mr. Stahley did not supervise the Petitioner's work or instruct him on how to use the lacquer. No evidence was offered to rebut her testimony. The Petitioner was also using his own scraper at the time of the injury.

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The evidence further establishes that the nature of Respondent's work was not in the area of painting and flooring, which was the reason why Respondent subcontracted that portion of the work to Mr. Short. This is established by the fact that Respondent had originally selected a lacquer and then deferred to Petitioner's recommendation to use a specific lacquer. Petitioner made the recommendation based on his experience and knowledge of the product. Ms. Haarlow's testimony confirms that the change in product was at the Petitioner's request.

The Commission also takes note that the Petitioner filed a personal injury complaint stating that he was an independent contractor. He also testified that he represents himself as an independent contractor available for hire.

The only factors that favor an employee/employer relationship are that Respondent could terminate the Petitioner and set the parameters and guidelines of the job. The Commission, however, finds that those factors are outweighed by the factors favoring an independent contractor status.

The Commission finds that Petitioner failed to establish an employee-employer relationship. Petitioner's claim for compensation is therefore denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 28, 2014, is hereby reversed for the reasons stated above.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 1 2015

Michael J. Brennan

Kevin W. Lamborn

MJB/tdm
O: 03-11-15
052

DISSENT

I vehemently disagree with the majority and believe Petitioner proved an employment relationship existed with Respondent. I would affirm the well reasoned decision of the Arbitrator and award the benefits as set forth in the Arbitrator's Decision.

The determination of an employment relationship is fact specific. The courts have listed various factors to help determine whether an employment relationship existed. "No single factor is determinative, and the significance of these factors will change depending on the work involved. The determination rests on the totality of the circumstances." Roberson v. Indus. Comm'n (P.I. & I. Motor Express, Inc.), 225 Ill. 2d 159, 175, 310 Ill. Dec. 380, 389, 866 N.E.2d 191, 200 (2007). The courts have held the single most important factor is "whether the purported employer has a right to control the actions of the employee." Ware v. Indus. Comm'n, 318 Ill. App. 3d 1117, 1122, 252 Ill. Dec. 711, 715, 743 N.E.2d 579, 583 (2000). Other factors are "whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment. Additionally, we have also considered whether the employer's general business encompasses the person's work." Roberson, 225 Ill. 2d at 175, 310 Ill. Dec. at 389, 866 N.E.2d at 200.

In this case, Respondent had the right to control Petitioner's actions. Respondent instructed Petitioner regarding specific rules that had to be followed – no smoking on the job site, no cussing and no talking to the owner of the residence while working. Petitioner testified that Respondent came to the job site every day, instruct Petitioner on what needed to be performed and inspect Petitioner's work at the end of each day.

As the Arbitrator noted, one event specifically shows that Respondent had control over how Petitioner performed the work. Petitioner approached the homeowner to discuss his plans on which lacquer to use to remove the mastic from the basement floor. He demonstrated the lacquer that he wanted to use. Instead of simply approve it, the homeowner instructed Petitioner to check with Respondent before proceeding. If Petitioner was truly an independent contractor, he would not have needed to seek such permission from Respondent and would have proceeded as he saw fit. Additionally, Respondent and the homeowner entered into a contract as to how the work on the homeowner's home should be performed. The specs were produced by Respondent and the homeowner, Petitioner was not involved in the contract in any way. Respondent would then come to work site to dictate to Petitioner what work needed to be performed each day. The Court has stated "Although the test focuses upon the right to control, the actual exercise of control is strong evidence of the employer's right to control. When actual control has been shown, only clear evidence that the employer exceeded its authority will overcome the inference that the right to control existed." Ware, 318 Ill. App. 3d at 1123, 252 Ill. Dec. at 715, 743 N.E.2d at 583.

Respondent clearly had the right to control the actions of Petitioner, which is the single most important factor in determining an employment relationship.

Other factors also favor finding an employment relationship. Respondent always paid Petitioner by the hour and supplied Petitioner with almost all of the equipment and materials necessary to complete the job duties. Respondent had the right to fire Petitioner and Petitioner had to ask Respondent permission to miss work.

While Petitioner referred to himself as an independent contractor in a civil law school, the courts have held the label the parties place on the relationship is a factor of lesser weight. Ware, 318 Ill. App. 3d at 1122, 252 Ill. Dec. at 715, 743 N.E.2d at 583. At other times Petitioner referred to himself as an employee of Respondent. Petitioner's claim cannot fail based on the fact that he occasionally referred to himself as an independent contractor.

Some of the factors weigh in favor of finding Petitioner was independent contractor. Those are that Respondent failed to withhold taxes from Petitioner's paychecks, and that the job duties Petitioner performed were outside of the scope of Respondent's general business. However, I do not find those factors enough to find that Petitioner was actually an independent contractor.

Based on the evidence presented as a whole, I would affirm and adopt the decision of the Arbitrator. As discussed above, Petitioner was clearly an employee of Respondent. He suffered a serious work injury and his condition of ill being is obviously causally connected to his work accident. Petitioner should be compensated as such.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHORT, STEVEN E
Employee/Petitioner

Case# **13WC017213**

15IWCC0280

SHAWN STALEY D/B/A CHRISTIAN HOME IMPROVEMENTS AND ST OF IL INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 5/28/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0080 PRUSAK WINNE & McKINLEY LTD
JOSEPH E WINNE
403 N E JEFFERSON ST
PEORIA, IL 61603

0358 QUINN JOHNSTON HENDERSON ET AL
CHRIS CRAWFORD
227 N E JEFFERSON ST
PEORIA, IL 61602

5260 ASSISTANT ATTORNEY GENERAL
SIMEON NOCKOV
500 S SECOND ST
SPRINGFIELD, IL 62706

STATE OF ILLINOIS)
)SS.
COUNTY OF **Peoria**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Steven E. Short
Employee/Petitioner

v.

Shawn Staley d/b/a Christian Home Improvements and State of Illinois Injured Workers' Benefit Fund
Employer/Respondent

Case # **13** WC **17213**

Consolidated cases: _____

15IWCC0280

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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Peoria**, on **4/17/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/9/12**, Respondent, Shawn Staley d/b/a Christian Home Improvements, ***was*** operating under and subject to the provisions of the Act.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

ORDER

On **4/9/12**, 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 **$27,040.00**; the average weekly wage was **$520.00**.

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

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

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

The Respondent shall pay the Petitioner temporary total disability benefits of $346.67 for the period of 3 weeks, as the Petitioner was disabled from work from 4/10/12 through 4/30/2012.

The Respondent shall pay the further sum of $13,012.39 for necessary medical services, as provided in Section 8(a) and 8.2 of the Act, which are currently unpaid and related to this injury.

The Respondent shall pay the Petitioner the sum of $312.00 per week for a further period of 15 weeks, as provided in Section 8 (c) of the Act, because the injuries sustained caused serious and permanent disfigurement to the Petitioner's lower extremities.

The Illinois State Treasurer, as ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of the Act in the event of the failure of the Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of the Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

D. Dylan McCarthy
Signature of Arbitrator

May 22, 2014
Date

MAY 28 2014

Steven E. Short v. Shawn Staley d/b/a Christian Home Improvements and State of Illinois Injured Workers' Benefit Fund 13 WC 17213

In support of the Arbitrator's findings relating to (B), the Arbitrator finds the following facts:

Petitioner testified on Arbitration that prior to 4/9/12 he had worked for the Respondent on different jobs. Within a week prior to 4/9/12 he was contacted by the Respondent to work on a residence located at 212 Sycamore Ave., Morton, IL 61550. The Petitioner testified the terms of employment were essentially the same as his previous four jobs he had worked for the Respondent; that is, he was to be paid $13.00 per hour for his work activities.

Petitioner testified as of 4/9/12 he had been working on this job in the basement of the residence for three days. This testimony was consistent with the testimony from the Respondent.

Petitioner testified that on this job the Respondent supplied scrapers, 4-inch razor knives, a broom, a mop, a mop bucket, a dumpster, rags, lacquer, and paint. Petitioner testified all he supplied was one scraper.

Petitioner further testified he was removing a substance from the basement floor at the time of the accident.

Petitioner testified it was his understanding the Respondent had the right to hire and fire him. Petitioner further testified the Respondent told him how to do each job.

Petitioner testified that although he did receive a Form 1099 at the end of the tax year, the Respondent would pay him a check at the end of the work day any time he needed additional money.

Petitioner testified his job was that of a painter, but he was also required to perform miscellaneous jobs.

Petitioner testified Respondent came to the job site every day and instructed him as to what to do on the job that day, and sometimes came during the middle of the day to check on his activities.

Petitioner testified Respondent had certain rules that had to be followed. The Respondent instructed the Petitioner not to smoke on the job, not to cuss, and not to talk to the owner of the residence while working there. Petitioner testified Respondent would come to the job site at the end of the day, and if Petitioner was in need of money at that time, Respondent would write him a check. Respondent admitted that he set the above referenced work rules. Though there was testimony from the homeowner that the Petitioner did not always abide by the work rules, the fact that they were set by the Respondent is significant.

Petitioner testified he never bid a job that the Respondent was operating, and he never signed any papers with the Respondent to create an independent contractor relationship.

Respondent, Shawn Staley, testified the Petitioner was not his employee. He further testified Petitioner was given a Form 1099 at the end of the year. However, the Respondent admitted there was no written contractual relationship signed by the parties creating an independent contractor relationship between them.

Respondent further stated if he was unhappy with the work the Petitioner was doing, he could terminate the Petitioner from the job.

Respondent also admitted there was no written documentation showing the Petitioner had bid this job before starting to work on it. Further, Respondent admitted he paid the Petitioner $13.00 per hour for his work on this job, just as he had for the previous four jobs on which the Petitioner worked for him.

Janet Haarlow testified on behalf of the Respondent. She testified she was the owner of the residence in question, located at 212 Sycamore Ave., Morton, IL.

Respondent's Exhibit B on Arbitration is a copy of the Complaint at Law filed on behalf of the Petitioner by his attorney in this matter, and was subsequently dismissed prior to the filing of the Application for Adjustment of Claim. Attached to this Exhibit is a Contract Proposal dated 3/10/12, and entered into between Janet L. Haarlow and the Respondent.

Respondent admitted this contract was entered into between the homeowner and him for a number of weeks prior to the date of the accident, and also prior to the time the Petitioner was hired to work on this jobsite.

Although the Respondent testified he had nothing to do whatsoever with the decision as to what products to use to strip the floor in the homeowner's residence, the Contract Proposal clearly sets out the floor was to be acid stripped and cleaned with the application of two coats of Ex-epoxy. Further, it shows the drywall was to be installed with three coats of finish and two coats of primer. This contract goes into specifics as to the materials to be used on the job and the costs of the purchase of such material. Both Respondent and homeowner admitted the Petitioner had no involvement in the preparation of this contract between the Respondent and homeowner.

In addition, Ms. Haarlow testified in great detail concerning the circumstances leading up to the fire. She said that the Petitioner approached her with plans on which lacquer to use to remove the mastic from the basement floor. He even provided a demonstration as to its effectiveness. Rather than just allow the Petitioner to proceed as he wished, she told him he would have to check with Mr. Staley, the Respondent. This indicates to the Arbitrator that the homeowner believed that Mr. Staley, not Mr. Short controlled how the project was to be done.

Although the homeowner testified the Petitioner did talk to her while working on the job and also smoked in her basement while working at that location, she testified the Petitioner was on the jobsite for two weeks prior to the date of the accident. This testimony was contradicted by both Petitioner and Respondent, in that they both indicated the Petitioner was injured during his third day on the job.

Both the Commission and the Courts have explained many times the factors to consider when determining whether one is an employee or independent contractor. Of the factors, the right to control the manner of work performed is the most important factor. Bauer v. The Industrial Commission, 51 Ill. 2d. 169 (1972)

The evidence in this case shows the Respondent had the right to control the manner of work performed and exercised that right in several ways. The testimony of the homeowner, referenced above, concerning which lacquer to use is significant. If the Petitioner was acting independently, he would have just gone ahead with his choice of lacquer instead of seeking permission. If the Respondent had no control, then Ms. Haarlow would not have told the Petitioner to get his permission before using the product. Secondly, the contract contained specifications as to how the work on Haarlow's home was to be performed, and those specs were produced by the Respondent and the homeowner. Additionally, the evidence shows that every day the Respondent told the Petitioner what needed to be done, and placed rules on his conduct while working.

Other factors favor an employment relationship. Petitioner was and always had been paid by the hour. Respondent supplied almost all of the equipment and all of the materials. Respondent had the right to fire, and the Petitioner had to ask the Respondent's permission to miss work.

Factors which favor a contractor relationship include the fact that the Petitioner referred to himself as such in a civil lawsuit. However, it is likely that was done at his lawyer's request, and when he first sought care in the

emergency room after the accident, he referred to himself as the Respondent's employee. ((PX 5) Petitioner did have his own painting business and no withholdings were taken from his pay.

The Arbitrator has weighed all of the relevant factors and concludes that an employment relationship existed between the Petitioner and Respondent Mr. Staley.

In support of the Arbitrator's findings relating to (C), the Arbitrator finds the following facts:

The Arbitrator incorporates his findings relating to (B) in support of his decision relating to (C) accident and (E) notice, in addition to the following:

Petitioner testified on Arbitration that on 4/9/12 he was working at a homeowner's residence in Morton, IL. On that date, he was using lacquer thinner to remove tar from the basement floor. While engaging in this activity, flames started surrounding him and his clothing caught on fire. He immediately ran out of the basement and to the upstairs of the residence. At that point he told the homeowner about the fire and the homeowner called 911. The Petitioner was subsequently taken by ambulance to OSF St. Francis Medical Center in Peoria, IL.

Respondent admitted the Petitioner was working in the basement of the homeowner's residence at the request of the Respondent, performing the removal of the tar from the basement floor. The Respondent further admitted he was aware a fire had started in the basement while the Petitioner was engaged in this activity; and, in fact, the Respondent picked the Petitioner up from the Springfield Burn Center, where the Petitioner was hospitalized for four days in intensive care, and returned him to his residence in Peoria, IL.

The Respondent did not provide any testimony to refute the accident of the Petitioner while at work in removing tar from the basement floor of the homeowner's residence. Therefore, the Arbitrator finds the greater weight of the evidence establishes an accident did occur that arose out of and in the course of Petitioner's employment with Respondent, Shawn Staley d/b/a Christian Home Improvements and further that the Respondent had notice of the occurrence within the time required by the statute.

In support of the Arbitrator's findings relating to (F), the Arbitrator finds the following facts:

The Arbitrator incorporates his findings relating to (B), (C), and (E) in support of his decision relating to (F), in addition to the following:

Petitioner testified on Arbitration that on 4/9/12, while at work, he suffered burns to his legs from a fire that was ignited while he was engaging in the removal of tar from the floor of the basement of a residence.

Petitioner testified that since his work injury on 4/9/12, he was disabled from work by the Springfield Burn Center for a period of three months.

Petitioner testified as a result of his 4/9/12 injury, he traveled to the OSF St. Francis Medical Center Emergency Room on two or three occasions, and was subsequently taken by ambulance to the Springfield Burn Center. He remained at the Burn Center for four days in intensive care, during which time he received treatment and skin removal for the burns to both legs.

Petitioner testified he continues to have some numbness, pain, and tingling in his legs, especially if he is in the sunlight for any period of time.

Respondent did not provide any evidence refuting the present condition of both the Petitioner's legs, or that the condition of the legs was caused by something other than his burns at work while working for the Respondent on 4/9/12.

Therefore, the Arbitrator finds the Petitioner's current condition of ill-being to both his legs is causally related to his 4/9/12 injury at work.

In support of the Arbitrator's findings relating to (G), the Arbitrator finds the following facts:

The Arbitrator incorporates his findings relating to (B), (C), (E), and (F) in support of his decision relating to (G), in addition to the following:

Petitioner testified on Arbitration that prior to 4/9/12, he was hired by the Respondent to work at a residence removing tar from a basement floor. The payment arrangement was that the Petitioner was to be paid $13.00 per hour. The testimony of the Respondent was consistent with that of the Petitioner with regard to the rate of pay. Further, the Petitioner testified that based upon his conversation with the Respondent, the Petitioner was of the understanding he was being hired on a full-time basis, indefinitely, at $13.00 per hour.

The Respondent, Shawn Staley, offered no evidence to refute the testimony of the Petitioner regarding his earnings as of 4/9/14 and for one year prior thereto.

The Stipulation Sheet signed by the parties reflects the earnings for the year preceding the injury were $27,040.00, giving the Petitioner an average weekly wage of $520.00. The Stipulation Sheet reflects the Respondent disputes this contention. However, Respondent offered no evidence as for the basis of the dispute.

Therefore, the Arbitrator finds that in the year preceding the injury, the Petitioner earned $27,040.00 and his average weekly wage was $520.00.

In support of the Arbitrator's findings relating to (J), the Arbitrator finds the following facts:

The Arbitrator incorporates his findings relating to (B), (C), (E), (F) and (G) in support of his decision relating to (J), in addition to the following:

Petitioner offered into evidence as Petitioner's Group Exhibit No. 2 on Arbitration the Medical Bill Summary setting out the medical bills incurred by the Petitioner as a result of his work accident herein. These medical bills total $14,493.70, of which $13,012.39 remain unpaid. Respondent offered no testimony to refute this evidence. Due to the fact the Arbitrator finds the Petitioner was an employee of Shawn Staley d/b/a Christian Home Improvement at the time of his work injury; the Petitioner suffered a work-related accident arising out of and in the course of his employment with the Respondent; that proper notice of the accident was given by the Petitioner to the Respondent; and further that there is a causal relationship between Petitioner's work activities for the Respondent and his current condition of ill-being, the Arbitrator finds the Respondent, Shawn Staley d/b/a Christian Home Improvement, is responsible for the payment of all Petitioner's medical bills incurred to date that remain outstanding to the extent allowed by the Fee Schedule, Section 8.2 of the Act.

In support of the Arbitrator's findings relating to (K), the Arbitrator finds the following facts:

The Arbitrator incorporates his findings relating to (B), (C), (E), (F), (G), and (J) in support of his decision relating to (K), in addition to the following:

Petitioner's Group Exhibit No. 4 on Arbitration contains the records from Morton Fire Department, which reflect the Petitioner was to be transported from the scene of the accident in Morton, IL to OSF St. Francis Medical Center Emergency Room Department in Peoria, IL. These reports state, in part, as follows:

> "ALS arrived on scene to find a 49 y/o male patient ambulatory on scene. Patient states that approx. 1 hour ago he was using chemicals to strip the floor surface of a basement when the fumes ignited. Patient is noted to have superficial flash burns to both lower legs. ALS noted the patient to have burns in spots to both the anterior/posterior and both lateral sides of both legs. Patient has no other signs of burns or trauma noted to any portion of the body. Patient is noted to have singed arm hair to his left arm and to his beard."

Petitioner's Group Exhibit No. 3 on Arbitration contains the Advanced Medical Transport records concerning the transfer of the Petitioner from OSF St. Francis Medical Center in Peoria, IL on 4/16/12 to Abraham Lincoln Memorial Hospital in Springfield, IL. These records indicate the Petitioner suffered second degree burns to the medial half of the left leg from the ankle to the knee. In addition, he suffered second degree burns to the lateral half of the lower right leg from the ankle to the knee. They also indicate this trauma represented a 10% burn to his body. The Petitioner was transferred to the Burn Unit at Memorial Hospital in Springfield, IL, and he was seen multiple times for his burns.

Petitioner's Group Exhibit No. 5 on Arbitration contains the medical records from OSF St. Francis Medical Center in Peoria, IL regarding the Petitioner's treatment in the Emergency Room on 4/9/12. His diagnosis at that time was burns involving 10-19% of his body surface with 0-9% third degree burns. In addition, these records indicate this Acct. Type was that of workers' comp.

Also contained in these records is a history stating, in part, as follows:

> "Steven Short is a 49 year old male presenting with burns. Mr. Short was seen at OSF ED on 4/9 due to flash burns of bilateral lower extremities. He had chemicals that came in contact with a pilot light, causing a flash burn. At that time, the burns were documented in nursing notes to have no blisters. The burns were irrigated and dressed. He was discharged with prescription for Sulfadiazine. Mr. Short returned today because he is concerned the burn "doesn't look good." He has noticed some pus. The pain has gotten worse since he left the ED on Monday. He denies fever and chills. He put the Sulfadiazine on yesterday and has been trying to clean the wounds."

Petitioner's Group Exhibit No. 5 on Arbitration also contains ED Provider Notes indicating that as of 4/14/12, the Petitioner was noted to have bilateral lower extremity erythematous up to his knee and 2 inches above his right knee. The erythema was not circumferential, but covered roughly 3/4 of the bilateral lower extremity. Blistering was present and patches of broken top layers of skin was apparent. There was some clear drainage and white discharge. The top layer of the skin appeared dark grey. Both lower extremities were debrided and the wounds were re-dressed with silver Sulfadiazine and Kerlex. He was given 500 mg of Bolus. He received instructions for dressing the wounds, as well as a Norco prescription. He was instructed not to drive, operate heavy machinery, drink alcohol, or take additional Tylenol while taking Norco. These notes later indicate he was told not to drive while taking narcotic pain medication. Later in these notes, it is indicated that Norco, as prescribed, is a narcotic, and that the Petitioner was being prescribed narcotic pain medication. He was specifically told not to drive or operate machinery after taking narcotics because they make him sleepy.

Also contained in Petitioner's Group Exhibit No. 5 are the Emergency Room Department records for his visit to this department on 4/16/12. At that time, the Petitioner was to be transferred to the Burn ICU at Springfield, IL. The bilateral burns on his lower extremities were described as weeping, worse on the right leg compared to the left, together with pus draining. These notes further indicate the Petitioner had gone to work on 4/16/12 and had

increased pain and increased weeping of the purulent d/c from the area. He noted on the previous day he felt more tired and was experiencing chills. He was not on any oral antibiotics. He had been putting Sulfadiazine on the burn areas without relief. One half of the right leg showed second degree burns. His feet around the open burn areas were red, bilaterally, and tender. The physician certification statement contained in these records indicates on 4/16/12, the Petitioner was being transferred to Springfield Memorial Burn Unit for advanced burn treatment. It is noted on this form the Patient could not be safely transported by car or wheelchair van without a medical attendant or monitoring. It was noted he had moderate/severe pain on movement in the transfer.

Petitioner's Group Exhibit No. 6 on Arbitration contains the medical records from Memorial Medical Center in Springfield. He was noted to have 3% total body surface area flash/flame burn to his bilateral lower extremities. He remained at the Burn Center until discharged on 4/18/12. As of 4/18/12, the Petitioner gave a history that he was very tired and hadn't slept since the burn happened eight days prior, due to pain. The office notes from the Burn Center dated 4/23/12 indicate the Petitioner was still having quite a bit of pain and having a difficult time walking around. At that time, he was approximately two weeks status post partial-thickness burns to his bilateral anterior legs. As of 4/30/12, he still had two open areas that were healing.

No medical evidence was offered to show any further medical treatment. No evidence concerning work restrictions at any time was offered, though the Arbitrator finds from the evidence that the Petitioner was in a healing state until 4/30/12, and the Respondent made no attempt to offer him modified work. Based upon the above, the Arbitrator finds the Petitioner reached a point of maximum medical improvement on that date, and orders the Respondent to pay TTD benefits from 4/10/12 through 4/30/12, a period of 3 weeks.

In support of the Arbitrator's findings relating to (L), the Arbitrator finds the following facts:

The Arbitrator incorporates his findings relating to (B), (C), (E), (F), (G), (J), and (K) in support of his decision relating to (L), in addition to the following:

Petitioner testified on Arbitration that on 4/9/12, while at work, his clothes caught on fire, resulting in severe burns to both lower extremities and a minor burn on his left upper extremity.

Petitioner's Group Exhibit No. 8 on Arbitration contains photographs of the Petitioner's lower extremities after the accident in question and during his recovery period. They depict significant scarring, welting, and blistering of both lower extremities from his knees down to his feet. Further, there is discoloration not only on the legs, between the knees and the feet, but also into the feet themselves.

Petitioner testified that as a result of his significant burns to his legs, he notices burning and tingling in his legs, especially when they are exposed to the sunlight.

The Arbitrator and both attorneys had an opportunity to examine both the Petitioner's lower extremities, in addition to this left upper extremity. That viewing revealed continued discoloration in both lower extremities and into both feet. The Arbitrator noted redness on the left anterior ankle, with less redness on the shin and calf. There was also a bluish tint to the Petitioner's right ankle extending to the mid-calf.

The Petitioner responded well to his treatment. The final treatment record from the burn unit at Memorial on April 30, 2012 indicates that the Petitioner's burns were healing well. There were small open areas on the Petitioner's ankles, but they were closed by the date of arbitration. He acknowledged on cross examination that his legs did not swell and his scarring was not raised.

Based upon the foregoing, the Arbitrator finds the injuries to the Petitioner have resulted in serious and permanent disfigurement to the Petitioner's ankles to the extent of 15 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICTOR NEVAREZ,
Petitioner,

vs.

NO: 07 WC 56636

CITY OF CHICAGO,
Respondent.

15IWCC0281

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical, causal connection, temporary total disability (TTD), and penalties, and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties. The Commission finds that Victor Nevarez reached maximum medical improvement (MMI) as it relates to his cervical condition as of January 27, 2009. Petitioner is entitled to medical expenses related to the cervical condition through January 27, 2009. Respondent is entitled to a credit for TTD paid from May 13, 2013 through September 9, 2013. All else is affirmed and adopted.

By way of procedural history, this matter was previously tried before the Arbitrator on June 24, 2008 pursuant to Section 19(b) of the Act. In its Decision dated September 11, 2008, the Arbitrator found Petitioner sustained injury to his neck, right shoulder, right knee, right leg,

and back following his work-related injury of August 22, 2007. Dr. Homer Diadula found Petitioner to be at MMI as of February 28, 2008. The Arbitrator awarded trigger point injections as recommended by Dr. Michael Haak.

Mr. Nevarez appealed to the Commission. In its Decision dated April 8, 2009 (09 IWCC 340), the Commission found Petitioner's cervical condition causally related to the August 22, 2007 accident and awarded prospective medical as recommended by Dr. Haak. The Commission found Petitioner's testimony that his cervical pain was worse after the accident credible. The Commission affirmed the remainder of the Arbitrator's Decision finding the right shoulder, right knee, right leg and back to be at MMI.

Respondent appealed to the Circuit Court of Cook County (2009 L 050512). The Honorable James Tolmaire confirmed the Commission's Decision on February 18, 2010. The Decision subsequently became final.

An Arbitration hearing was held on April 1, 2014. The Arbitrator found no causal connection existed between the cervical condition and the August 22, 2007 injury. The Arbitrator found Petitioner sustained a cervical sprain only and reached MMI, at the latest, by June 2013. The Arbitrator found no causal connection between the shoulder complaints and the August 22, 2007 accident as they were controlled by the law of the case doctrine.

In *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 786 N.E.2d 218, 271 Ill. Dec. 960 (2003), the court noted that where an award of benefits, based on a finding of a causal connection between the claimant's work accident and the claimed injuries, is not challenged as set forth in the Act, it becomes final and conclusive and cannot be challenged in a permanency hearing. *Irizarry*, 337 Ill. App. 3d at 605-06. The court further observed that, once the first causation finding became a final judgment, it also became the law of the case and was not subject to further review. *Irizarry*, 337 Ill. App. 3d at 606-07.

The Commission finds that the issues relative to Petitioner's right shoulder, right knee, right leg, and back have been found to be at MMI by the previous Commission Decision dated April 8, 2009. The Commission's Decision was confirmed by the Circuit Court's February 18, 2010 Order and no appeal was taken. Therefore, pursuant to the principle set forth in *Irizarry*, the law-of-the-case doctrine dictates that those issues are not subject to further review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. During the April 1, 2014 hearing, Petitioner testified that he sustained prior injuries in 2002 and 2004. As a result of those prior injuries, Petitioner was given permanent work restrictions on April 11, 2006 as a result of his June 2004 accident consisting of no lifting greater than 10 pounds, no repetitive bending, no continuous standing or

sitting, limited driving and to avoid prolonged driving. He was at MMI. PX.6. Those claims were subsequently settled by Petitioner under case number 02 WC 55070 and 04 WC 36072.

2. Petitioner testified that he was working under restrictions as of August 2007. His accommodated position did not cause him any shoulder issues prior to August 22, 2007 and he did not have any neck or shoulder restrictions prior to 2007. T.76. Petitioner sustained an injury on August 22, 2007 when he fell off a chair and injured his neck, shoulder and back. It is this accident that is the basis of this claim. As of September 28, 2007, Petitioner was returned to work full-duty as the result of his injury. PX.6.

3. Petitioner was seen by Dr. Haak of Northwestern Medical Center on February 5, 2008 with complaints of neck, shoulder, upper back and low back pain as the result of his August 22, 2007 injury. He was currently working light duty. Dr. Haak noted Petitioner sustained primarily soft tissue injuries with an exacerbation of his underlying degenerative disk problems in the neck and low back. He was referred to Anesthesia Pain Clinic for trigger point injections for the neck and back, and physical therapy. PX.4. Petitioner last saw Dr. Haak on April 1, 2008.

4. Petitioner attended physical therapy between December 9, 2008 and January 27, 2009, and never underwent the trigger point injections. T.61. According to the ATI physical therapy record dated February 16, 2009, Petitioner had missed his last few appointments because of low back pain. The record indicated Petitioner was to follow-up with his doctor to determine the next course of action. He was thereafter discharged from physical therapy. PX.8.

5. Petitioner testified he returned to work in the same accommodated position that was given to him after his 2002 and 2004 accidents, following this injury but continued to experience a lot of aches and pains in his neck and shoulder. T.17. He could avoid activity at work that provoked his symptoms in his neck, shoulder and arm; however, his neck and shoulder symptoms never went away between 2007 and 2013. T.21. He took primarily over-the-counter medication daily. T.78. He was told to not come to work in May 2013. Petitioner testified that he has not conducted a job search since May 2013. T.74.

6. Petitioner presented to Dr. Jason Savage of Northwestern on June 4, 2013 with complaints of neck pain, right shoulder pain, back pain and left leg pain that had been present since 2002. Petitioner reported he was doing reasonably well until he experienced an exacerbation of his symptoms several months prior. He denied any recent inciting event or trauma. Examination revealed mild tenderness to his right cervical paraspinal muscles. He had a positive Neer and Hawkins test in the right shoulder and a positive "empty can" test. He had tenderness to palpation of his

lumbar paraspinal muscles. X-ray revealed mild degenerative changes at C5-C6 and L5-S1. He was diagnosed with muscular neck and back pain, and right rotator cuff strain/tendinopathy. Dr. Savage recommended physical therapy with a return to work as there was no reason to have any restrictions. PX.4.

7. Petitioner was seen by Dr. Savage on July 30, 2013. Petitioner had permanent restrictions limiting him to a 10 pound weightlifting restriction from his 2004 injury. Dr. Savage noted Petitioner had no restrictions in relation to his neck or right shoulder from the August 22, 2007 injury. He was to continue his permanent restrictions to his low back from his 2004 injury. PX.4.

8. Petitioner underwent a Section 12 examination with Dr. Jay Levin of Adult & Pediatric Orthopedics on June 12, 2013. Dr. Levin was subsequently deposed on February 18, 2014. He issued an addendum on September 30, 2013 as he did not have all the records available to him during the June 2013 examination. Dr. Levin found that Petitioner sustained a cervical and lumbar myofascial strain, right knee contusion and a right shoulder strain as a result of his accident. He could have returned to work as of August 31, 2007. He had no current disability from the injuries. He needed no further medical treatment and was at MMI. RX.3.

9. Petitioner was seen by Dr. Victor Romano of Hinsdale Orthopaedic on September 30, 2013 for neck and right shoulder pain. Dr. Romano was subsequently deposed on December 19, 2013. Petitioner reported his work injury of August 22, 2007. Dr. Romano noted there were no prior MRIs of the neck and shoulder. Petitioner reported that his pain had been a constant 7 out of 10 and physical therapy had not helped. Examination of the cervical spine was spastic and tender with normal lordosis. Examination of the right shoulder revealed poor posture with moderate slouching of his shoulders and no winging of the scapula. He had a plus 2 impingement. The x-ray of the cervical spine revealed loss of the normal lordosis with some degenerative changes at C4-C5 and C5-C6. Petitioner was diagnosed with rotator cuff tendinitis and C7 radiculopathy. He was taken off work. PX.9.

10. Petitioner underwent a cervical MRI on October 21, 2013 that revealed diffuse straightening of the cervical spine. He had underlying cervical sponylosis with multilevel degenerative discs, grade 1 retrolisthesis at C5-C6, and mild disc osteophytes from C2-C7 resulting in mild stenosis. PX.9.

11. Dr. Romano noted on October 28, 2013 that Petitioner was not interested in surgery and wanted conservative treatment. He was continued off work.

12. In separate correspondence dated October 30, 2013 and March 10, 2014, the Department of Streets and Sanitation indicated Petitioner was on a leave of absence due to a work-related injury. PX.3.

15IWCC0281

13. Dr. Romano authored a letter to "Whom it May Concern" on November 4, 2013 stating Petitioner sustained a workers' compensation injury on August 22, 2007 resulting in his current diagnosis of cervical radiculuitis and rotator cuff tendonitis. PX.5.

14. Petitioner was seen by Dr. Romano on December 18, 2013 for right shoulder and neck pain. Petitioner reported that the physical therapy was providing relief to his right upper extremity and cervical spine. He still had stiffness and soreness in the cervical spine that did not dissipate despite the therapy. He had shoulder pain at the anterior and lateral aspect of the shoulder that was worse with overhead activity and rotational movements. He had some radiating pain traveling to the arms with some tingling sensations in the distal extremity. His pain had remained 4 out of 10 for the last 6 years. He had tenderness to palpation over the subacromial space. He was diagnosed with a rotator cuff tear of the right shoulder with mild cervical radiculopathy on the right. He was returned to work full-duty work without restriction. PX.5.

15. Petitioner underwent right shoulder arthroscopic rotator cuff repair and subacromial decompression on February 12, 2014. He was to remain off work for 10 to 14 days. PX.5.

The Commission affirms the Arbitrator's Decision of no causal connection as it relates to the cervical condition. The Commission, however, modifies the MMI date from July 30, 2013 to January 27, 2009, the date Petitioner last received medical treatment before his 4 year gap in treatment. The Commission is not persuaded by Petitioner's testimony that his symptoms remained a constant 4 to 7 out of 10 during this 4 year gap in treatment.

The Commission notes that Petitioner had two prior workers' compensation injuries. The first occurred on September 30, 2002 (02 WC 55070) and the second on June 30, 2004 (04 WC 36072). Petitioner was given permanent restrictions of no lifting greater than 10 pounds, no repetitive bending, no continuous standing or sitting, and limited driving as a result of the second accident. Petitioner was placed in an accommodated position of employment.

Petitioner sustained a work-related injury on August 22, 2007 and was returned to work on September 28, 2007 consistent with his prior restrictions. The Petitioner was awarded trigger point injections; however, he never underwent the injections and abandoned his physical therapy in January 2009. During the January 22, 2009 physical therapy session, Petitioner complained of low back pain only. However, Petitioner's back condition is controlled by the law of the case doctrine finding no causal connection. The Commission notes, however, that during the prior Arbitration hearing, Petitioner testified that he had persistent low back pain that radiated to his left leg. Petitioner offered no evidence that his complaints during physical therapy were related to his August 22, 2007 injury.

15IWCC0281

It was not until after Petitioner last worked for Respondent in May 2013 that he resumed medical treatment. However, at the time, Petitioner was working in an accommodated position as a result of his June 30, 2004 accident, not his August 22, 2007 accident. The Petitioner offered no evidence that his prior permanent restrictions changed as a result of the August 2007 accident. Dr. Savage specifically noted on July 30, 2013 that Petitioner had no restrictions relative to his neck or right shoulder as a result of the August 22, 2007 accident, and Petitioner was to continue working pursuant to his permanent restrictions from the prior injury. Dr. Romano also noted Petitioner could work full-duty without restrictions.

Therefore, the Commission finds that Petitioner's condition reached MMI as of January 22, 2009, the date Petitioner last attended physical therapy. At that time, Petitioner had low back pain only and elected to not undergo the trigger point injections. He received no medical treatment for over four years. The Commission finds that Respondent is liable for medical expenses through January 22, 2009 only. Respondent is entitled to a credit for TTD paid from May 3, 2013 through September 9, 2013.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 26, 2014, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 1 2015

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
O: 3-23-15
052

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

NEVAREZ, VICTOR
Employee/Petitioner

Case# **07WC056636**

15IWCC0281

CITY OF CHICAGO
Employer/Respondent

On 09/11/2008, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.90% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0391 HEALY LAW FIRM
111 W WASHINGTON
SUITE 1425
CHICAGO, IL 60602

0113 CITY OF CHICAGO
SPENCER, SMITH
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)
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
19(b) ARBITRATION DECISION

Victor Nevarez
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case #07WC056636

15IWCC0281

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 **Richard A. Peterson**, arbitrator of the Commission, in the city of **Chicago**, on **June 24, 2008**. 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 the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☐ What amount of compensation is due for temporary total disability?

L. ☒ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Other Prospective Medical

FINDINGS

- On **August 22, 2007**, the respondent, **City of Chicago**, *was* operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
- On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident *was* given to the respondent.
- In the year preceding the injury, the petitioner earned $**58,240.00**; the average weekly wage was $**1,120.00**.
- At the time of injury, the petitioner was **43** years of age, ***married*** with **-1-** child under 18.
- Necessary medical services ***have*** been provided by the respondent.
- To date, $**-0-** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $**n/a**/week for **-0-** weeks, from **n/a** through **n/a**, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
- The respondent shall pay $**-0-** for medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay $**-0-** in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $**-0-** in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $**-0-** in attorneys' fees, as provided in Section 16 of the Act.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Signature of arbitrator

September 10, 2008
Date

ICArbDec19(b) p. 2

SEP 11 2008

On August 22, 2007, the Petitioner was a 43 year old laborer working for the Respondent's Department of Streets and Sanitation. Although he regularly worked as a laborer but in an office setting, Petitioner's assignment for that day was to work at Senior Fest at McCormick Place. As Petitioner was sitting in a chair, the chair gave way beneath him, causing him to fall to the floor. He injured his neck, right arm and right leg. Also, he re-injured his back.

He was transported via ambulance to Michael Reese Hospital emergency room where he complained of pain in his low back, right shoulder and neck. X-rays were taken of his back, right arm, right leg and neck all of which were negative for fracture or dislocation. He was given a prescription for Flexeril and Vicodin and discharged. (PX1)

On August 24, 2007 the Petitioner saw Dr. Phillipa Norman at Mercy Works. The doctor examined him, prescribed Vicodin and Flexeril as needed but instructed him not to take Vicodin during work and released him to full duty work. On August 31, 2007, Petitioner returned to MercyWorks complaining of pain in his neck, right shoulder, low back, right knee and right chest area. He was examined by Dr. Homer Diadula who prescribed Flexeril, Vicodin, a home exercise program and warm soaks. (PX 2)

He returned to Mercy Works on August 30, 2007, September 18, 28, and October 3, 2007 complaining of right knee, neck and back pain radiating to the left thigh. Dr. Diadula prescribed pain medication, MRI's and a home exercise program. On October 12, 2007, Dr. Diadula reviewed a lumbar MRI and found a L4-5 and L5-S1 disc herniation. He noted Petitioner would see an orthopedic doctor, Dr. Hepler. (PX2) The Petitioner contacted Dr. Hepler but learned he relocated to a different state. Dr. Hepler's patients were transferred to Dr. Michael Haak.

Although Petitioner was working, he continued to experience pain. On November 20, 2007, he was examined by Dr. Michael Haack of the Northwestern Medical Faculty Foundation. Dr. Haack examined him and diagnosed him with cervicalgia, pain in thoracic spine, cervical radiculopathy, lumbago and right knee pain and recommended he continue light duty restrictions. He recommended a course of physical therapy and prescribed a Medrol DosePak, Mobic, tramadol, Zanaflex, and a cervical MRI. The Petitioner had the cervical MRI at Preferred Open MRI on December 10, 2007. The results showed a protruded disc at C4-5. (PX 2 and 3) Petitioner participated in physical therapy and continued to follow-up with Dr. Haack and MercyWorks. On February 28, 2008, MercyWorks discharged Petitioner at MMI with the following restrictions: no lifting more than ten pounds, no repeated bending or stooping. No continuous standing or sitting. Vary positions and light driving. (PX 2) These were the same restrictions Petitioner had prior to his August 22, 2007, injury.

He returned to Dr. Haak on February 5, 2008. His exam and pain complaints were unchanged. The doctor referred him to the Anesthesia Pain Clinic for trigger point injections of the neck and back. (PX 3)

On February 28, 2008 he was seen by Dr. Diadula who found he was at maximum medical improvement. On February 29, 2008, Dr. Haack recommended trigger point injections and continued physical therapy. This was not authorized by Respondent as Petitioner was able to work with the same restrictions as before his injury and he had been determined to be at MMI on February 28, 2008, by Dr. Diadula. (PX 2 and 3)

The Petitioner saw Dr. Haak next on April 1, 2008 with the same pain complaints. The doctor examined him and noted he was still symptomatic from his on the job injury. The doctor prescribed pain medication, physical therapy and injections to reduce his neck and back pain. The Respondent refused Petitioner's requests for physical therapy and injections recommended by Dr. Haak.

During the hearing on June 24, 2008, Petitioner testified he had a prior back injury but never injured his neck, right shoulder or right knee before August 22, 2007.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO F, IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

It was undisputed that the Petitioner sustained injuries to his neck, right shoulder, right knee and reinjured his back when a chair collapsed at work on August 22, 2007. At the Respondent's request, he came under the care of doctors at Mercy Works including Dr. Diadula. He later saw an orthopedic specialist, Dr. Michael Haak. (PX 2 and 3)

During a visit to Mercy Works on February 28, 2008, Respondent's doctor recorded Petitioner's neck pain was 4/5 out of 10 and his back pain was 2.5 out of 10. Dr. Diadula restricted him from lifting more than ten pounds, no repeated bending, stooping, no continuous standing and sitting, should vary positions and limit driving.

Although Petitioner testified to some back pain prior to the August 22, 2007, accident, no evidence was presented of any intervening injuries that could have caused his condition. On February 28, 2008, he was seen by Dr. Diadula who found he was at maximum medical improvement. On February 29, 2008, Dr. Haak recommended trigger point injections and continued physical therapy. This was not authorized by Respondent as Petitioner was able to work with the same restrictions as before his injury and he had been determined to be at MMI on February 28, 2008, by Dr. Diadula. (PX 2 and 3)

On several occasions, Dr. Haak referred to Petitioner "...appears to have sustained an injury when a chair broke on-the-job..." (PetEx3, November 26, 2007, visit) On February 5, 2008, Dr. Haak felt that "...the patient sustained primarily soft tissue injuries with exacerbation of his underlying degenerative disk problems in the neck and low back..." (PetEx3, February 5, 2008, visit) However, Dr. Haak's records do not show that he was aware of the details of Petitioner's condition prior to his August 22, 2007, accident. Also, Dr. Haak never compares Petitioner's condition after his work injury with his condition prior thereto. Accordingly, Dr. Haak's references, to Petitioner's condition appearing to be related to a August 22, 2007, work accident, cannot be given any weight as to whether or not Petitioner's condition (after Dr. Diadula found, on February 29, 2008, that Petitioner was at maximum medical improvement) had resolved to his pre-accident condition.

Petitioner testified that, at the time of his August 22, 2007, work accident, he was working under restrictions from a prior accident. He further testified that his present restrictions are similar to those prior restrictions. By Petitioner's own admission, he is now working the same job under the same restrictions as before his August 22, 2007, work accident. He further testified that prior to this work accident to had good days and bad days, that his pain got worse as the day went on and that he was on muscle relaxers.

To establish that his present condition, after his release at MMI by Dr. Diadula, continues to be causally related to his August 22, 2007, work accident, he must establish that his condition now somehow differs from his condition before that accident. Dr. Haak's records do not establish that, as they show that Dr. Haak may not have even known of Petitioner's prior condition and certainly did not perform any medical comparison of Petitioner's condition of ill-being before and after that accident. Petitioner did not produce any other evidence to show that his condition has not resolved to his pre-injury condition or to show that his present condition is not a continuation of his pre-injury medical problems. The Arbitrator concludes that the Petitioner has failed to establish, by evidence in the record, that his present condition is any different from his condition before this work accident. Based on the foregoing, the Arbitrator concludes that Petitioner's condition of ill-being, prior to his release on February 29, 2008, at MMI by Dr. Diadula, is causally related to his work accident of August 22, 2007. The Arbitrator also concludes that Petitioner's condition of ill-being after his release, on February 29, 2008, at MMI by Dr. Diadula, to the present is not causally related to his August 22, 2007, work accident.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO J, WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator has found above that Petitioner's condition of ill-being from his August 22, 2007, work accident through his release, on February 29, 2008, at MMI by Dr. Diadula, was causally related to his August 22, 2007, work accident. The Arbitrator also has found above that Petitioner's condition of ill-being after his release, on February 29, 2008, at MMI by Dr. Diadula, to the present is not causally related to his August 22, 2007, work accident. Respondent produced no evidence that the treatment received by Petitioner was unreasonable or unnecessary. Based on the foregoing, the Arbitrator concludes that Respondent is liable for payment of all medical bills from Petitioner's August 22, 2007, work accident through his release, on February 29, 2008, at MMI by Dr. Diadula, but not for payment of medical bills for services rendered to Petitioner thereafter. Petitioner submitted one medical bill for services provided by Dr. Haak with an unpaid balance of $10.80. (PetEx4) That bill was for services rendered on April 1, 2008, and accordingly is not the responsibility of Respondent.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO L, SHOULD PENALTIES OR FEES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner sought penalties and fees for Respondent's refusal to pay for medical treatment after his release, on February 29, 2008, at MMI by Dr. Diadula and for refusal to authorize additional prospective medical treatment. The Arbitrator has concluded above that Respondent is not liable for such medical treatment. Therefore, the Arbitrator concludes that Petitioner is not entitled to any such penalties and fees.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO N, Other Prospective Medical, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator has concluded above that Petitioner's condition of ill-being after his release, on February 29, 2008, at MMI by Dr. Diadula, to the present is not causally related to his August 22, 2007, work accident. Therefore, the Arbitrator finally concludes that the Respondent is not liable for prospective medical treatment for Petitioner's condition of ill-being after his release, on February 29, 2008, at MMI by Dr. Diadula.

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lance D. Champlain,

Petitioner,

vs. NO: 09 WC 28816

Pontiac Correctional Center,

15IWCC0282

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and permanent disability, reverses the Decision of the Arbitrator regarding and finds that Petitioner failed to establish that he suffered injuries arising out of and in the course of his employment with Respondent and vacates all awards of compensation.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent.

One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the Arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

With the above in mind, the Commission notes that Petitioner testified that starting sometime in the 2000's, he would check out/register inmates' purchases by inputting the inmate's number and purchases into a computer until. (T.13) Petitioner testified that this changed some years later when the prison started using scanners, at which time he would scan an inmate's identification card and purchases. (T.13) Petitioner explained that sometimes he used a hand held scanner, but most of the time he used the permanent scanner in the desk. (T.13) Petitioner further

testified that he used both hands to scan and explained that he would "[p]ick the item up, swipe it over the scanner, hand it to the inmate, inmate put it in a bag." (T.14) The Arbitrator noted in his decision that when Petitioner demonstrated how he scanned at work, he swiped "from left to right." (T.14) Petitioner testified that he spent 8 hours a day inputting items into the computer and scanning and that a good portion of that time was spent typing. (T.14-15) Petitioner also testified that his hands and arms would "become very painful" when working on the computer and that he started having left hand symptoms while working at the commissary. (T.27-28)

Petitioner testified that in March of 2009, Petitioner was assigned to the receiving dock. (T.15-16) During this time, he worked at the commissary about 2 to 4 hours a day, and worked the rest of his shift at the receiving dock. (T.16-28) Petitioner testified that he split time between the two departments for about 8 months. (T.28) Petitioner retired in November of 2009. (T.28)

On May 12, 2009, Petitioner saw Dr. Purnell and complained of bilateral arm numbness. (PX7) A subsequent EMG revealed that Petitioner had bilateral carpal tunnel syndrome. (PX2) While the Commission notes that there is no question that Petitioner has bilateral carpal tunnel syndrome, we find that the record fails to establish by a preponderance of the evidence that Petitioner's job at the commissary was repetitive in nature.

The Commission notes that the record is devoid of any evidence that Petitioner performed repetitive work activities at the commissary non-stop. Petitioner testified that he would scan items and an identification card, then load up items in a bag or hand items to inmates. The Commission does not find that this constitutes the constant typing Petitioner claimed to perform or which would cause Petitioner's wrist to be in a constantly flexed position. The Commission further notes that Petitioner's typing, by his own admission, was considerably less once scanners were provided. While monotonous, Petitioner's work activities were not repetitive in a way that would cause or aggravate Petitioner's bilateral carpal tunnel syndrome. Petitioner's treating physician, Dr. Nardone, testified that he believed that Petitioner typed 8 hours a day, which was not the case, especially towards the end of Petitioner's time with Respondent. (PX5-pg.29) Furthermore, Dr. Nardone clarified that he opined that Petitioner's typing at work could have caused or aggravated Petitioner's carpal tunnel syndrome, but qualified it by stating: "I didn't say it did." (PX5-pg.29) Furthermore, Dr. Nardone pointed out other factors in the development of carpal tunnel, obesity and smoking, both of which applied to Petitioner. (PX5-pgs.30-32)

Based on the totality of the evidence, the Commission finds that Petitioner failed to establish that his work activities were repetitive in nature and that, as a result of those work activities, he suffered a compensable work accident in the form of a repetitive trauma, i.e., bilateral carpal tunnel syndrome. As such, the Commission reverses the Arbitrator's Decision and vacates all awards of compensation.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on July 22, 2014, is hereby reversed as stated above and all awards of compensation vacated.

15IWCC0282

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

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

DATED:
MJB/ell APR 2 1 2015
o-03/10/15
52

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHAMPLAIN, LANCE
Employee/Petitioner

Case# **09WC028816**

09WC028817

15IWCC0282

PONTIAC CORRECTIONAL CENTER
Employer/Respondent

On 7/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0190 LAW OFFICES OF PETER F FERRACUTI
THOMAS M STROW
110 E MAIN ST
OTTAWA, IL 61350

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

5300 ASSISTANT ATTORNEY GENERAL
CODY KAY
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUL 22 2014

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

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lance Champlain
Employee/Petitioner

v.

Pontiac Correctional Center
Employer/Respondent

Case # **09** WC **28816**

Consolidated cases: **09 WC 28817**

15IWCC0281

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Bloomington, Illinois, Illinois**, on **May 30, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 19, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

Petitioner's current condition of ill-being *is* causally related to the accident of May 19, 2009.

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

In the year preceding the injury, Petitioner earned **$52,000**; the average weekly wage was **$1000**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

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

ORDER

Respondent shall pay reasonable and necessary unpaid medical services of $7,152.00, as provided in Sections 8(a) and 8.2 of the Act, as well as reimbursement to Petitioner of $480.00 for Petitioner's out-of-pocket expenses. Respondent shall be given a credit of $12,187.65/$7,569.78 adj. for medical benefits that have been paid by both its workers' compensation, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 66.625 weeks, because the injuries sustained caused the 17-1/2% loss of the right hand (35.875 weeks) and 15% loss of the left hand (30.75 weeks), as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

7/22/14
Date

ICArbDec p. 2

JUL 22 2014

FINDINGS OF FACT:

Petitioner, Lance Champlain, has been employed by Pontiac Correctional Center since May 7, 1984. He had been employed as a correctional officer for 20 years. Petitioner testified that he was temporarily assigned to the supply department sometime in the first half of the decade in the 2000's.

Petitioner testified that he also worked in the commissary where residents and inmates could shop. He said that inmates would come to a window with a box of items they would like to buy. In the past, Petitioner would determine how much money each inmate had, add it on the computer, and take it off the books. After some time, this process was changed to where Petitioner would use a scanner ID.

Petitioner testified that he would sometimes use a handheld scanner, but there was also a bar on the desk that he could utilize to scan items as well. If holding the item, Petitioner described that he would use both hands to pick up an item and swipe it over the scanner. Petitioner testified that he is right hand dominant, and he demonstrated that he would scan items using a left to right swiping motion.

Petitioner testified that he typically worked 8 hours per day. He testified that a good portion of his day would be spent typing, as that was really his only job in the commissary. Sometimes he would also fill boxes, staple them, and deliver them. Such orders were made and delivered throughout the week.

On March 20, 2009, Petitioner was working on the receiving dock. He testified that he had been reassigned to the receiving dock because a coworker had recently retired. Petitioner testified that typically, he would work at the receiving dock from 12 p.m. until 2 p.m., and then he would continue to work until 4 p.m. in the commissary.

Petitioner testified that at the receiving dock, he would use a forklift to unload and distribute the goods to wherever they needed to go throughout the prison. Petitioner provided that this particular forklift is propane operated with 12 tanks. On this day, he loaded them and took them to be filled so they would have some gas. Petitioner testified that the propane tank weighed between 75-100 pounds. Petitioner stated that as he lifted same, he pulled a muscle on his right shoulder.

Petitioner testified that he had no pain in his right shoulder or neck prior to this incident. He stated that he did not immediately report this to his supervisor because he didn't think it was that bad of an injury initially. Ultimately, Petitioner filled out an incident report with his employer on April 21, 2009, which states that the pain had gotten worse since the accident and his right hand was going numb. (PX 16)

Petitioner testified that between March 20, 2009 and April 21, 2009, he was never completely symptom free and had no incidents or accidents at home. He described the pain as excruciating and said it felt like a lump formed and came on. He said the pain came on while he was at work, and the location of the pain was exactly the same as it was on the date of the accident.

Petitioner saw his family physician, Dr. John Purnell, on April 21, 2009 with regards to this condition. Petitioner reported that he had been feeling severe pain and "can't really stand it." (PX 7 at 24) On April 27, 2009 Petitioner returned with numbness in his right arm that seems a little worse than the last visit, and he still had pain in the right shoulder and right scapular area. The doctor noted Petitioner got hurt at work injury. A

MRI was ordered. On May 1, 2009, Dr. Purnell noted that a C spine MRI showed that Petitioner did not require surgery, but he did have problems that would need to be solved with medication and physical therapy. (PX 7 at 24)

On May 12, 2009, Petitioner informed Dr. Purnell that he was still having problems with his right arm as well as some in the left, in that he felt numbness. Petitioner reported that whenever he worked on the computer it got a lot worse. (PX 7 at 24) Petitioner confirmed in his testimony that this was an accurate statement. He still had a problem with his neck as well, for which physical therapy seems to be helping. An EMG was ordered. (PX 7 at 24)

Petitioner underwent an EMG on May 19, 2009, and the findings were consistent with an acute C7 radiculopathy on the right and chronic C6, C7 radiculopathies on the left. It also showed bilateral carpal tunnel syndrome and an ulnar neuropathy at the left elbow. (PX 9) On May 29, 2009, Dr. Purnell diagnosed Petitioner with bilateral carpal tunnel plus nerve problem on the left arm. (PX 7 at 25)

Petitioner attended 6 physical therapy sessions at OSF St. James Medical Center between May 4, 2009 and May 28, 2009 to treat his symptoms in his right arm. OSF St. James records from June 18, 2009, show Petitioner self-discharged after completing six treatments from May 4-28, 2009. The first record from May 4, 2009 described a current pain level of 1/10 that would increase during day until reaching 10/10 pain level at night. The record from May 22, 2009 listed pain levels at 1/10 before treatment and 0/10 after. It stated he wakes up and doesn't feel pain until he gets on the computer. His June 18, 2009 discharge record reported he achieved his only long term goal, while meeting and missing one short term goal. The current status explained those achievements as gaining range of motion, with the only limitation being pain. Finally, the discharge told him to return to doctor if symptoms progressed. (PX 15, RX 5)

Petitioner saw Dr. Purnell again on July 13, 2009, and reported that his right arm was still going numb to the point where he turned around and stopped driving on his vacation because of the numbness. He returned on August 26, 2009 still complaining of numbness. On September 1, 2009, Dr. Purnell determined that Petitioner had mild carpal tunnel and bilateral C7 issues. He referred Petitioner to Dr. Nord at that time. (PX 7 at 25-26)

Petitioner saw Dr. Nord on September 3, 2009 for orthopedic consultation and case management of upper discomfort with neuropathy symptoms. Dr. Nord diagnosed cervical spine stenosis, bilateral cervical radiculopathy, and bilateral carpal tunnel syndrome. Dr. Nord referred Petitioner to Dr. Nardone for a neurosurgical consultation to determine whether surgery would be a viable option on the cervical spine. (PX 2)

On September 16, 2009, Petitioner saw Dr. Nardone for the first time and reported pain on his right side in his shoulder, elbow, wrist, and finger knuckles associated with numbness in the arm and hand. He noted that his symptoms began as a work injury when he was lifting heavy propane tanks. Petitioner also reported a history that approximately five years before he had developed pain and numbness that went into his left arm. He continued that those symptoms improved with conservative treatment. Dr. Nardone recommended a myelo CT of the cervical spine and a repeat EMG/NCV. (PX 3)

With respect to the prior history, medical records from OSF St. James confirm previous left upper extremity issues, showing that on July 15, 2003, Petitioner was diagnosed with left shoulder muscle strain. On that July 2003 visit, Petitioner's chief complaint was left cervical and shoulder pain with numbness in left upper extremity. Petitioner's pain was reported as constant, with a current level of 5/10, with it ranging from 1-10/10 at times. Petitioner's pertinent medical history stated the original injury was from lifting weights. Further, it was reported he had 6-10 previous episodes, with the first occurring in 1996, and his past history stated his

index finger had been numb for years. On a July 30, 2003 follow-up, the assessment by physical therapist, Jane Wright, was that Petitioner's complaints were consistent with neurological pain at left C6, C7 region. (RX 5)

Petitioner underwent an EMG on September 29, 2009. The findings were consistent with bilateral chronic C7 and left C6 radiculopathies, as well as moderate left carpal tunnel and mild right carpal tunnel. It also showed a possible ulnar neuropathy at the left elbow. (PX 9)

On October 28, 2009, Petitioner presented to Diagnostic Neuro Technologies for a cervical myelography procedure and interpretation. A spiral CT of the cervical spine was performed followed by multiplanar reformations. The tests showed significant loss of disc height and a moderate size broad-base central disc herniation at the C6-7 level. There was also prominent uncovertebral osteophyte formation significantly encroaching upon the neural foramina bilaterally, but seemed to be more pronounced on the left side. Clinically, it was felt that this may produce C7 radiculopathy. Dr. Naveed Yousuf who interpreted the studies concluded there was a mild developmental spinal stenosis of the cervical spinal canal due to shortened pedicles; mild to moderate broad base central disc herniation associated with degenerative disc disease at C6-7. There was also significant uncovertebral osteophyte formation, bilaterally, left greater than right, at C6-7 level encroaching upon the existing respective C7 nerve roots. Finally, Dr. Yousuf found minor cervical spondylolytic change otherwise, as there was also minimal degree of focal ossification of the posterior longitudal ligament at the C5 level. (PX 6)

Petitioner returned to Dr. Nardone on November 4, 2009 complaining of right-sided neck pain, shoulder pain, arm numbness, and left hand grip weakness. The doctor indicated that Petitioner's EMG was compatible with C7 chronic irritation and mild left carpal tunnel syndrome. He noted the myelo CT showed significant degenerative disc disease at C6-7 with a remarkable left-sided C6-7 foraminal stenosis and mild right one. Dr. Nardone commented that all of Petitioner's symptoms did not match. He felt the symptoms were behaving like a C8 irritation. Dr. Nardone gave Lance the option to undergo an anterior cervical decompression and fusion at C6-7 and opening of the foramen, but only gave him a 50% chance of improvement. Dr. Nardone noted that most of Petitioner's symptoms could be related to the work injury reported by Petitioner. (PX 3)

On June 29, 2010, Respondent authorized further treatment with Dr. Nardone. (PX 17)

On August 4, 2010, Petitioner presented to Diagnostic Neuro Technologies for an MRI of the cervical spine and an MR 3D rendering. The tests show a mild broad-base central disc herniation with mild stenosis and bilateral neural foraminal stenosis at the C5-6 level. At the C6-7 level, it shows another mild to moderate broad-base central disc herniation and a moderate degree of central stenosis without cord impingement or alteration of the cord signal. (PX 6)

On August 9, 2010, Petitioner presented to Dr. Nardone and reported that he continued to experience neck pain, shoulder pain, and bilateral hand numbness that woke him at night. Dr. Nardone diagnosed carpal tunnel syndrome. At that time it was determined to proceed with left carpal tunnel release. (PX 3)

Petitioner underwent a left carpal tunnel release procedure on September 16, 2010 at OSF St. Joseph Medical Center. (PX11 at 147) On October 4, 2010, Petitioner followed with Dr. Nardone. Records show Petitioner had been recovering well and that Petitioner preferred to proceed with a right sided carpal tunnel release in November 2010, which was to be arranged by Dr. Nardone. (PX4 at 46) Petitioner testified this did not initially occur because another doctor told him he did not have carpal tunnel symptoms in his right hand.

On November 11, 2010, Petitioner was seen at OSF St. Joseph Medical Center. Petitioner complained of mostly right arm pain after pulling something at work. Petitioner also reported that his left arm felt better after the carpal tunnel release. (PX11 at 7) Petitioner was diagnosed with right carpal tunnel syndrome, and the plan was to undergo a right carpal tunnel release. (PX11 at 9) The symptoms were then reviewed with Petitioner and Dr. Nardone. The doctor noted that Petitioner's symptoms were not indicative of carpal tunnel syndrome, but rather 4th and 5th finger numbness and pain in his shoulder. As a result, the carpal tunnel release surgery was cancelled at that time. (PX11 at 16)

Petitioner returned to Dr. Nardone on November 22, 2010. Petitioner was still complaining of pain and numbness from the shoulder down the inside portion of the right arm involving the 4th and 5th finger. Dr. Nardone did not believe this was carpal tunnel related and referred Petitioner to Dr. Fang Li for an EMG/NCV of his upper extremities. (PX4 at 45)

On December 7, 2010, Petitioner presented two months status post left carpal tunnel release. He continued to complain of problems with his right arm and hand which the doctor indicated did not appear totally compatible with carpal tunnel syndrome. Petitioner insisted that his similar symptoms on the left had been relieved with the carpal tunnel surgery. Dr. Nardone reviewed the MRI of the cervical spine which he felt showed no etiology to justify his symptoms on the right. Dr. Nardone wanted to wait for the EMG/NCV results before giving a final recommendation. (PX4 at 44)

Petitioner underwent the EMG on December 21, 2010. Dr. Li noted the moderate neuropathy at left wrist was no longer present. He also noted the EMG findings were most consistent with chronic C5, 6, 7 cervical radiculopathis on both sides with a minimal to mild superimposed median neuopathy at the right wrist. (PX 4 at 52)

On December 28, 2010, Dr. Nardone explained to Lance that his EMG/NCV results were compatible with right carpal tunnel syndrome, but with no ulnar neuropathy and chronic cervical radiculopathy. The doctor felt there was no urgency to perform a right carpal tunnel release at that time. (PX4 at 43)

On January 20, 2011, Petitioner returned to OSF St. Joseph Medical Center complaining of carpal tunnel syndrome in the right hand for several years. (PX11 at 59) Petitioner underwent a right carpal tunnel release at that time. (PX11 at 63)

On February 7, 2011, Petitioner presented post right carpal tunnel release. He reported complete improvement of the numbness in his right hand. He continued to complain of right shoulder pain, as well as foraminal stenosis on both the right and left side, worse on the left. Dr. Nardone explained that he could attempt C6-C7 anterior decompression allograft fusion and plating, but he was not sure it would improve his symptoms that could be related to his previous injury. (PX4 at 41)

At the request of Respondent, Petitioner attended a Section 12 examination with Dr. Daniel Troy on April 11, 2012. Petitioner presented with complaints of posterior neck and posterior right shoulder pain with numbness in the shoulder area. Petitioner also informed Dr. Troy that he had not treated since February 2011. On physical examination, Petitioner had a 25 percent limitation with flexion, extension, lateral rotation, and lateral bending of cervical spine. Petitioner reported pain with palpation of cervical spine on the right side greater than the left with no pain radiating to upper extremities. Dr. Troy had AP, lateral, flexion, and extension views of cervical spine performed in his office with them demonstrating loss of lordosis in the lateral view secondary to moderately advanced degenerative disc disease greatest at C5-6 and C6-7 levels. No gross instability was noted with flexion and extension. Dr. Troy also reviewed previous diagnostic testing dating

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back to October 2009. Dr. Troy assessed Petitioner with advanced degenerative disc disease of the cervical spine, specifically at C5-6 and C6-7 levels, with secondary posterior neck pain. Dr. Troy felt Petitioner's complaints of pain, numbness and tingling were due to his pre-existing congenital spinal stenosis and advanced arthritic changes of the cervical spine. Dr. Troy noted that at the time of injury, Petitioner reported symptoms in his right shoulder but yet when it came to intervention, Petitioner elected to undergo a left carpal tunnel release first. He felt that this strongly suggested Petitioner had greater symptoms on the left side than on the right. Dr. Troy opined that it did not appear that either carpal tunnel surgery was related to the March 20, 2009 injury. Dr. Troy also questioned the causality of Petitioner's symptoms regarding his neck and shoulder indicating Petitioner took four weeks to report neck and shoulder injury. Dr. Troy stated that "At most, I feel that the claimant may have had a short-term aggravation of pre-existing degenerative changes in his cervical spine on the March 20, 2009." The doctor further stated that based on the arthritic changes present in the myelogram and other diagnostics, Petitioner was at high risk for having chronic symptoms in his neck and upper extremities. (RX 3 dep. 2)

With respect to the proposed cervical surgery, Dr. Troy opined that the need for the surgery would be based only on Petitioner's subjective complaints. The doctor stated, "...the basis for cervical surgery would be based on the claimant's inability to live with his chronic neck pain." The doctor opined Petitioner reached maximum medical improvement following physical therapy in May 2009. (RX 3 dep. 2)

On April 30, 2012, Petitioner presented to OSF Medical Group complaining of neck pain. Petitioner provided he was experiencing numbness in the shoulder area and pain in the posterior neck. Petitioner requested referral to Dr. Ghanayem for his opinion on surgical options. (PX 14)

Petitioner saw Dr. Ghanayem on May 10, 2012. Dr. Ghanayem took a history, performed an examination and reviewed a CT myelogram which the doctor indicated showed cervical spondylosis, most significantly at the C6-7 disc space with posterior osteophyte formation. Dr. Ghanayem's impression was cervical spondylosis, C6-7. The doctor did not recommend surgical intervention at that time, but rather non-operative treatment including medications and therapy. (PX 8)

Petitioner testified that he continues to feel symptoms to this day. His right shoulder tends to go numb and feels like it has bugs crawling on it. He also suffers from a bit of a hunchback. Petitioner testified that he had no symptoms prior to March 20, 2009, and he has never really returned to the condition he was in prior to that date. He struggles with certain daily activities such as walking, driving, physically using his arms, cutting limbs with a chainsaw, and other physical activities. Petitioner provided that he did not have issues with any of these activities prior to March 20, 2009. Petitioner also testified that he decided not to pursue a surgical option because Dr. Nardone did not give a strong indication of it helping his condition.

Petitioner testified that he worked at the receiving dock for about 8 months before he retired. He continued to work in the commissary for about 2 hours a day, at which time he noticed an aggravation in his left hand. He testified that he did not really feel any pain in the right hand until he picked up the propane tank. After the propane tank incident, he continued to work with no heavy lifting, and would often supervise as inmates drove the forklift. Today, his hands feel much better after having undergone the surgeries.

Petitioner's treating surgeon, Dr. Emilio Nardone testified via deposition. Dr. Nardone testified that Petitioner initially presented with complaints of right shoulder pain; pain down the arm; numbness in the right hand and arm; left wrist and index finger numbness. Petitioner provided that he had lifted heavy propane tanks at work and hurt his shoulder. The doctor stated Petitioner provided that later his entire right arm went numb. (PX 5 pg. 7) Dr. Nardone detailed how he reviewed Petitioner's past medical history including his previous

consultation with Dr. Nord. (PX 5 pgs 7-9) Dr. Nardone testified he felt Petitioner had a preexisting cervical spondylosis with the foraminal stenosis that probably had nothing to do with the work injury. He however felt Petitioner had persistent symptoms mostly on the right side that could have been related to some sort of whiplash/stretch injury that started with a work accident. He stated the symptoms with the pain along the arms, and the numbness along the arms along the inner portion of the forearms seemed to be a direct correlation between the symptoms and the work injury. (PX 5 pgs. 11-12, 18) Dr. Nardone stated that the C6-C7 degeneration was preexisting. He indicated the symptoms didn't completely match the distribution of the nerves between C6-C7 and C8 although there can sometimes there can be some overlapping innervations. For that reason, he didn't feel surgery would have a high chance of succeeding. He however felt that overall, the injury sustained at work caused Petitioner's symptoms but those symptoms were not completely related to C6-C7 forminal stenosis. (PX 5 pgs. 13-14)

With respect to Petitioner's right and left hand symptoms, Dr. Nardone testified in response to a hypothetical. Dr. Nardone testified that Petitioner's repetitive finger motion involving typing on the computer after he scanned items as a possible cause or aggravating factor in developing carpal tunnel syndrome. Dr. Nardone stated, "quite often carpal tunnel syndrome is a consequence of repetitive finger hand motion. So considering that he was doing that type of activity, it's likely that that activity at the computer and the typing and so forth, would have been either the cause of the carpal tunnel or an aggravating factor…" (PX5 pgs. 20-22)

Dr. Daniel Troy, an orthopedic surgeon from Advanced Orthopedics and Spine Care, Illinois, testified via deposition regarding his independent medical examination of Petitioner. He gave testimony confirming the accuracy of his independent medical examination report and then gave summaries of the report. He confirmed Petitioner had long-standing pre-existing arthritic changes to his neck that were not causally related to the March 2009 accident. (RX 3 pgs 8-9) Dr. Troy provided that it didn't appear that Petitioner's carpal tunnel was related to the March 2009 accident. He explained that lifting the propane tanks does not appear to be an event that would cause carpal tunnel syndrome. The doctor however, stated that said event might have caused a temporary aggravation of Petitioner's preexisting changes in Petitioner's neck. He further stated that the fact that Petitioner had successful carpal tunnel releases proves that his symptoms were more carpal tunnel in nature. (RX 5, pgs. 9-10) Dr. Troy summarized his testimony as follows: "The patient has, again, long-standing pre-existing arthritic changes to his cervical spine greatest at C5-6 and C6-7 levels. The patient picked up a propane tank which may have caused a strain to his neck area, but because his degenerative changes are so long-standing and pre-existing it is my opinion that the strain should have resolved after six to twelve weeks…the current treatment and symptomatology he's undergoing at this point in time and complaints are secondary to his long-standing pre-existing arthritic changes and not from the injury of – the subject of injury of picking up a propane tank. (RX 5 pg. 13)

In support of the Arbitrator's Decision regarding C. WHETHER, ON THE ABOVE DATE, PETITIONER SUSTAINED ACCIDENTAL INJURIES THAT AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT, the Arbitrator finds the following:

The Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of employment.

Petitioner testified that he began working for Respondent Pontiac Correctional Center on May 7, 1984 and worked as a correctional officer for 20 years. He was assigned to the supply department sometime in the first half of the decade in the 2000's. At this time, he also worked in the commissary where he spent a good portion of his day typing. Petitioner would typically work 8 hours a day, and he testified that his job in the commissary was primarily typing.

Petitioner also scanned items either by using a handheld scanner or by scanning it over a bar on the desk. Petitioner testified that when scanning items over the desk, he would use both hands to pick up the item. He would then swipe the item over the scanner in a left to right motion. Sometimes he would also fill orders and deliver them throughout the week.

Petitioner testified that using the computer made his condition much worse. He said that his hands and arms would become very painful. He testified that for about 8 months before he retired, he would work in the commissary for about 2 hours a day. At that time, he felt an aggravation in his left hand. He also testified that between March 20, 2009 and April 19, 2009, he felt an aggravation with numbness in his right hand as well.

The Arbitrator finds that May 19, 2009 is an appropriate accident date for Petitioner's repetitive trauma accident as this was when Petitioner received his EMG results, which showed that Petitioner was suffering from bilateral carpal tunnel syndrome and an ulnar neuropathy at the left elbow.

Based upon the greater weight of the evidence, and the testimony of Dr. Nardone, the Arbitrator finds that Petitioner suffered a repetitive trauma accident affecting both upper extremities arising out of his and course of his employment with Respondent that culminated and manifested itself on May 19, 2009.

In support of the Arbitrator's Decision regarding F. WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY CONNECTED TO THE INJURY, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's current condition of ill-being is causally connected to the Petitioner's work accident.

Dr. Emilio Nardone testified that Petitioner's work activities, specifically typing on a computer and using a hand scanner, would have been either the cause of the carpal tunnel or an aggravating factor. He further testified that repetitive motion, including typing, is a known factor in aggravating or causing carpal tunnel syndrome, and he believes that it would be more likely than not that Petitioner's work activities were an aggravating factor.

Petitioner offered the records of Dr. John Purnell, who noted that Petitioner was having problems with numbness in both of his arms. Dr. Purnell attributes this numbness to a work injury reporting that whenever Petitioner worked on the computer, his condition seemed to get worse. He diagnosed Petitioner with bilateral carpal tunnel plus a nerve problem on the left arm.

Respondent offered the records of Dr. Daniel Troy, which the Arbitrator gives little weight. Dr. Troy reported in his IME dated April 11, 2012 that he did not believe that either of Petitioner's carpal tunnel surgeries were related to his work accident. Dr. Troy's reasoned that picking up a propane tank and putting it on a truck would not appear to be an event that causes bilateral carpal tunnel syndrome. Dr. Troy does not specifically mention in his report how typing may have affected his carpal tunnel condition. However, he does testify that repetitive activities can arguably make you at risk for carpal tunnel syndrome.

Based upon the credible testimony of Petitioner, as well as all of the medical records and medical testimony of Dr. Nardone and opinions of Dr. Purnell, the Arbitrator finds that Petitioner met his burden of proving that his condition of ill-being regarding his right hand and left hand is causally related to his work injury which manifested itself on May 19, 2009.

In support of the Arbitrator's Decision regarding J. MEDICAL EXPENSES, the Arbitrator finds the following:

Petitioner offered PX1 as his total medical costs associated with the present case and consolidated case number 09 WC 28817. The Arbitrator has separated out Petitioner's medical expenses relating to Petitioner's cervical injury, and having found for Petitioner on causal connection, orders that Respondent shall pay reasonable and necessary unpaid medical services of $7,152.00, as provided in Sections 8(a) and 8.2 of the Act, as well as reimbursement to Petitioner of $480.00 for Petitioner's out-of-pocket expenses. Respondent shall be given a credit of $12,187.65/$7,569.78 adj. for medical benefits that have been paid by both its workers' compensation, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In support of the Arbitrator's Decision regarding L. WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

Petitioner is right hand dominant. Petitioner often complained of bilateral numbness in his arms and hands. He had been diagnosed with bilateral carpal tunnel syndrome by Dr. Nord, Dr. Nardone, and Dr. Purnell. Petitioner told Dr. Purnell in 2009 that using the computer made this condition worse, and he stated that his hands and arms would become very painful. Petitioner underwent carpal tunnel release surgeries on both the left and right side. Petitioner testified that his hands feel much better today after having the surgeries. However, he also testified that he has never really returned to the condition he was in prior to the accident. Further, Dr. Nardone testified that if Petitioner's symptoms were to persist for four or more years, then it is quite common that it will be persistent and permanent. (PX5 pgs 35-36)

Based upon the greater weight of the evidence, the Arbitrator finds that Petitioner sustained 17-1/2% loss of use of the right hand and 15% loss of use of the left hand under Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY MURILLO,

Petitioner,

vs.

NO: 11 WC 45754

15IWCC0283

RCN TELECOM SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection and nature and extent, and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties. The Commission finds that Mr. Murillo sustained 7.5% loss of use of the person-as-a-whole as a result of his right shoulder injury. The Commission vacates the permanent partial disability (PPD) award relating to the ribs and right elbow.

According to Section 8.1(b) of the Act, for accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and

professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Dr. M. Bryan Neal of Arlington Orthopedic & Hand Surgery found Petitioner sustained 6% upper limb impairment. The Petitioner works as a headend/hub site technician and was 62 years old at the time of the injury. The Petitioner returned to work and demonstrated no loss of future earning capacity as a result of his injury. The MRI revealed a partial tear of the distal articular surface of the supraspinatus tendon and a possible full thickness tear of the leading edge of the supraspinatus. Petitioner has elected to not undergo a proposed surgery. Petitioner's testimony establishes that he has some difficulty performing overhead work. Therefore, the Commission finds Petitioner sustained 7.5% loss of use of the person-as-a-whole.

Petitioner sustained a contusion of the right elbow and rib. As of January 14, 2013, Petitioner had not had any significant right elbow pain during the previous 3 months and only had occasional rib pain. The records reveal that Petitioner's elbow and rib pain was slight and the injury did not result in any permanent partial disability. Therefore, the Commission vacates the PPD award relating to the ribs and right elbow.

The Commission has considered each and every factor as required under Section 8.1(b) of the Act. The Commission has assigned no greater weight to any specific factor.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 3, 2014, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $935.43 per week for a period of 2 weeks (November 11, 2011 through November 29, 2011), that being the period of temporary total incapacity for work under §8(b) of the Act.

15IWCC0283

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 37.5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 7.5 percent loss of use of the person-as-a-whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 1 2015

MJB/tdm
O: 4-7-15
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MURILLO, ANTHONY
Employee/Petitioner

Case# **11WC045754**

15IWCC0283

RCN TELECOM SERVICES INC
Employer/Respondent

On 10/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0009 ANESI OZMON RODIN NOVAK KOHEN LTD
JOHN M POPELKA
161 N CLARK ST 21ST FL
CHICAGO, IL 60601

2623 McANDREWS & NORGLE LLC
JAMES E MURRAY
53 W JACKSON BLVD SUITE 315
CHICAGO, IL 60604

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

Anthony Murillo
Employee/Petitioner

v.

RCN Telecom Services, Inc.
Employer/Respondent

Case # **11 WC 45754**

Consolidated cases:
15IWCC0283

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **07/31/14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **11/10/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 **$72,963.35**; the average weekly wage was **$1,403.14.**

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$1,883.60** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,883.60**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $935.43/week for 2 weeks commencing 11/11/11 through 11/29/11, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 2.53 weeks, because the injuries sustained caused 1% loss of the right arm (elbow) as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of 695.78/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, relative to the right shoulder, as provided in Section 8(d)(2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of 695.78/week for 2 ½ weeks, because the injuries sustained caused the .5% loss of the person as a whole, relative to the ribs, as provided in Section 8(d)(2) of the Act.

Respondent shall be given a credit of $1,883.60, for payment of temporary total disability benefits to Petitioner, pursuant to Section 8(b) 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.

FINDINGS OF FACT

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

Anthony Murillo ("Petitioner") testified that he was a hub site technician employed by RCN Telecom Services, Inc., ("Respondent") on the date of accident, i.e. November 10, 2011. He oversees and adjusts equipment including terminal connections, installs gear, racks and runs cable, which includes going up and down ladders and working 40% of the time on his feet and above his head.

The petitioner testified that on November 10, 2011, he walked out into a hallway and fell when he stepped onto newly laid, carpeting glue, landing on his right arm and rib area. The petitioner further testified that he had had a prior right arm injury in the early 1960's when he fell. He was treated with a cortisone injection but no surgery. In a doctor's note dated December 2, 2011, Dr. Antoine Fakhouri of MidAmerica Hand to Shoulder Clinic, indicated that prior to the subject fall, petitioner had mild, intermittent, right shoulder pain. The MRI scan of November 23, 2011, documented mild to moderate degenerative changes of the acromioclavicular joint, with a significant 3.4 mm inferior spur formation from the distal under the clavicle, which abutted the musculotendinius junction of the supraspinatus. There was also concern regarding positional impingement. This is consistent with impingement syndrome and the acromioclavicular degenerative joint disease as outlined by Dr. Fakhouri in his December 2, 2011 report. PX3.

On November 10, 2011, Petitioner was driven to the emergency room of Illinois Masonic Medical Center. X-rays were taken of his right shoulder, elbow, forearm and chest. They showed no fracture but there was an irregularity noted along the superolateral aspect of the right humeral head that was considered to be degenerative, as well as an ossific density at the distal right humerous with small spurs at the olecranon process in the ulna. Petitioner was given medication, authorized to stay off work; and advised to follow-up with his physician. PX1.

Petitioner presented to Dr. Nahhas on November 22, 2011. The medical records indicate that Petitioner's chest pain had subsided, but his right shoulder pain had persisted along with stiffness. The November 23, 2011 MRI of the right shoulder found no evidence of fracture or dislocation but the impression indicated a partial tear of the distal articular surface of the supraspinatus tendon and possible full thick tear of the leading edge of the supraspinatus, interiorly. There were mild degenerative changes of the acromioclavicular joint with the spur formation at the distal end of the clavicle, mild glenohumeral joint effusion, mild subacromial-subdeltoid bursitis and mild to moderate subcoracoid bursitis. Dr. Nahhas released the petitioner to return to work in a light duty capacity, which was accommodated by Respondent.

The petitioner was referred to Dr. Antoine J. Fakhouri at the MidAmerican Hand to Shoulder Clinic who confirmed that the MRI was consistent with impingement syndrome and acromioclavicular degenerative joint disease. The petitioner was given a cortisone injection on December 20, 2011; and released to restricted work while undergoing therapy. The petitioner followed up with Dr. Fakhouri on February 23, 2012, stating that he was doing fine and had no symptoms while tolerating his present work activities. On March 22, 2012, Dr. Fakhouri examined the Petitioner and found that he demonstrated full range of motion of the shoulder. Another cortisone injection was prescribed along with exercises and continued modified work duties.

On April 30, 2012, the petitioner appeared for re-evaluation and stated that that he was doing well. Physical therapy was completed and Petitioner stated that he would like to return to work so Dr. Fakhouri released the Petitioner to full-duty work with no restrictions and discharged him from care. Dr. Fakhouri also found that Petitioner was MMI and would only need to be seen in the future on an "as needed" basis. The Petitioner was released to full-duty work with no restrictions. PX3.

On September 15, 2012, the Petitioner was examined by Dr. Jeffrey Coe, M.D. who found that the work injury caused an aggravation of degenerative arthritis; and development of the right shoulder impingement syndrome. Dr. Coe found that the Petitioner also experienced a right elbow contusion and right rib contusions. His examination found tenderness about the right elbow and lower rib cage as well as in the right shoulder joint. Dr. Coe found a causal relationship between the November 10, 2011 accident and the Petitioner's current symptoms. Dr. Coe is of the opinion that the injury caused some partial disability to the right arm with additional disability to the person as whole from the right rib contusions. PX6.

On January 20, 2013, Petitioner was examined, on behalf of the Respondent, by Dr. M. Bryan Neal at Arlington Orthopedic and Hand Surgery Specialists. The petitioner provided a history that his right elbow had "pretty much healed" and he agreed that it had resolved to "just about 100%". The Petitioner stated that the last time he had any significant right elbow pain was at least three (3) months earlier. Petitioner stated that, for the most part, his chest felt good. The petitioner also stated that he was experiencing right shoulder stiffness and clicking. After examination, Dr. Neal concluded that there was no clinical condition or problem with the right elbow; and that any discomfort in his right chest wall was well tolerated and not of significant clinical concern. Concerning his right shoulder, Dr. Neal diagnosed a right shoulder rotator cuff tear with tendonopathy secondary to impingement syndrome and acromioclavicular arthritis. Dr. Neal found the medical records demonstrated pre-existing degenerative changes and rotator cuff tendonopathy that was responsible for his intermittent right shoulder symptoms prior to the event of November 10, 2011. Dr. Neal noted that the medical histories from the treating physicians did not provide a formal diagnosis of the rotator cuff tear. Dr. Neal agreed with the other physicians that the Petitioner could continue to work his full duty job, without any restrictions. Dr. Neal concluded that there was an element of permanent partial disability, that the petitioner was at maximum medical improvement and provided an

impairment rating of 6% loss of use of the upper limb impairment. Dr. Jeffrey Coe's report did not set forth an impairment rating. PX1 & RX1 & 6.

Petitioner testified that he was approximately 62 years old at the time of the accident and that he anticipated this being his last job. He did not want to follow-up with a physician and possibly undergo surgery, requiring him to be off work, because he was concerned that it would jeopardize his job. He explained that his superiors were flexible with him and he worked with good associates that helped him accommodate his job activities. He will be 65 years old in two (2) months and is not entitled to full Social Security retirement benefits until he turns 66. He intends to continue working at least until that time. He testified that if he continues to have issues with his right shoulder, or if those symptoms worsen, he would like to seek medical attention for his right shoulder after his retirement. He currently does exercises at home every day, including stretching exercises, which have allowed him to continue working.

He further testified that the work that he currently does is "subdued" compared to his pre-accident work. There are ten (10) hub sites that he periodically visits. In Skokie, there are three hub sites that require him to climb down into vaults via a fixed ladder. The vaults are approximately ten (10) feet deep. He testified he has not gone into the vaults since the accident, and his associates perform those duties for him. He testified that he has avoided the vaults due to his shoulder, but also due to his knees. Petitioner and his associates rotate being "on-call". When his associates are on-call and a situation arises in the downtown area, he covers their calls in exchange for them working in the vault for him; and doing overhead work for him. Petitioner testified that he has pain constantly in his shoulder and his elbow, but only with certain movements on his right side. He said that his right shoulder pain is present every day, especially in the evening. He continues to see Dr. Nahhas regularly, and receives his Naproxen prescription from him.

The petitioner further testified that he experiences tenderness in his ribs and his right elbow and has been using extension tools to relieve the torque. While continuing to perform exercises at home the petitioner also testified that he watches baseball and still bowls but has downgraded to using a 10-pound ball. *See* RX1.

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner's current condition of ill-being is in part related to the injury sustained on November 10, 2011 as that accident caused an aggravation of pre-existing degenerative changes. Petitioner also suffered a right partial tear of the distal articular surface of the supraspinatus tendon with a possible full thickness tear of the leading edge of the supraspinatus, anteriorly.

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

The respondent's physician, Dr. Neal also found tendonopathy secondary to impingement syndrome and acromioclavicular joint arthritis along with the right shoulder rotator cuff tear. Dr. Neal opined a 6% upper limb impairment rating.

The Arbitrator finds minimal permanent disability to the right elbow and ribs in that there is no evidence of significant treatment and little residual deficiency documented by the medical treatment records and evidence. Respondent shall pay Petitioner permanent partial disability benefits of $695.78/week for 2.53 weeks, because the injuries sustained caused 1% loss of the right arm (elbow) as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of 695.78/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, relative to the right shoulder, as provided in Section 8(d)(2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of 695.78/week for 2 ½ weeks, because the injuries sustained caused the .5% loss of the person as a whole, relative to the ribs, as provided in Section 8(d)(2) of the Act.

15IWCC0283

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
11 WC 45754
SIGNATURE PAGE

Signature of Arbitrator

September 30, 2014
Date of Decision

OCT 3 – 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WAYNE LARAMORE,

Petitioner,

vs.

NO: 12 WC 24145

15IWCC0284

CHESTER MENTAL HEALTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causation, temporary total disability (TTD) and permanency, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission initially notes that the Arbitrator's award indicates a $2,463.60 credit to Respondent for temporary total disability (TTD) in the "Findings" section of the decision. However, no TTD was awarded in the case, and in the "Attached Findings" portion of the decision (Page 4 of 4), the Arbitrator indicated: "Temporary total disability benefits were also placed into dispute based upon the Respondent disputing accident, causation and notice. Based upon the conclusions herein regarding accident, causation and notice, the Respondent is liable for TTD benefits to the Petitioner. The Petitioner acknowledged receiving all TTD benefits from his employer herein. There is no overpayment of TTD to Petitioner."

The parties stipulated to a period of TTD from September 2, 2011 through September 26, 2011, a period of 3-4/7 weeks. The evidence in the case indicates the Petitioner initially went off work on August 26, 2011, the date he underwent right carpal tunnel release. Petitioner testified that he underwent the surgery and received TTD until he returned to his regular job. The surgeon, Dr. Mirly, issued a September 27, 2011 report indicating the Petitioner was released to

return to work.

The Request for Hearing form submitted to the Arbitrator (Arb. Exhibit 1) indicated that TTD benefits were put at issue by the parties. The form signed by the parties also stipulates that the Respondent paid TTD benefits totaling $2,463.60.

Based on the above, the Commission finds that the Petitioner was entitled to TTD from August 26, 2011 through September 27, 2011, a period of 4-5/7 weeks. Based on the Petitioner's $1,034.67 average weekly wage, the TTD rate is $689.78, and the TTD award totals $3,251.62. Respondent is entitled to the credit of $2,463.60, resulting in a TTD underpayment of $788.02.

The Commission also modifies the Arbitrator's decision with regard to the permanent partial disability credit awarded to Respondent for Petitioner's prior settlements involving his right hand. The Arbitrator determined, based on Respondent's Exhibits 9 and 10, that Respondent was entitled to credit of 22.5% of the right hand, for prior awards/settlements involving the right hand. In reviewing Respondent's Exhibit 9, the Commission agrees that the Respondent is entitled to credit for the Petitioner's prior October 11, 2000 settlement for 18.5% of the right hand. However, in reviewing Respondent's Exhibit 10, while the Commission's database indicates Petitioner settled a prior case for 5% of the right hand, a review of the actual settlement contract indicates that it appears the Commission database contains a clerical error, and that the settlement was actually to the left hand, and involving injury to the Petitioner's left thumb. Based on this evidence, we find that Respondent is entitled to a credit of 18.5% of the right hand.

The Commission notes that, because Petitioner's current injury was caused by repetitive trauma, and because the accident date found was subsequent to June 28, 2011, both the prior settlement of 18.5% of the right hand, and the current award of 27.5% of the right hand, were based on the right hand having a value of 190 weeks of permanent partial disability. As such, there is no need to determine if the credit should be calculated based on a deduction of the percentage of loss, or the number of weeks of permanent partial disability. Using either method will result in the same dollar amount of credit.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is modified as noted above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $689.78 per week for a period of 4-5/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $620.80 per week for a period of 56.375 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused the loss of use of 27.5% of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical services included in Petitioner's Group Exhibit 5, as provided in §§8(a) and 8.2 of the Act.

15IWCC0284

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 is entitled to a credit for medical benefits that have been paid by Respondent under §8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to credit under §8(e)17 of the Act of 18.5% of the right hand, based on Petitioner's prior October 11, 2000 settlement.

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

DATED: APR 22 2015
TJT: pvc
o 3/10/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

NOTICE OF ARBITRATOR DECISION

LARAMORE, WAYNE
Employee/Petitioner

Case# **12WC024145**

CHESTER MENTAL HEALTH CENTER
Employer/Respondent

15IWCC0284

On 6/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4850 FISHER KERHOVER & COFFEY
JASON E COFFEY
P O BOX 191
CHESTER, IL 62233

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0588 ASSISTANT ATTORNEY GENERAL
KYLEE J JORDAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 30 2014

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

15IWCC0284

STATE OF ILLINOIS)
)SS.
COUNTY OF **Franklin**)

- ☐ 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

Wayne Laramore
Employee/Petitioner

v.

Chester Mental Health Center
Employer/Respondent

Case # **12** WC **24145**

Consolidated cases: **None**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 14, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0284

FINDINGS

On **July 15, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$53,802.93**; the average weekly wage was **$1,034.67**.

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

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

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

Respondent shall be given a credit of **$2,463.60** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$2,463.60**.

Respondent is entitled to a credit under Section 8(j) of the Act for all benefits paid through the date of trial.

ORDER

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

Respondent shall pay reasonable and necessary medical services as provided in Petitioner's Group Exhibit #5, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $620.80/week for 10.25 weeks, because the injuries sustained caused the 27.5% loss of the right hand/wrist (less a credit of 22.5% of the right hand/wrist being 5% new disability herein), as provided in Section 8(e) of the Act.

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

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

Edward Lee
Signature of Arbitrator

6/27/14
Date

JUN 30 2014

15IWCC0284

The parties presented at arbitration disputing the following issues: accident; notice; causal connection; TTD; medical bills; and the nature and extent of Petitioner's injuries subject to Respondent's credit for prior settlements received by Petitioner for disability to his right hand. The Petitioner provided the only live testimony at hearing stating he was currently 63 years old and retired. The Petitioner testified he was employed at Chester Mental Health Center on July 15, 2011 as a Unit Manager where he had served for 9 years.

The Petitioner testified the Unit Manager position primarily involves timekeeping. The Unit Manager keeps the time for the Security Therapy Aides and Therapists at the facility. They also make sure the patients at the facility have supplies, their rooms are taken care of, and generally maintain the unit they are assigned to. The Petitioner typed a document with his daily job duties listed and designated times dedicated to each task (Petitioner's Deposition Exhibit #6). The Petitioner testified to some of the job duties listed on the document at hearing.

The Petitioner first testified to his job duty of timekeeping. The Petitioner stated he would devote basically three hours of his shift working 8:30 a.m to 4:30 pm Monday through Friday to timekeeping by hand. He would collect the time sheets and then document on a form by hand. The timekeeping duties were done with a pencil for three hours per day. The Petitioner testified he is right-hand dominant and writes with his right hand. The Petitioner stated he would grip the pencil with his right hand while performing this job duty. The Petitioner further stated he would develop right hand cramps from keeping time for 3 hours every day.

On cross-examination, the Petitioner testified that, after turning in the hand-written time forms, he would enter the same information onto a database on the computer, which he would do in the afternoon. The Petitioner would use a keyboard to enter the information on the computer. The Petitioner further testified he was responsible for timekeeping for approximately 35 people.

The Petitioner then testified to his job duty of processing money, clothing, and shoes. The Petitioner described how when a patient at the facility is given money through the mail or from a visitor, he has to document it. He would fill out the form by hand, have the patient sign the form, and then process the money into a Trust Fund. The Petitioner further described that if a patient receives clothing from home or from a visitor, he would fill out a different form to ensure the patient gets their name placed on their clothing. If a patient does not get any clothing, the Petitioner would fill out forms by hand to requisition clothing on their behalf. The Petitioner noted he performs these job duties on behalf of about 64 to 67 patients on his unit. He would be working with the money and clothing forms for about one-half hour to one hour per day depending on the day.

The Petitioner then discussed his job duty involving the mail noting he was in charge of mail distribution on the unit. The Petitioner testified he picks up the mail in the morning and will go through it to ensure it has the proper postage. If the mail does not have the proper postage, he must document it by hand. He then will open all the mail and open any and all packages for the patient. If there are packages contained within larger packages, the Petitioner would have to open both. The Petitioner noted there is quite a bit of mail that comes in. If there are magazines that come in he will remove all staples from the magazines and will check every single piece of mail by hand to ensure there is no money or other contraband contained within the package. The Petitioner testified the mail can take up to 45 minutes per day to go through.

The Petitioner also testified to performing Treatment Plan Reviews (or TPR's). The Petitioner explained that the Unit Manager will review the treatment plan of every patient on the unit with the therapist for approximately 15 patients per week. The Unit Managers will maintain files on every patient on the unit which are kept in a

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cabinet. The Unit Manager must pull and replace all the files and perform all filing duties. The Petitioner testified he has no assistant to help him with this job duty. The Unit Manager also maintains files on all the Security Therapy Aides and therapists at the facility as well. The Petitioner noted some of the files are quite large. The Petitioner stated that some days he does no filing, but some days he will spend up to one hour out of his day filing. The Petitioner further testified he uses his daily afternoons do catch up on his keyboarding for the data entry he must perform. The Petitioner testified he uses his upper extremities in the performance of his job duties basically the whole day, the seven and one-half hours he works per day.

The Petitioner testified that in the course of performing his job duties, he developed symptoms in his right upper extremity. The Petitioner stated he sought medical treatment for his symptoms which resulted in a nerve conduction study on July 15, 2011. The Petitioner was told that day he had right carpal tunnel syndrome by the physician performing the test. The Petitioner then identified Respondent's Exhibits #3 and #4 which he recognized to be the forms the Workers' Compensation Coordinator requested he fill out at the facility. The forms were dated July 18, 2011(Respondent's Exhibits #3 and #4). The Petitioner testified the forms were given to Lynn Hubert who serves as Unit Director at Chester Mental Health facility. The Petitioner testified she is his boss.

The Petitioner then testified he was referred to Dr. Harvey Mirly, an orthopedist, for further medical treatment. Dr. Mirly instructed the Petitioner to speak with his Workers' Compensation Coordinator. The Petitioner stated he did speak with the Coordinator who told him one and one-half hours later to go ahead and schedule surgery. The Petitioner did schedule surgery pursuant to the instructions of his Workers' Compensation Coordinator. The Petitioner underwent right carpal tunnel release per Dr. Mirly on August 26, 2011. The Petitioner testified he underwent the surgical procedure because he was told by the Workers' Compensation Coordinator at the facility that it was approved. In fact, the Petitioner further testified he received all of his temporary total disability payments during the time period he was authorized off of work by Dr. Mirly. The Petitioner was subsequently released after follow-ups with Dr. Mirly on December 2, 2011(Petitioner's Deposition Group Exhibit #3).

The Petitioner testified, since his release by Dr. Mirly, he still notices pain in the middle of the night especially in the last three fingers. Further, the Petitioner stated he does not have as much strength in the right hand as he did prior to surgery and certain job duties that he does now like weed eating or mowing grass causes problems.

The Petitioner also testified at hearing that he enjoys wood carving as a hobby. The Petitioner stated he has been engaged in this hobby for about 15 years. The Petitioner indicated he engages in wood carving about two to three hours per week. On cross-examination, the Petitioner noted that some weeks he would carve more than that, but that were many weeks he would not carve at all.

Dr. Mirly testified, via deposition, that he treated the Petitioner and ultimately performed a right open carpal tunnel release. Dr. Mirly noted his office sought authorization for the surgery from Petitioner's employer prior to performing the same. He further noted he received authorization to proceed with surgery from Petitioner' s employer. Dr. Mirly testified he reviewed the same typewritten job duties which were offered by Petitioner at trial. Based upon the job duties listed and the amount of time dedicated to each job duty, Dr. Mirly believed Petitioner's job duties aggravated Petitioner's right carpal tunnel syndrome (Petitioner's Group Exhibit #4, pg. 13). On cross-examination, Dr. Mirly noted several other factors which can aggravate carpal tunnel syndrome in the population at large including aging. However, Dr. Mirly felt the timekeeping, processing money and

clothing, and the filing all could contribute to the aggravation of carpal tunnel syndrome in the Petitioner (Petitioner's Group Exhibit #4). Dr. Mirly was also asked about Petitioner's hobby of wood carving and he indicated it would be a contributing factor, but that it would not eliminate the contribution made by his work activities (Petitioner's Group Exhibit #4, pg. 40).

The Respondent requested the Petitioner undergo a Section 12 examination with Dr. Patrick Stewart, and, following the evaluation, Dr. Stewart testified via deposition. Dr. Stewart agreed with Petitioner's diagnosis of carpal tunnel syndrome. However, Dr. Steward opined Petitioner's right carpal tunnel syndrome was not related to his work duties. Dr. Stewart based his opinion on a study issued by the Mayo Clinic.

On cross-examination, Dr. Stewart admitted he did not know how much time Petitioner spent in an average day with data entry. He further admitted he did not know whether the majority of the documentation was done by hand or on a keyboard. Dr. Stewart was asked about the Mayo Clinic study on which he based his causation opinions. Dr. Stewart testified the study looked specifically at computer use and its relationship to carpal tunnel syndrome. Dr. Stewart also stated that awkward wrist postures, hyperflexing and hyperextension of the wrist contributes to carpal tunnel syndrome if done more than fifty percent of the time. He also testified that forceful gripping contributes to carpal tunnel syndrome.

Based upon the foregoing, the Arbitrator hereby makes the following conlusions of law:

1. The Petitioner sustained his burden of proof regarding accident. It was the undisputed testimony of the Petitioner he performs job duties involving his right hand nearly the entire seven and one-half hours he works per day. The Respondent had a representative from the facility at trial who did not testify or seek to refute any of the Petitioner's testimony. Accordingly, the Arbitrator finds the testimony of the Petitioner to be credible. The Commission has previously noted individuals who perform data entry work, both handwritten and by computer, for half of their day can sustain an alleged repetitive trauma injury (*Janet Chaudhry v. Wal-Mart Associates*, 12 IWCC 227). Further, the Commission has routinely found workers engaging in the performance of charting, filing, copying, drafting correspondence and typing sustained repetitive trauma injuries (*Brenda Robinson v. Franklin Hospital*, 12 IWCC 409 and *Stephanie Ryan v. Methodist Medical Center*, 12 IWCC 1169). The Arbitrator can find no evidence in the record to dispute the fact that Petitioner herein performed job duties involving his right hand almost his entire day every day he worked at Chester Mental Health Center.
2. The Petitioner also sustained his burden of proof regarding causal connection. The opinions of Dr. Mirly are more persuasive than those of Dr. Stewart. Dr. Stewart primarily based his opinions upon a study authored by the Mayo Clinic looking to the relationship between computer usage and carpal tunnel syndrome. However, Dr. Stewart admitted he did not know how much time the Petitioner devoted to computer usage versus hand written data entry during his day. In fact, Dr. Stewart could not respond to inquiry regarding specifically how much of the work performed by Petitioner involved writing as opposed to typing. Dr. Mirly had a much better understanding of the job duties performed by Petitioner. The Petitioner provided him a detailed type-written description of his job duties which was the exact same type-written description which was entered into evidence at trial. There was no evidence provided to rebut or refute the type-written job description. Dr. Mirly acknowledged Petitioner's hobby of wood carving, but he further stated this hobby would not take away the contribution make by his job duties in aggravating Petitioner's right carpal tunnel syndrome. In

repetitive trauma claims, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause (*All Steel, Inc. v. Industrial Commission*, 221 Ill. App. 3d 501).

3. The Arbitrator finds the manifestation date of Petitioner's injury was July 15, 2011. The Petitioner's undisputed testimony reveals he did not know he had right carpal tunnel syndrome until he was told at his nerve conduction exam on July 15, 2011. The Petitioner then filled out the appropriate forms to notify his employer of his work-related condition on July 18, 2011, three days following the nerve conduction test. It should also be noted the Workers' Compensation Coordinator instructed Petitioner to get surgery per Dr. Mirly. It seems odd that the Respondent would dispute notice at hearing nearly three years following their instruction to Petitioner to seek surgery for his work-related condition.
4. The medical bills were placed into dispute based upon the Respondent disputing accident, causation, and notice. Based upon the conclusions herein regarding accident, causation, and notice, the Respondent is hereby ordered to pay all reasonable and necessary medical bills pursuant to the fee schedule in the Act. Accordingly, there would be no medical bill overpayment herein. Once again, the Petitioner was instructed to undergo the treatment per Dr. Mirly by his employer.
5. Temporary total disability benefits were also placed into dispute based upon the Respondent disputing accident, causation, and notice. Based upon the conclusions herein regarding accident, causation, and notice, the Respondent is liable for TTD benefits to the Petitioner. The Petitioner acknowledged receiving all TTD benefits from his employer herein. There is no overpayment of TTD to Petitioner.
6. The Arbitrator hereby finds the Petitioner suffered 27.5% permanent partial disability to his right hand/wrist less a credit to Respondent for 22.5% for two previous injury settlements received by Petitioner. Accordingly, the Petitioner is hereby awarded 5% new disability for his right carpal tunnel surgery herein. The Arbitrator notes the continued complaints of Petitioner since being released by Dr. Mirly as stated herein.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Antonio Lopez,

Petitioner,

vs. NO: 13 WC 28769

HC Lights,

15IWCC0285

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission after considering the sole issue of nature and extent, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent, and based on our complete review of the record, we find that Petitioner suffered a 55% loss of use of the hand as a result of the March 22, 2013 accident.

In his Statement of Exceptions, Petitioner requested an award of 50 weeks under Section 8(c) for disfigurement of the right arm. Petitioner did not request a viewing by the Commission, instead choosing to rely "on the Arbitrator's observation of the scarring of the Petitioner's right forearm, all above the wrist" and on the Commission's decision in *Lyndsey McCain vs Unity Christian School* 10IWCC416. (Petitioner's Brief,pg.2) In *McCain*, the Commission explained that "[b]ecause Petitioner's loss of use is of her foot, while her disfigurement is of her leg, the Arbitrator's award under both Section 8(e) for the foot and Section 8(c) for the leg is lawful and appropriate." (Petitioner's Brief,pg.2)

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The Commission notes that Section 8(c) reads, in pertinent part: "No compensation is payable under this paragraph where compensation is payable under paragraphs (d), (e) or (f) of this Section." 820 ILSC 305/8(c) (2013)

In the case at bar, the award under Section 8(e) was for the hand and wrist. The Arbitrator's description of the scarring she viewed indicates that the scarring is on Petitioner's hand and wrist. The only mention of any scarring above the wrist is in the forearm where the skin graft was taken. The Commission notes that, based on the description provided by the Arbitrator and accepted by the parties, the majority of the scarring is in Petitioner's hand, palm, and around the wrist area. Considering Petitioner's scarring is basically in the hand and wrist area and the Arbitrator's award of permanent partial disability benefits is for Petitioner's hand and wrist injury, the Commission finds that an award for disfigurement under Section 8(c) would go against that section's dictate that no compensation is payable under Section 8(c) where compensation is payable under Section 8(e), which is exactly what was done in this case. The Commission finds Petitioner's reliance on *McCain* misplaced since the disfigurement award in that case was for a different body part (the leg) than the body part for which compensation under Section 8(e) was awarded (the foot). In the case at bar, Petitioner is asking for compensation under Sections 8(c) and 8(e) for the same body part (hand/wrist), which, as previously mentioned, is not allowed under the Act. Therefore, Commission finds that Petitioner is not entitled to additional compensation under Section 8(c) of the Act.

Regarding the actual award of permanent partial disability, the Commission notes that the Arbitrator properly listed and considered the factors that must be considered under Section 8.1b of the Act and outlined her findings regarding each factor. However, the Commission places more weight on a two specific factors and finds that Petitioner has proved entitlement to a higher award of permanent partial disability benefits.

The Commission notes that while the updated functional capacity evaluation (hereinafter "FCE") indicates that Petitioner could return to return to work as a field manager, Petitioner testified that he was unable to move the 32 foot ladder used at work as he had before the accident. (T.28-29) Petitioner further testified that he was unable to move a 32 foot ladder while working for a new employer. (T.28) The FCE also demonstrated that Petitioner could work a heavy demand level job, but still restricted Petitioner's work activities as follows: 72 pounds occasionally, 63 pounds frequently, and 18 pounds constantly. (RX1,RX2) The Commission also notes that Petitioner underwent a total of three surgeries as a result of the accident: 1. an application of external fixator, open reduction internal fixation, allograft, fasciotomy, and carpal tunnel release; 2. an examination under anesthesia and split full-thickness skin graft, and application of a long arm cast; and 3. removal of external fixation and internal fixation of the right wrist. (PX2) Considering the substantial affect multiple surgeries can have in the development and finding of personal disability, and Petitioner's permanent restrictions, the Commission finds that Petitioner has suffered a 55% loss of use of the hand under Section 8(e) of the Act.

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One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $368.76 per week for a period of 112.75 weeks, as provided in Section 8(e)(9) of the Act, for the reason that the injuries sustained caused the 55% loss of use of the right hand.

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 by Respondent is hereby fixed at the sum of $41,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015
MJB/ell
o-03/23/15
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Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOPEZ, ANTONIO
Employee/Petitioner

Case# **13WC028769**

H C LIGHTS
Employer/Respondent

15IWCC0285

On 7/1/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0062 TEPLITZ & BELL
JOEL BELL
221 N LASALLE ST SUITE 1900
CHICAGO, IL 60601

1886 LEAHY EISENBERG & FRAENKEL LTD
CALLIOPE M LUCAS
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Antonio Lopez
Employee/Petitioner

v.

H.C. Lights
Employer/Respondent

Case # **13** WC **28769**

Consolidated cases: **N/A**

15IWCC0285

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Geneva**, on **May 23, 2014** and **June 4, 2014**. By stipulation, the parties agree:

On the date of accident, **March 22, 2013**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned **$31,959.20**, and the average weekly wage was **$614.60**.

At the time of injury, Petitioner was **43** years of age, ***married*** with **2** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$11,015.19** for TTD[1], **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,015.19**.

[1] The parties stipulated that Petitioner was entitled to temporary total disability commencing March 23, 2013 through September 27, 2013. AX1.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $368.76/week for a further period of 92.25 weeks, because the injuries sustained caused 45% loss of use of the right hand/wrist, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from March 22, 2013 through June 4, 2014, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

June 30, 2014
Date

JUL 1 - 2014

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
NATURE AND EXTENT ONLY

Antonio Lopez
Employee/Petitioner

v.

H.C. Lights
Employer/Respondent

Case # **13** WC **28769**

Consolidated cases: **N/A**

15IWCC0285

FINDINGS OF FACT

The only issue in dispute is the nature and extent of Petitioner's injury. Arbitrator's Exhibit[2] ("AX") 1.

On March 22, 2013, Petitioner worked for Respondent as a holiday lights installer, a seasonal position, on commercial and residential properties. Tr. at 9, 29-30. On that date, he was on a 12 foot A-frame ladder and he fell down about 10 feet. Tr. at 9-10. He landed on his head, butt, and body. *Id.* Petitioner testified that he when he woke up he realized that he could not feel his right hand. Tr. at 10. Petitioner is right hand dominant. Tr. at 16-17.

The medical records reflect that Petitioner was transported to Delnor Hospital via ambulance within an hour of the accident. PX1. Petitioner treated with Ankur A. Dhawan, D.O. *Id.* Dr. Dhawan initially noted a fall of six to ten feet from a ladder onto concrete with a point of impact of the right wrist. *Id.* Further, Dr. Dhawan diagnosed a right wrist fracture. *Id.* The radiology report noted "[t]here is an impacted Colles' fracture of the distal radius and an avulsion fracture of the ulnar styloid. There is slight dorsal subluxation of the radiocarpal joint. No other fractures are seen." *Id.* CT-scans of the cervical spine, chest, abdomen and head were reported to be normal. *Id.* The right wrist was reduced. *Id.* Post-reduction, Petitioner's right wrist x-rays showed "[t]he comminuted intra-articular fracture of the distal radius is redemonstrated there is reduction of the dorsal angulation however significant impaction overlap of the fracture site fragments is still visible measures approximately 12.5 mm. There is fracture of the ulnar styloid. Carpal bones appear intact." *Id.* Petitioner was discharged and instructed to follow up with an orthopaedic surgeon. *Id.*

Petitioner testified that he then saw Dr. Anthony Brown, an orthopaedic surgeon. Tr. at 12. The medical records reflect that on March 26, 2013 Dr. Brown diagnosed Petitioner with a comminuted, displaced fracture of the right distal radius and ulnar styloid and he scheduled surgery. PX2. He noted that updated x-rays showed a highly comminuted, displaced fracture of the right distal radius and ulnar styloid. *Id.*

On March 29, 2013, Dr. Brown performed the following surgical procedures: "1. Application of external fixator. 2. Open reduction internal fixation. 3. Allograft. 4. Fasciotomy. 5. Carpal tunnel release." *Id.*

Dr. Brown was unable to close the wound due to severe swelling which necessitated second surgery on April 4, 2013. *Id.* Specifically, he performed an examination under anesthesia, a split full-thickness skin graft obtained

[2] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. The Arbitration Hearing Transcript is denominated as "Tr." with corresponding page numbers.

from the right thigh and placed on the defect on the forearm and dorsal radial defect, and long arm cast dressing. *Id.* During that procedure, Dr. Brown further evaluated the ulnar styloid in surgery and noted that an open procedure was not appropriate or required. *Id.*

On May 9, 2013, Dr. Brown performed a third surgery and removed the external and internal fixation implements. *Id.* Petitioner continued to follow up with Dr. Brown post-operatively who addressed both the right wrist and skin graft area of the thigh. *Id.* By June 14, 2013, Dr. Brown noted that the right thigh wound area had finally healed and he referred Petitioner to physical therapy at Physical Therapy and Sports Injury Rehabilitation ("PTSIR"). *Id.* Petitioner treated there from June 27, 2013 through August 30, 2013. *Id.*

On August 9, 2013, Dr. Brown examined Petitioner, recommended continued therapy, and released Petitioner to light duty with no lifting greater than 25 pounds. *Id.* On September 3, 2013, Dr. Brown indicated that he spoke with Petitioner's physical therapist who indicated that Petitioner was at the end of therapy and recommended a functional capacity evaluation. *Id.*

Petitioner underwent the recommended functional capacity evaluation at PTSIR on September 11, 2013. RX2. Petitioner had decreased range of motion and grip strength testing right vs. left. *Id.* The evaluating physical therapist found the results to be valid and ultimately recommended that Petitioner could function on a full-time basis as follows: "1. Material Handling: 72# occasional, 63# frequent, and 18# constant. 2. Non-Material Handling: based on the client's description of non-material handling duties, he meets all requirements for his position as a field manager." *Id.* He also noted that Petitioner "should be able to function on a full time basis at levels identified in the Heavy work demand level." *Id.*

Petitioner testified that he last sought medical treatment on September 24, 2013. Tr. at 23. On this date, Dr. Brown reviewed the results of the functional capacity evaluation with him and discharged Petitioner from his care indicating that he could return on an as-needed basis. PX2. Petitioner testified that Dr. Brown recommended additional lifting restrictions during this last visit, but these are not specified in Dr. Brown's records. Tr. at 24-25, 29, 33; PX2. Petitioner testified that, however, that Dr. Brown discussed the functional capacity evaluation results with him and told him to limit what he could lift including heavy things like ladders. Tr. at 33. Petitioner testified that he has not been back to see a doctor since September 24, 2013 and that Dr. Brown retired. Tr. at 23-24.

Before the accident, Petitioner testified that he did not have any injury to the right hand or arm aside from an injury to his right index finger that was severed when he was 19. Tr. at 14-15. Since the accident, Petitioner has had no other injuries to his right arm. Tr. at 16.

Regarding his current condition, Petitioner testified that he notices difficulty moving his right wrist and he cannot twist it the way that he used to. Tr. at 16, 24. He has pain and discomfort, which he did not have previously and some tightness. *Id.* When he has to lift items, his right wrist does become more painful. *Id.* Petitioner also testified that the scarring does get itchy with weather and heat. *Id.* Petitioner does not use prescription medication for pain. Tr. at 24.

Petitioner also testified that he has residual scarring from the surgery to his right wrist, which was viewed by the Arbitrator. Tr. at 17. The scar on the top side of his hand and wrist extended two and a quarter inches long and approximately one-half inch wide. Tr. at 18. Another scar, approximately three-quarters of an inch long and a quarter-inch wide, is present along the base of the thumb in the area of the wrist, as well as a thin, white scar two inches in length and approximately a millimeter in width that extends from the base of the thumb about an

inch to the bottom of the first finger, which Petitioner believed resulted from the incision to release skin pressure. Tr. at 19-20. Finally, there is a larger, discolored scar that is red-purplish in areas and with a green tint toward the middle located on the underside of the wrist extending toward the forearm in the direction of the shoulder which is approximately four inches in length and an inch-and-a-half in width and is from the skin graft. Tr. at 21-22. Petitioner testified that all of the scars on his right wrist and hand resulted from the surgeries performed by Dr. Brown, and were due to the injury sustained on March 22, 2013. Tr. at 32.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file.

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

First, no 8.1b subsection (a) report delineating Petitioner's level of impairment was submitted into evidence by either party. Thus, the Arbitrator considers the parties to have waived their right to do so and assigns no weight to this factor.

Second, the evidence established that Petitioner was a seasonal lights installer. The Arbitrator finds Petitioner's testimony regarding his duties at work on the date of accident and as reflected in the medical records to be credible. This evidence is uncontroverted and, thus, the Arbitrator assigns it significant weight.

Third, the parties stipulated that Petitioner was 43 years old on the date of accident. This evidence is uncontroverted and, thus, the Arbitrator assigns it significant weight.

Fourth, while there is evidence reflecting Petitioner's physical capabilities (i.e., Petitioner's own testimony, Petitioner's functional capacity evaluation results, and Dr. Brown's medical records releasing Petitioner to work) no evidence was introduced regarding Petitioner's future earning capacity as a result. Thus, no weight is assigned to this factor as there is no evidence of any impact on Petitioner's future earning capacity as a result of his injury.

Fifth, the treating medical records reflect that Petitioner underwent emergency medical treatment that included a closed reduction and arm casting that was followed by three surgical procedures including an open reduction internal fixation, an examination under anesthesia and skin graft, and removal of the external and internal fixation implements to address his comminuted right wrist and ulnar styloid fractures. Petitioner continued with post-operative physical therapy and followed up with his orthopaedic surgeon, Dr. Brown, for seven months. Petitioner credibly testified that after his release back to full duty work pursuant to the functional capacity evaluation and Dr. Brown he continued to have some pain and discomfort in the right wrist, difficulty with certain motions including twisting and lifting, weather sensitivity, and itching on the scarred areas. In view of all of the foregoing, the Arbitrator finds that there is credible evidence of ongoing disability as reflected in the treating medical records corroborating Petitioner's testimony of continuing symptomatology in his dominant right hand/wrist. This evidence is uncontroverted and, thus, the Arbitrator assigns it significant weight.

Finally, the parties dispute whether Petitioner is entitled to a single award pursuant to Section 8(e) of the Act or two awards as a result of his accident under Section 8(e) for the hand/wrist and Section 8(c) for disfigurement. Section 8(c) of the Act states in pertinent part:

> For any serious and permanent disfigurement to the hand, head, face, neck, arm, leg below the knee or the chest above the axillary line, the employee is entitled to compensation for such disfigurement ... No compensation is payable under this paragraph where compensation is payable under paragraphs (d), (e) or (f) of this Section. 820 ILCS 205/8(c) (LEXIS 2011).

In this case, Petitioner's complaints of continuing symptomatology (i.e., pain, loss of strength, loss of range of motion, tightness, discomfort, weather sensitivity, etc.) are all part and parcel of the same injury to the right wrist with scarring extending up into the forearm as a result of the surgeries to address the right wrist fracture. Thus, given the facts in this case, the Arbitrator finds that one award pursuant to Section 8(e) is appropriate.

Based on the record as a whole, showing that Petitioner sustained a highly comminuted distal radius fracture and avulsion fracture of the ulnar styloid requiring three surgeries resulting in impaired motion and strength with continuing symptomatology including weather sensitivity in the dominant right hand/wrist, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 45% loss of use of the right hand/wrist pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Randy Kram,
Petitioner,

15IWCC0286

vs.

NO: 14 WC 6476

SOI/Vienna Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 30, 2014, is hereby affirmed and adopted.

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

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

DATED: APR 2 3 2015
o4/8/15
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KRAM, RANDY
Employee/Petitioner

Case# **14WC006476**

SOI/VIENNA CORR CTR
Employer/Respondent

15IWCC0286

On 6/30/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ILLINOIS ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 30 2014

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

15IWCC0286

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Randy Kram
Employee/Petitioner

v.

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

Case # 14 WC 06476

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 14, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 4, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$54,107.60**; the average weekly wage was **$1,040.53**.

On the date of accident, Petitioner was **44** 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 $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses as outlined in Petitioner's group exhibit. Respondent shall have credit for the amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any disputes pertaining to the payment of medical bills for which it is receiving this credit.

Respondent shall pay Petitioner temporary total disability benefits of $693.69/week for a further period of 8 2/7 weeks, commencing 1/7/14 through 3/6/14, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $624.32/week for 21.5 weeks, because the injuries sustained caused the 10% loss of the left leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

6/27/14
Date

JUN 30 2014

FACTS

On the date of the injury, January 4, 2014, Petitioner was employed as a Correctional Officer at Respondent's Vienna Correctional Center. (T.11-12). On said date, Petitioner injured his left knee when he stepped off of the steps depicted in Respondent's exhibit 2 in front of the barber shop while monitoring the chow lines coming from the chow hall. (T.12-13). Petitioner testified that his attention normally is not diverted by the inmates because the inmates usually come out of the chow hall and pair up in formation as they should. (T.32). On the date of the accident, however, Petitioner saw two inmates break formation and head toward the front of the chow line. (T.14). When Petitioner stepped off of the step to take corrective action and get the inmates to pair up, he injured his left knee. (T.14). Petitioner testified to no prior claims, treatment, pain or problems with his left knee. (T.22). Respondent disputes accident, but not causal connection.

After receiving prompt care and imaging studies at Union County Hospital, Petitioner was referred to Dr. Roland Barr at the Orthopaedic Institute of Southern Illinois. (PX4). Dr. Barr noted that Petitioner felt a pop in his left knee at the time of the accident and that Petitioner did not have any prior problems with his knee. (PX4, 1/14/14). Petitioner presented with complaints of pain and swelling over the left knee and instability. *Id.* Physical examination showed swelling about the left knee, tenderness to palpation along the medial joint line, and crepitation with motion. *Id.* McMurray's test was positive for pain and Petitioner lacked flexion in his knee secondary to pain and guarding. *Id.* Dr. Barr suspected a medial meniscus tear but wished to confirm this with an MRI. *Id.* If a meniscal tear was present, Petitioner would require arthroscopic surgery. *Id.* Petitioner was placed on light duty with sedentary duties only. *Id.*

Petitioner's MRI of January 21, 2014 confirmed Dr. Barr's suspicion of a medial meniscus tear. (PX4, 1/21/14). Petitioner returned to Dr. Barr on January 28, 2014 with persistent pain and mechanical symptoms. (PX4, 1/28/14). Petitioner's physical examination was unchanged. *Id.* Dr. Barr recommended surgery. *Id.* On February 20, 2014, Petitioner underwent a left knee arthroscopy with partial medial meniscectomy. (PX5). Petitioner improved following surgery and was released to return to work on March 4, 2014. (PX4, 3/4/14). Petitioner testified at Arbitration that despite the improvement resulting from surgery, he still has some pain in his left knee after prolonged standing and climbing stairs. (T.25). He takes Aspirin, Tylenol or Ibuprofen for his symptoms. (T.25).

CONCLUSION

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

The Supreme Court holds that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 128 N.E.2d 718, 720 (1955). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Id.*

It is clear that Petitioner's injuries occurred in the course of his duties. The question before the Arbitrator is whether Petitioner's duties arose out of his employment. An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work ***or*** that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* This increased risk may be **qualitative**, such as some aspect of employment that contributes to risk, or quantitative, such as the number of times they are required to encounter the risk. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, 990 N.E.2d 284, 290 (4th Dist. 2013). A claim for injuries sustained as a result of navigating stairs is not barred where a claimant can prove an increased risk of injury by this neutral risk. *Village of Villa Park v. Illinois Workers' Comp. Comm'n*, 3 N.E.3d 885, 378 Ill.Dec. 320. (2nd Dist. 2013).

As recently noted by the Appellate Court in *Accolade*, one cannot dismiss an injury that occurs during a routine, uneventful motion such a reaching, simply because the motion itself is not peculiar, if at the time of the occurrence the "claimant was engaged in an activity she might reasonably be expected to perform incident to her assigned duties." *Accolade v. Illinois Workers' Comp. Comm'n*, 2013 IL App (3d) 120588WC, 990 N.E.2d 901, 908. (3rd Dist. 2013).

Similarly, Petitioner was not only reasonably expected, but required to take corrective action when inmates do not comply with their directive. Petitioner was performing his assigned duties when his injury occurred, and the qualitative distraction created by the inmates breaking formation diverted his attention from where and how he stepped from the landing. The Arbitrator therefore finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Issue (K): What temporary benefits are in dispute? (TTD)

Respondent only disputed medical expenses and temporary total disability as it pertained to liability for same based on its dispute regarding accident. (T.4-5). Based upon the above findings resolving the issue of accident in Petitioner's favor, the Arbitrator hereby orders Respondent to pay the medical expenses contained in Petitioner's group exhibit. Respondent shall have credit for any amounts paid through its group carrier and shall indemnify and hold Petitioner harmless from any claims made by any providers for which Respondent is claiming credit for payment of medical expenses. Respondent shall pay temporary total disability benefits for the 8 2/7 weeks of temporary total disability commencing January 7, 2014 through March 6, 2014.

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

Pursuant to §8.1(b) of the Act, the Arbitrator hereby considers: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

(i) Neither party obtained or submitted an impairment rating.

(ii) Petitioner continues to be employed at Vienna Correctional Center as a Correctional Officer.

(iii) Petitioner was 44 years old at the time of injury. He has diminished healing capacity as a result thereof.

(iv) While there is no evidence of immediate reduction in earning capacity, due to Petitioner's age, his surgical intervention and his testimony of increased symptoms with prolonged standing or stair climbing, it is reasonable to conclude that such repercussions may manifest in the future.

(v) As a result of his accidental work injury, Petitioner sustained a meniscal tear and underwent a left knee arthroscopy with partial medial meniscectomy. (PX5). Petitioner testified at Arbitration that despite the improvement resulting from surgery, he still has some pain in his left knee after prolonged standing and climbing stairs. (T.25). He takes Aspirin, Tylenol or Ibuprofen for his symptoms. (T.25).

Based upon the foregoing factors, the Arbitrator finds that Petitioner has sustained serious and permanent injuries that have resulted in the 10% loss of his left leg.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Seth Landwehr,
Petitioner,

15IWCC0287

vs.

NO: 12 WC 15993

City of Peoria,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 25, 2014, is hereby affirmed and adopted.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015
o4/8/15
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LANDWEHR, SETH
Employee/Petitioner

Case# **12WC015993**
12WC042854

CITY OF PEORIA
Employer/Respondent

15IWCC0287

On 8/25/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4707 LAW OFFICE OF CHRIS DOSCOTCH
2708 N KNOXVILLE AVE
PEORIA, IL 61604

1337 KNELL & KELLY LLC
STEPHEN P KELLY ESQ
504 FAYETTE ST
PEORIA, IL 61603

0980 HASSELBERG GREBE SNODGRASS
BOYD ROBERTS III
124 S W ADAMS ST SUITE 360
PEORIA, IL 61602

15IWCC0287

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SETH LANDWEHR
Employee/Petitioner

v.

CITY OF PEORIA
Employer/Respondent

Case # **12 WC 15993**

Consolidated cases: **12 WC 42854**

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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Peoria**, on **July 22, 2014.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 16, 2010 and April 16, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did* exist between Petitioner and Respondent.

On 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 $**72,800.00**; the average weekly wage was $**1,400.00**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **all IOD benefits which are paid in full through Petitioner's return to full duty on July 16, 2012.**

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 25 weeks because the injuries sustained caused the 5% loss of the person as a whole as provided in Section 8(d)(2) of the Act.

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

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

D. Dylan McCarthy
Signature of Arbitrator

August 19, 2014
Date

ICArbDec p. 2

AUG 25 2014

FINDINGS OF FACT:

At arbitration, the Petitioner testified that he had been employed by the City of Peoria as a police officer for nine years. (Tr. p. 28). On April 16, 2012, he was a patrol officer for the Tenth District in the East Bluff area. The Tenth District perimeters are Knoxville to Prospect, east and west from St. Francis to War Memorial Drive, north and south. (Tr. pp. 28-29). This is arguably the biggest district in the City in terms of violent crime. (Tr. pp. 28-29).

On April 16, 2012, the Petitioner was traveling northbound on Wisconsin Avenue when he saw a vehicle make a few traffic violations and attempted to initiate a traffic stop. (Tr. pp. 32-34). By the time he caught up to the car, he had parked and the driver had gotten out on the 2100 block of Maryland. The individual began running westbound on Republic despite Officer Landwehr's indications to stop. Officer Landwehr was able to catch up to the suspect and grab him from behind in a bear hug type fashion. As he attempted to take the suspect to the ground, the suspect pushed up, causing Petitioner to lose his balance and fall backward into a concrete windowsill. His head struck the corner of the basement windowsill and he lost consciousness. (Tr. pp. 32-34).

When Petitioner awoke, the suspect had run to the back of the house and the Petitioner pursued the suspect, where they squared up on each other. The suspect began to run and the Petitioner gave pursuit. The combatants exchanged a few punches and jumped a fence. They ran through another yard and jumped another fence, at which time the Petitioner attempted to radio his position. Finally the Petitioner used his pepper spray in the backyard of a home.

Petitioner stated that photographs were taken of the crime scene, including photographs of the Petitioner after the suspect had been apprehended and the location where the Petitioner had hit his head. (Tr. p. 36).

Following the incident, he was taken by ambulance to St. Francis Hospital. After discharge, he was referred to OSF Center for Occupational Health. (Tr. p. 37).

After the accident, Petitioner stated he suffered from vertigo, nausea and motion sickness for about a week after the incident. He also experienced memory loss, stuttering and vision problems. Specifically, he suffered from blurred vision and was referred to an eye specialist, Dr. Quentin Allen. (Tr. p. 38).

Subsequent to the incident, Petitioner recalls feeling depressed and began drinking a lot. His wife told him he was acting snappy and mean but he did not notice that he was acting that way. Petitioner also suffered from a decreased sex drive following the incident. (Tr. p. 39).

Petitioner cannot recall how long he had difficulty with his memory after the incident but acknowledged that at the time of arbitration, symptoms had resolved. He also suffered from headaches for a couple of months up to a year after the incident which he described as pain behind his head and eyes with additional pain near his temples. Petitioner also experienced

light sensitivity which caused the headaches. At the time of arbitration, the headaches had resolved but there was still some light sensitivity. (Tr. p. 40).

Petitioner saw Dr. Moody in January 2014 and indicated he was no longer experiencing headaches and he has not experienced any headaches since that time. During the course of his treatment, he had been referred to Dr. Jankowska, a neurologist, who diagnosed him with some cognitive impairment and comprehension issues and ordered neuropsychological testing. (Tr. p. 41).

At the time he was examined by Dr. Jankowska, he was enrolled at ICC in a general studies class for his associate's degree. Petitioner testified he was having difficulty with his studying and focusing. He was also restricted from driving and given a daytime driving permit. (Tr. p. 42). Petitioner was not able to drive at night until his vision issues had resolved and he was also given glasses. (Tr. p. 43).

Petitioner worked light duty answering phones and typing reports in the computer for a few days in May of 2012 but was put back on off duty status due to the intense headaches he was experiencing when he attempted to read and stare at the computer screen. (Tr. p. 43).

The Petitioner acknowledged that he returned to full duty work on July 16, 2012. He had to pass neuropsychological testing in order to carry his weapon. (Tr. p. 44).

During the course of his treatment, he participated in a Warrior Dash five kilometer obstacle course event and posted pictures of himself of the event on his Facebook page. (Tr. p. 45). Petitioner stated he had paid the entry fee in November and only walked during the event going around each obstacle as they progressed through the course. (Tr. p. 46).

Subsequent to the event, the Petitioner saw Dr. Moody. Dr. Moody indicated that he did not have a problem with Petitioner participating in the event as Dr. Moody had previously removed all of his physical restrictions and wanted him to be as active as he wanted. (Tr. p. 47).

The Petitioner previously suffered four head injuries prior to the incident of April 16, 2012. These include two head injuries when he was a child. He also had a concussion when he was 19 working construction. Lastly, he had a head injury in December of 2010 while working. (Tr. pp. 49-50).

With regard to the December 2010 injury, the Petitioner was tackling a suspect during a foot chase when his head struck a curb. He immediately had a headache and felt nauseous and was taken to the emergency department. After the emergency room visit, he did not seek any additional medical treatment and his headache and nausea he experienced resolved the day afterwards. (Tr. pp. 50-51).

Currently Petitioner testified that he wears his glasses all the time. He can see shapes without his glasses but cannot make out details or provide a description. (Tr. p. 51).

On cross examination, the Petitioner testified that he believes he lost consciousness during the events of April 16, 2012 for approximately three to four seconds at most. (Tr. p. 58). However, he was able to catch up and corner the suspect as they were both exhausted

from running. At that point, he back up officers arrived. It was only after the suspect was handcuffed and taken away that photographs were taken and admitted into evidence. (Tr. pp. 58-59).

Petitioner testified he was completely awake and conscious when the photos were taken. Petitioner also acknowledged that he had received reasonable medical treatment for his head injury and related symptoms and that he was paid his full salary while he was off work. Petitioner testified he is not making any claim for unpaid wages or any injured off duty pay. (Tr. pp. 61-62).

Petitioner acknowledged that he was referred to Dr. Jankowska who later referred him to Dr. Kurth, a neuropsychologist. He recalled meeting with Dr. Kurth on June 29, 2012. (Tr. p. 62). Petitioner understood that Dr. Kurth's report indicated that his neuropsychological exam and profile were completely within normal limits. (Tr. p. 62). The purpose of the exam with Dr. Kurth was to obtain clearance to carry his weapon and other tools utilized in his occupation as a police officer. (Tr. p. 63).

Since July 16, 2012 until the present time, Petitioner testified he has worked full duty as a police officer. He is performing the same duties in the same high crime district of Peoria that he was prior to April 16, 2012. He is able to fully perform his job in terms of patrolling, investigating, reporting, questioning, and apprehending suspects. (Tr. p. 64).

Petitioner has not had any incident at work involving any problems with his performance since July 16, 2012 and he has not filed any accident reports related to any head injuries. (Tr. p. 65).

Officer Landwehr agreed that the three prior non-occupational incidents involved different parts of his head than the two most recent incidents that were at issue. He also stated that the three prior incidents resulted in some short term headaches, minor nausea, some head wound cleaning and stitches. (Tr. p. 69). The April 2012 injury was the only incident that caused significant symptoms or cognitive difficulties which lasted more than a day. (Tr. p. 70).

At the time of arbitration, Officer Landwehr had no concerns regarding his ability to function as a police officer for the City of Peoria. He loves his job and indicated he would seek appropriate medical treatment if he felt he was unable to function as a police officer. (Tr. p. 70). He testified that he has no concerns that his head injuries, including the April 16, 2012 incident, would affect his future ability to perform his job as a police officer. (Tr. p. 71).

The Petitioner's wife, Stacy Landwehr, also testified at arbitration. She indicated that following the April 16, 2012 incident, the Petitioner was not quite as a sharp or quick-witted as she knew him to be. He seemed depressed, anxious, and would often stutter. (Tr. p. 13). She believed that he was more cynical and that he was having vision problems after the injury. Further, her husband's short term memory was very sporadic. He was also more defensive and more irritable. (Tr. p. 14).

His changes in mood and demeanor were a little rough on their marriage but she affirmed that his memory issues had improved over time and that he was not currently having any problems with his memory. (Tr. p. 14).

She further testified that his irritability gradually resolved by late fall of 2013 and that his concentration and quick-wittedness eventually returned to normal. Likewise, his stuttering, depression and personality changes had gradually resolved as time went on. (Tr. p. 17).

On cross-examination, Mrs. Landwehr acknowledged that her husband worked light duty at various times throughout his recovery but would periodically be taken off work due to functional difficulties. She then testified that she and her husband participated in a Warrior Dash obstacle course race in Channahon, Illinois while he was on light duty. (Tr. p. 21).

She is unaware of any personal memory problems he has had while at work since July of 2012 and she is unaware of any injury reports that he has filed since being returned to full duty in July of 2012. (Tr. p. 22). He has been back to normal for at least the last six months. (Tr. p. 23).

The evidence deposition of Detective Eric Esser was offered into evidence by Petitioner. The deposition was taken on January 29, 2014. Detective Esser was an office with the City of Peoria at the time of Petitioner's work accident of April 16, 2012. He was the first officer that responded to the scene. He observed Officer Landwehr trying to use his pepper spray on the suspect but it looked like he was completely missing the suspect off to the right. (PX 14, pp. 4-5).

After the other officers responded to the scene and the suspect was placed into custody, Detective Esser was able to get his camera and take pictures. (Tr. p. 5). The pictures have a date of March 17, 2012 but that is inaccurate. (Tr. p. 9).

The pictures of Officer Landwehr were taken almost immediately after the suspect was placed in custody. (Tr. p. 29). As far as he knows, Officer Landwehr never lost consciousness. (Tr. p. 31). Since April 16, 2012, he has not noticed any speech impediment or memory loss for the Petitioner. (Tr. p. 40). He would not have any issue working with Officer Landwehr in the future and he believes he is capable of performing his duties as a patrol officer. (Tr. p. 41).

In reviewing the Petitioner's treating medical records, the Petitioner went to the emergency department at OSF St. Francis Medical Center on April 17, 2012. A brain CT was performed which had findings of some soft tissue swelling and hematoma. A CT of the cervical spine was unremarkable. The Petitioner had a 1.5 cm laceration to his left posterior head. The laceration was repaired with two sutures. Petitioner was released with antibiotic ointment and told to follow up with his physician if symptoms worsened or persisted.

The Petitioner then went to OSF Occupational Health and Dr. Edward Moody on April 18, 2012. At that time, he indicated he was not having any problems with blurring of vision or double vision, dizziness or vertigo or balance abnormality. He denied any problems with memory, thought process or speech. His physical exam was normal and Dr. Moody assessed him with a head injury and took him off work.

The Petitioner returned to Dr. Moody and OSF Occupational Health on April 23, 2012. He presented with continuing nausea that comes on mainly with motion such as riding in a car. He also described problems with proprioception. Mrs. Landwehr also noted some slow

word finding and difficulty in navigation but indicated his memory was intact. Dr. Moody assessed him as post-concussion syndrome and took him off work. An MRI was ordered.

A brain MRI was taken on April 26, 2012 which showed no intracranial abnormality demonstrated.

Petitioner returned to Dr. Moody on April 30, 2012. Petitioner reported resolution of dizziness and vertigo although he was having problems with word finding and short term memory. Dr. Moody encouraged him to increase his activity a bit as tolerated but kept him off work.

On May 2, 2012, Petitioner saw Dr. Maria Jankowska with INI Neurology in Peoria. Petitioner indicated that the first week after the accident, he had headaches, dizziness and nausea with movement but he was slowly improving. He is now able to read short sentences but cannot really comprehend. His dizziness is improving. His physical exam was essentially normal and he was diagnosed with post-concussion syndrome and mild cognitive impairment with memory loss. She recommended a referral to a neuropsychologist and prescribed Meclizine. She also recommended exercising and kept him off work.

The Petitioner then returned to Dr. Moody on May 8, 2012. He indicated he has increased his activities but is still having some problems with short term memory and reading. Dr. Moody continued to assess the Petitioner as having a post-concussion syndrome and kept him off work.

On May 16, 2012, the Petitioner underwent a driving evaluation at INI. As a result of the evaluation, the Petitioner was deemed to have the appropriate skills to drive safely and functionally for work and in the community as he met all necessary cognitive, visual and motor skills.

Dr. Moody saw the Petitioner on May 16, 2012. At that time, Dr. Moody returned him to restricted duty with four hours per day max. He was also instructed not to carry a weapon.

On May 30, 2012, the Petitioner returned to OSF Occupational Health. Petitioner indicated his return to work has not been successful as he is having difficulty with multi-tasking and feelings of being overwhelmed which have caused him to develop headaches. Dr. Moody took him off work completely and referred him to an ophthalmologist to see if his visual acuity tests or abnormalities are related to a refraction error or processing.

On June 1, 2012, the Petitioner began seeing Dr. Quentin Allen with Illinois Eye Center. Dr. Allen indicated his vision on June 1, 2012 was 20/30 in each eye without correction. On June 14, 2012, Dr. Allen gave the Petitioner a prescription for eyeglasses. He would need to wear glasses for computer and reading. The underlying mechanism of the Petitioner's hyperopia and astigmatism were not caused by his concussion but in all likelihood were made more noticeable by the concussion and the medications he was given afterwards. Dr. Allen indicated the Petitioner will require glasses to some extent for the rest of his life for computer and reading and eventually perhaps for distance.

On June 19, 2012, the Petitioner returned to Dr. Moody. Dr. Moody returned him to desk work and was to inquire as to neuropsychological testing.

On June 29, 2012, the Petitioner saw Dr. Shanna Kurth at the Neuropsychology Clinic in Peoria. Dr. Kurth found the Petitioner's neuropsychological profile entirely within normal limits with no cognitive or neural behavior residual of his concussive injury appreciated. She diagnosed him from a neuropsychological standpoint with post-concussive syndrome resolved. She did not feel that he needed any further neuropsychological services and returned him to his treating physicians.

Petitioner then returned to Dr. Moody on July 9, 2012. He reported that his restricted duty had been uneventful and he was not having any problems with headaches, vision or balance. He also was not having any problems with memory or cognition. Dr. Moody elected to wait until Dr. Jankowska had a chance to review the neuropsychological testing with the Petitioner.

On July 16, 2012, the Petitioner was released to unrestricted duty by Dr. Moody and discharged from care pending his neuropsychological testing.

On July 19, 2012, the Petitioner saw Dr. Jankowska with INI. She indicated his post-concussion syndrome was resolved and he was returned to work without any restrictions.

Dr. Quentin Allen issued a report dated October 22, 2012. Dr. Allen indicated that based on the amount of the underlying hyperopia and astigmatism the Petitioner would have required glasses at some point regardless of any aggravating trauma or injury. The need for glasses, at least in the short term, was certainly related to his concussion and perhaps pain medications or muscle relaxants he received at the time of the injury. Dr. Allen indicated stated that it was impossible to know whether or not he would have independently developed eye strain and symptoms related to his hyperopia and astigmatism had the concussion not occurred. It is not uncommon for a 29-year old to present with complaints of headaches and blurred vision, even his level of hyperopia and astigmatism. Therefore, it was possible for Dr. Allen to definitively correlate the concussion with the onset of the blurred vision, however there is certainly a chance the concussion did make him more acutely aware of the underlying hyperopia and astigmatism and at least in the short term, would have exacerbated these complaints. Dr. Allen indicated the Petitioner would have certainly required glasses or visual correction at some point in the not too distant future had he not sustained his work injury.

The Petitioner then continued to work full duty as a police officer for the City of Peoria from July 16, 2012 until the date of arbitration. He was seen by Dr. Fletcher on May 28, 2013 for an independent medical examination on behalf of the Petitioner.

The deposition of Dr. David Fletcher was taken on November 18, 2013. Dr. Fletcher is an occupational medicine physician who was asked to examine the Petitioner on behalf of his attorney. He examined the Petitioner on May 20, 2013. At that time, Petitioner had no complaints of pain. Petitioner stated his vision had changed since the accident and he had to get glasses and he would have headaches if he didn't wear the glasses. He also indicated that the Petitioner self-reported increased alcohol consumption and concerns with speech after the accident. In addition, Petitioner's wife stated that his personality had changed. Dr. Fletcher's physical exam of the Petitioner was unremarkable with no obvious neurological deficit and no overt cognitive disorder. He did feel that the Petitioner was depressed. Based

on his review of records and his physical exam, he recommended some additional testing and gave a diagnosis of mild traumatic brain injury suffering from post-traumatic stress disorder and secondary depression. He felt he needed a repeat brain MRI with contrast, an evaluation regarding his occasional headaches, repeat neuropsychological testing and treatment for depression. Dr. Fletcher had concerns with the Petitioner continuing to work as a police officer based on his diagnosis and recommended treatment.

On cross-examination, Dr. Fletcher did not have any specific recollection with regard to the Petitioner's prior four concussion-type incidents. Dr. Fletcher also confirmed that the Petitioner's physical exam was unremarkable with no obvious neurological deficit. Dr. Fletcher confirmed the Petitioner was working for the City of Peoria full time as a police officer at the time he examined him and had been working full duty since July 16, 2012. Dr. Fletcher also confirmed that the Petitioner had prior brain MRI which was unremarkable, along with prior neuropsychological testing, also normal. Dr. Fletcher stated that he believed if Dr. Moody re-examined the Petitioner that he would recommend the repeat testing suggested by Dr. Fletcher. Dr. Fletcher is unaware of any incidents of any inability for the Petitioner to perform his job after he returned to full duty. Petitioner did not indicate he was having any problems performing his job. Dr. Fletcher indicated Petitioner's current problems at the time he saw him were not disabling to his ability to work for the City of Peoria.

He was next seen for treatment by Dr. Kattah, a neuro-opthamologist, on July 16, 2013. Dr. Kattah wrote that "refractive air was well compensated for prior to injury. After head injury his ability to compensate for refractive air became diminished and he now requires eye glasses. Although this would have happened predictably in the mid 40's, the premature occurrence suggests an impaired adaptation ability." (PX 7) Like Dr. Allen, Dr. Kattah noted a vision loss, finding the Petitioner to be 20/30 in the right eye and 20/40 in the left. (id)

The Petitioner next saw Dr. Edward Moody on January 15, 2014. At that time, the Petitioner indicated he had not followed up with any of Dr. Fletcher's recommendations. He told Dr. Moody he had been free from headaches for at least two months and he was not having any blurred vision when he used his glasses. In his deposition, Dr. Moody indicated he did not feel Officer Landwehr was suffering from post-traumatic stress disorder as of January 15, 2014, but rather experiencing normal anxiety. He did not feel any further treatment including the treatment recommended by Dr. Fletcher was necessary. He felt that the Petitioner was capable of working his regular duty job as he had been for the last year and a half.

As of January 15, 2014, Dr. Moody in his deposition indicated he did not feel the Petitioner met the criteria for a continuing diagnosis for post-traumatic stress disorder. He did not feel that there was sufficient evidence to speculate whether the Petitioner was more susceptible to incurring future brain damage. He did not believe the Petitioner needed any additional neuropsychological testing, neurological consultation or an additional brain MRI.

CONCLUSIONS OF LAW

As the parties agree that the Petitioner suffered an injury which arose out of and in the course of his employment with the City of Peoria, the only issue before the Arbitrator is the nature and extent of the injury. Section 8.1(b) of the Illinois Workers' Compensation Act requires that I consider the following enumerated factors in determining an employee's permanent partial disability:

1. Their reported level of impairment pursuant to an American Medical Association impairment rating.

2. The occupation of the injured employee.

3. The age of the employee at the time of the injury.

4. The employee's future earning capacity.

5. Evidence of disability corroborated by the treating medical records.

Section 8.1(b) further states that no single factor shall be the sole determinant of disability and that I am to discuss the relevance of weight of any factors used in addition to the level of impairment as reported by the AMA impairment rating. Below I will discuss each of the factors and the relative weight I attribute them.

First, neither party obtained an AMA impairment rating so this factor cannot be considered.

Second, regarding the middle three factors, the Petitioner is a 31-year old police officer for the City of Peoria. The evidence shows that the Petitioner was released by his treating physicians to work full duty as a police officer as of July 16, 2012 and that he has been able to complete all required duties of the job and has had no complications requiring further treatment. The Petitioner did not present sufficient evidence that his work injury would in any way affect his future earning capacity as a police officer with the City of Peoria.

Finally, with regard to the medical opinions, the Petitioner experienced a good recovery from his injuries. Although Petitioner testified regarding his personal concerns as to future concussions and/or head injury and through Dr. Fletcher's deposition testimony regarding brain injuries, this testimony is entirely speculative and is not corroborated by the Petitioner's treating medical records. In fact, Dr. Moody, in the most recent examination of the Petitioner, indicated that the Petitioner's cognitive ability and ability to perform his job are no longer affected by the Petitioner's work injury. Dr. Moody did say however, that the Petitioner was more susceptible to experience future concussions as a result of his two accidents. (RX 4 at 34) .

His total recovery time was three months from the date of accident to the date of maximum medical improvement and his release to full duty as a police officer. The Petitioner received reasonable and necessary medical treatment and was allowed to take the necessary time to return to work due to the nature of his head injury. Specifically, Petitioner's post-accident memory loss, speech issues, cognitive disability, and change in personality were all treated appropriately and resolved at least nine months prior to the date of arbitration per the testimony of Petitioner's wife.

With regard to Petitioner's vision problems, Dr. Allen indicated that it is his opinion that the Petitioner would have eventually needed eyeglasses sooner rather than later due to the Petitioner's underlying pre-existing conditions. Dr. Allen stated that the work accident only brought these pre-existing conditions forward on a short term basis. Dr. Allen specifically

stated that the work accident did not cause the Petitioner's vision problems as they were in existence prior to the injury.

Dr. Kattah provided a similar opinion He said that while the Petitioner would have eventually needed glasses to correct his acuity, likely when the Petitioner was in his mid-forties. The accident caused the need for the earlier refraction.

It is Petitioner's burden to prove the extent to which his injury has permanently disabled him. Petitioner's testimony, the testimony of Dr. Fletcher and the testimony of the Petitioner's wife are speculative and not sufficient to sustain a substantial award for the nature and extent of his work injury. Further, their testimony is not corroborated by the Petitioner's treating medical records. They are actually contradicted by the fact Petitioner has been working his heavy duty job as a police officer for the City of Peoria for over two years as of the date of arbitration. Both Petitioner and his wife indicated that his injuries are no longer affecting his personal life and his ability to perform his job has not been impacted since his return to full duty. Petitioner testified that he has no concerns regarding his ability to perform his job as a police officer. Therefore, the severity of the Petitioner's alleged disability is not corroborated by the weight of the treating records and is speculative in nature.

Based upon my consideration of the foregoing factors specified in the Illinois Workers' Compensation Act, I find that the Petitioner has sustained injuries of 5% loss of use of a person as a whole pursuant to Section 8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joyce Krone,
Petitioner,

15IWCC0288

vs.

NO: 11 WC 6733

All Clean Restoration Service Inc,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 22, 2014, is hereby affirmed and adopted.

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

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

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 23 2015
o4/7/15
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KRONE, JOYCE
Employee/Petitioner

Case# **11WC006733**

ALL CLEAN RESTORATION SERVICE INC
Employer/Respondent

15IWCC0288

On 5/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4463 GALANTI LAW OFFICE PC
LESLIE COLLINS
PO BOX 99
EAST ALTON, IL 62024

0693 FEIRICH MAGER GREEN & RYAN
R JAMES GIACONE
2001 W MAIN ST
CARBONDALE, IL 62903

15IWCC0288

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Joyce Krone
Employee/Petitioner

v.

All Clean Restoration Service, Inc.
Employer/Respondent

Case # **11** WC **006733**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **3-25-14**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2-26-08**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

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

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

In the year preceding the injury, Petitioner earned **$16,824.60**; the average weekly wage was **$323.55**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$7250.00** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$7250.00 plus medical bills in the amount of $62,634.77**.

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

ORDER

Based on the two conflicting statements, the Arbitrator finds that Ms. Krone is not a credible witness. It does not appear she was working at the time of the accident. As such, she was not in the course and scope of her employment at the time of the motor vehicle accident on February 26, 2008. Therefore, all benefits in the Illinois Workers' Compensation Act are hereby denied.

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

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

Signature of Arbitrator

5/19/14
Date

MAY 22 2014

JOYCE KRONE V. ALL CLEAN RESTORATION SERVICE, INC.
11-WC-006733

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT ON ALL ISSUES:

On February 26, 2008, the petitioner, Joyce Krone, was employed at All Clean Restoration. The evidence shows an average weekly wage of $323.55 per week. On February 26, 2008, Ms. Krone was involved in a motor vehicle accident in Edwardsville, Illinois. A dispute exists as to whether she was in the course and scope of her employment at the time of the accident.

Ms. Krone testified on her own behalf at arbitration. She testified that prior to the accident, she was working on paperwork associated with her employment as an account representative at All Clean Restoration. She then decided to go to the Schnuck's grocery store to purchase gift cards to hand out to customers of All Clean Restoration. She then testified that her intent was to go back home to do more paperwork before ultimately going in to All Clean Restoration. Ms. Krone testified that she was getting a late start to her day because she did not feel well. She was in her husband's vehicle at the time of the accident. Ms. Krone indicated that she used his car because it was parked behind hers at the time that she was ready to leave.

Following the motor vehicle accident, she testified that she sought medical care at Anderson Hospital. She was ultimately diagnosed with an aggravation of her pre-existing thoracic outlet syndrome. Ultimately she was treated surgically and released from treatment by Dr. Robert Thompson in 2011. She testified that she has not been back since that time and she is having no trouble with her condition. She further testified that she is feeling good.

On cross examination, Ms. Krone read into evidence excerpts from two recorded statements she gave following the accident. One statement was given on February 29, 2008 regarding her husband's policy on his automobile. The second statement was given to the workers' compensation claims adjuster on March 6, 2008. Ms. Krone also testified that she did own a car of her own at the time of the accident. Her car was much smaller than her husband's van. She testified that she sometimes used her husband's van when she went to buy groceries as it was larger. Ms. Krone testified that her being on a cell phone and not paying attention to the road is what caused her automobile accident. She did testify that she did not feel she was being reckless at the time. Finally, Ms. Krone testified that her husband worked for Country Insurance as a claims adjuster at the time of the accident.

Mike Nagy from All Clean Restoration testified on behalf of the respondent at arbitration. He testified that he did not recall her using gift cards from Schnuck's to give to customers. He further testified that he was not aware of any reason she would have needed to come to All Clean Restoration on February 26, 2008. He testified that he had never seen her drive her husband's van into work at All Clean Restoration in the past. Mr. Nagy further testified that he did not find out she was claiming this to be a work accident until a few days after the motor vehicle accident.

The respondent offered transcripts of two recorded statements given by petitioner following the accident into evidence at arbitration. Respondent's Exhibit 2 is a recorded statement given on February 29, 2008 to DeeDee Staton, an insurance adjuster with Country Insurance with respect to the automobile policy on the petitioner's husband's van. The following excerpts are taken directly from the statement:

Q. And your occupation?

A. I'm an Account Representative for All Clean Restoration Services.

Q. And were you working at the time a the accident?

A. No, unt-ah.

Q. Can you describe in your own words what happened?

A. Yeah, I just, I was really stressed and I was talking on the cell phone and I had borrowed Jerry's van to go to the grocery and I was talking on the cell phone and I just had a real stressful situation, my brother's in the hospital and...., it was just kind of, I think that's why I blew the light. My first accident and I'm forty, so, yeah.

Q. So you didn't see the light at all?

A. No, I was just, yeah, that's why I think it was just the stress of everything, so.

Q. Did you see the other vehicle at all prior to the accident?

A. Yeah, right before I hit her I did, right before I hit her because I, in my mind I was thinking I was just driving, like there was either no light there or, it was green, you know, so that's why I think it was just, you know, the stress and then I just saw the car, it was just there and I go "Oh no", you know, so.

Respondent's Exhibit 1 is a statement given on March 6, 2008 to Bob Hudak, a workers' compensation claims adjuster.

The following excerpts were taken directly from the recorded statement from March 6, 2008:

Q. And can you just kind of tell me what happened that day?

A. Okay. I was, I wasn't, I was leaving for work really late that day because I just didn't think I could work that day, I wasn't feeling well but anyway I started making phone calls and doing my prep work at home because I do a lot of prep work at home and then Jerry came home for lunch and I thought "I'm just going to run up to Schnuck's and get some gift cards" because I do entertainment, I give out gift cards for people that have used us sometimes --

Q. Like gifts?

A. Yeah, yeah and so then I was running up to Schnuck's and I was going to come back home and finish my paperwork and stuff before I headed out and then so I was headed down 159 and I looked up and I had saw the light and then I looked down again and by the time I looked up it was already red and somebody, the first person was coming out of, you know, the other side on my right, they had just headed out because their light had just turned green and so I couldn't get stopped in time and I ran into them.

Obviously, these statements are drastically different. First and foremost, Ms. Krone was asked directly in the February 29, 2008 statement whether she was working. She responded that she was not working. At arbitration, Ms. Krone attempted to explain this contradictory statement. She testified that she did not know she was working at the time because she does not have in depth knowledge of workers' compensation laws. The Arbitrator finds that it is reasonable to believe that Ms. Krone does not understand the nuances of the Illinois Workers' Compensation Act and thus finds that she was not aware at the time that the statement was given that she had a workers' compensation claim. However, if her sole purpose that day was to go to the grocery store to purchase gift cards to be used for work- and nothing else - as she testified, then the Arbitrator finds it difficult to believe that she would not answer that she was working that day. It is noteworthy that the question asked of her had nothing to do with a workers' compensation claim or the Workers' Compensation Act. The question was simply were you working at the time. The answer she provided was no. The Arbitrator finds that knowing you are working is different than knowing whether you have a workers' compensation claim. Ms. Krone testified at arbitration that as part of her compensation package with All Clean Restoration she would turn in mileage expenses for trips such as this to the grocery store. If this was indeed solely a trip to the grocery store that she intended to seek mileage reimbursement for, she certainly would have known she was working at the time. Had Ms. Krone truly been going to the grocery store for the sole purpose of purchasing gift cards for work, the Arbitrator believes she would have answered in the affirmative when asked about working in her recorded statement.

The Arbitrator further questions Ms. Krone's credibility in that her description of the accident was quite different in the two statements provided. In the February 29, 2008 statement which was more contemporaneous to the accident, she went into great detail to describe the cell phone conversation and stressful situation which led to the accident. Such detail is conspicuously absent from the second statement given to the workers' compensation claims adjuster. This leaves the Arbitrator to wonder if Ms. Krone felt such information might be detrimental to any workers' compensation claim.

Based on the two conflicting statements, the Arbitrator finds that Ms. Krone is not a credible witness. It does not appear she was working at the time of the accident. As such, she was not in the course and scope of her employment at the time of the motor vehicle accident on February 26, 2008. Therefore, all benefits in the Illinois Workers' Compensation Act are hereby denied.

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STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim O'Shea,

Petitioner,

vs. No. 12 WC 00970

University of Illinois,

15IWCC0289

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care and temporary disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission affirms the Arbitrator's finding that both the right shoulder condition and the left shoulder condition are causally connected to the work accident. In the request for hearing form, Petitioner claimed unpaid medical bills from Orland Park Orthopedics in the sum of $16,066.38 and South Chicago Surgical Solutions in the sum of $23,750.15. The record shows South Chicago Surgical Solutions is an ambulatory surgical center associated with Orland Park Orthopedics. The bills from Orland Park Orthopedics and South Chicago Surgical Solutions were included in Petitioner's Exhibit 2. The Commission modifies the Arbitrator's award of medical bills to award related medical bills in evidence from Orland Park Orthopedics and South Chicago Surgical Solutions pursuant to sections 8(a) and 8.2 of the Act, giving

Respondent credit for the payments it had made toward these medical bills, as is reflected in Respondent's Exhibit 11.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 24, 2014, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $624.74 per week for a period of 98 6/7 weeks, from December 23, 2011, through November 13, 2013, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay related medical bills in evidence from Orland Park Orthopedics and South Chicago Surgical Solutions pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for prospective medical care in the form of the left shoulder surgery recommended by Dr. Rhode, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.[1]

DATED: APR 2 3 2015
o-04/09/2015
SM/sk
44

Stephen J. Mathis

Mario Basurto

David L. Gore

[1] The Commission is not unmindful that pursuant to §19(f)(1) of the Act, a decision of the Commission in a case brought against the State of Illinois is not subject to judicial review. However, it appears a claim brought against the University of Illinois is not considered to be a claim against the State of Illinois for the purposes of §19(f)(1). See University of Illinois v. Industrial Comm'n, 365 Ill. App. 3d 906 (2006).

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

15IWCC0289

O'SHEA, TIMOTHY
Employee/Petitioner

Case# **12WC000970**

UNIVERSITY OF ILLINOIS
Employer/Respondent

On 6/24/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4678 PARENTE & NOREM PC
PARAG P BHOSALE
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

0904 STATE UNIVERSITY RETIREMENT SYS
PO BOX 2710 STATION A*
CHAMPAIGN, IL 61825

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
WILLIAM A LOWRY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

1073 UNIVERSITY OF ILLINOIS
OFFICE OF CLAIMS MANAGEMENT
100 TRADE CENTER DR
SUITE 103
CHAMPAIGN, IL 61820

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

JUN 24 2014

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

15IWCC0289

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIMOTHY O'SHEA
Employee/Petitioner

v.

UNIVERSITY OF ILLINOIS
Employer/Respondent

Case # 12 WC 00970

Consolidated cases: NONE

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **November 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

15IWCC0289

FINDINGS

On the date of accident, **December 6, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current conditions of ill-being of his left and right shoulders ***are*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$48,729.72**; the average weekly wage was **$937.11**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of **$52,394.74** for TTD benefits they have previously paid, for a total credit of **$52,394.74**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$624.74**/week for **98-6/7** weeks, commencing **12/23/11** through **11/13/13**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$52,394.74** for temporary total disability benefits that they have paid Petitioner.

Respondent shall pay Petitioner for the following charges that were incurred for the reasonable, necessary and related medical services: **$16,066.38**, for the care provided by Orland Park Orthopedics and **$23,750.15**, for the care provided by South Chicago Surgical Solutions. All of the above charges are to be paid pursuant to Section 8(a) and subject to Section 8.2 of the Act.

Respondent shall pay for the prospective medical care in the form of the left shoulder surgery that Dr. Rhode has prescribed, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

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

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

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

Arb. Brian Cronin

June 23, 2014
Date

ICArbDec19(b)

JUN 24 2014

15IWCC0289

TIM O'SHEA,	)	
	)	
Petitioner,	)	
	)	
v.	)	IWCC NO.: **12 WC 00970**
	)	
UNIVERSITY OF ILLINOIS,	)	
	)	
Respondent.	)	

FINDINGS OF FACT

Petitioner has worked for Respondent for 25 years as a maintenance engineer. Among his duties as a maintenance engineer, Petitioner services the heating and air conditioning units and does a great deal of overhead work. Over the course of his employment by Respondent, Petitioner has sustained previous injuries to his back and left shoulder.

Petitioner testified that on December 6, 2011, he was changing an air filter on a large fan on the University of Illinois - Chicago campus. While he was walking across the room, he tripped on a brace, stumbled into a wall and struck his right shoulder. He reported the injury to Respondent.

Petitioner testified that he had never previously injured his right shoulder.

Petitioner testified that he treated with his primary-care physician, Dr. Araceli Feria, on December 9, 2011. Dr. Feria took x-rays of his right shoulder and then referred him to follow-up with Dr. Blair Rhode.

Petitioner was familiar with Dr. Rhode since Dr. Rhode had performed ***left*** shoulder surgery on him in 2010. Dr. Rhode's records reflect that, effective September 27, 2010, he released Petitioner to return to full-duty work following treatment to his left upper extremity. (PX.2)

Petitioner testified that after he had an MRI taken of his right shoulder and after he saw Dr. Rhode on December 23, 2011, he underwent right rotator cuff surgery on July 24, 2012. Following surgery, Petitioner began a course of physical therapy at Premier Physical Therapy, L.L.C.

Petitioner testified that on May 21, 2013, while in physical therapy and performing a strengthening exercise called "flies," he experienced a burning sensation in his ***left*** shoulder. He testified that the sensation was similar to the one he felt back in 2010, but this time it was more intense. He immediately told his physical therapist about his left shoulder pain.

The May 21, 2013 Premier Physical Therapy, LLC, physical therapy notes indicate, *inter alia*, the following: "c/o soreness in anterior left shoulder from doing butterfly." (PX.2)

Dr. Rhode's records reflect that Petitioner next saw him on June 12, 2013. Dr. Rhode wrote, *inter alia*, the following:

CC: *Mr. O'Shea is a 48 year old male who presents for follow-up of right shoulder (arthroscopic rotator cuff repair) surgery. Symptoms are secondary to an injury while at work.*

HPI: *Timothy is s/p an arthroscopic rotator cuff repair. He continues with strengthening with slow improvement. He states the left shoulder actually flared up on his last PT visit while doing flies, which he relates as a burning type pain.*

Dr. Rhode ordered an M.R.I. of Petitioner's left shoulder. Ms. Linda Dew offered the following impression of the July 24, 2013, MRI results:

Partial bursal surface tear along the anterior aspect of the distal supraspinatus tendon at the insertion site measuring 3 mm. transverse 2 mm. superior to inferior and 1.5 mm. AP diameter. Diffuse rotator cuff tendinosis most marked involving the supraspinatus tendon. No evidence of complete rotator cuff tear. The remainder of the study was unremarkable. (PX.2)

In his August 16, 2013, chart notes, Dr. Rhode wrote that Petitioner received a left shoulder injection that resulted in a slight improvement. Dr. Rhode further wrote, however, that Petitioner is unwilling to live with the current symptoms and wishes to proceed with surgical intervention. Dr. Rhode noted that the MRI showed a "high grade partial tear supra" and recommended that Petitioner proceed with a rotator cuff repair of the left shoulder. (PX.2)

Petitioner testified that since May 21, 2013, Respondent would not authorize any treatment or procedure for his left shoulder.

Petitioner testified that he previously injured his left shoulder on August 18, 2009. Dr. Rhode operated on that shoulder on February 6, 2010, and Petitioner returned to work without any restrictions in September 2010.

Petitioner testified that when he saw Dr. Feria on December 9, 2011, he was not having any problem with his left shoulder. Petitioner further testified that he has never worked as a "wrestling coach," although his son, Tim, Jr., does.

Petitioner is currently not working as he is waiting for approval for the left shoulder surgery.

RECORDS FROM DR. ARACELI I. FERIA, MD (PX.1)

Dr. Araceli's records contain her handwritten office notes from February 16, 2006 through December 13, 2011, along with some notes from other doctors and diagnostic reports. There are no left shoulder complaints until Dr. Feria's August 20, 2009 entry, which mentions the old August 18, 2009 injury. Dr. Feria diagnosed left shoulder impingement syndrome and referred him to an orthopedic surgeon for that problem.

On October 16, 2009, Dr. Feria noted that Petitioner was seeing Dr. Luke for impingement syndrome. In her October 13, 2011 entry, Petitioner had come to see her for chest pain and a cough. She noted "chronic cough, [right] sided chest pain" and E.D. There are no complaints of any left shoulder problem.

In her next entry on December 6, 2011, Dr. Feria noted Petitioner's work accident where he "fell changing air filters in a fan, tripped on a brace right into the wall hitting [right] shoulder." The chart notes indicate that he could hardly move his right shoulder. She diagnosed a right shoulder contusion and impingement syndrome, ordered x-rays, and referred him back to Dr. Rhode. There are no complaints of any left shoulder problem.

Her last note of December 13, 2011, reflects no right shoulder improvement and a referral for a right shoulder M.R.I. Once again, there are no complaints of any ***left*** shoulder problem.

RECORDS FROM ORLAND PARK ORTHOPEDICS (PX.2)

Pre-accident:

Dr. Rhode first saw Petitioner on November 16, 2009, for a second opinion with regard to a possible left shoulder surgery. On February 6, 2010, Dr. Rhode performed such surgery, which included a left shoulder subacromial decompression. In his February 6, 2010 surgical report Dr. Rhode noted:

Inspection of the rotator cuff revealed no evidence of significant rotator cuff pathology on bursal sided inspection. There was approximately 10% tendinopathy of the supraspinatus edge. This was not felt to require repair. (PX.2)

On September 20, 2010, Dr. Rhode noted that Petitioner's ***left*** shoulder was "stable" and released him to full-duty work without any restrictions.

Post-accident:

On December 23, 2011, after reviewing the December 19, 2011 right shoulder MRI, Dr. Rhode noted that Petitioner had sustained a right shoulder rotator cuff tear that would require surgery. Petitioner had a lung infection that forced him to delay the surgery for a short period, but it was ultimately performed on July 24, 2012. On August 3, 2012, Dr. Rhode's Physician's Assistant referred Petitioner for physical therapy.

Physical therapy continued over the next several months. On May 10, 2013, Dr. Rhode recommended that Petitioner continue with strengthening in physical therapy.

Post-5/21/13 records:

On June 12, 2013, Dr. Rhode's Physician's Assistant wrote: "He states the left shoulder actually flared up on his last PT visit while doing flies, which he relates as a burning type pain." This was the first time that Dr. Rhode's records mention any type of ***left*** shoulder issue since September 20, 2010.

Dr. Rhode examined Petitioner's left shoulder on July 10, 2013, and diagnosed him with left shoulder impingement. (PX.2) On August 7, 2013, Petitioner was advised in writing that the Respondent would not authorize any treatment for the Petitioner's left shoulder. (RX.2)

After a left shoulder MRI was performed on July 24, 2013, Dr. Rhode confirmed a "high grade partial tear supra[spinatus]." Dr. Rhode planned for left shoulder surgery as Petitioner was ready to proceed.

Petitioner was last examined by Dr. Rhode on November 4, 2013. At that time, Dr. Rhode examined both of Petitioner's shoulders. His assessment included shoulder pain, traumatic tear of the rotator cuff, acromioclavicular joint strain, and frozen shoulder. Relative to each listed diagnosis, there was no indication as to whether the diagnosis pertained to Petitioner's right shoulder or to his left shoulder. Dr. Rhode noted that Petitioner was awaiting

authorization for left shoulder surgery. He added that Petitioner was scheduled for an IME the following day. (PX.2)

Dr. Rhode kept Petitioner on restricted work on all dates from December 23, 2011 to November 4, 2013.

RECORDS FROM PREMIER THERAPY, LLC (PX.3 & RX.8)

After his right shoulder surgery, Petitioner's initial therapy evaluation took place on August 20, 2012, upon a referral from Dr. Rhode. Respondent authorized therapy to proceed three to four times per week through November 30, 2012. Authorization for more physical therapy was not given again until February 7, 2013, at which time Dr. Wolin prescribed one more month of P.T.

So, physical therapy began after a seven-week interruption. Petitioner testified that it took several months to regain the strength in his right shoulder that he had lost due to the interruption.

From August 20, 2012 through May 20, 2013, Petitioner attended over 50 physical therapy sessions. There is no mention in any of those records of any left shoulder pain, problem, complaint, or issue. On May 21, 2013, however, the following is recorded: "[complaining of] soreness in anterior left shoulder from doing butterfly." This was the first mention of any left shoulder issue since physical therapy began on August 20, 2012.

The records indicate that physical therapy continued through October 8, 2013 with Petitioner continuing to complain of left shoulder pain.

RESPONDENT'S SECTION 12 REPORTS FROM DR. PRESTON WOLIN (RX.10 & RX.12)

In Dr. Wolin's February 5, 2013 report, he concluded, in pertinent part, as follows: (1) the July 24, 2012 rotator cuff surgery and care up to that date was appropriate; and (2) an additional one month of physical therapy ***and*** 4-6 weeks of work conditioning would be needed (Emphasis added). The report is dated February 5, 2013, but the outgoing fax stamp lists transmission from Dr. Wolin's office at 10:54 pm on February 12, 2013.

In Dr. Wolin's November 5, 2013 report, he concluded, in pertinent part, as follows: (1) Petitioner's right rotator cuff tear was causally related to the December 6, 2011 work accident; (2) the left shoulder rotator cuff tear was not work related because Petitioner should have been

finished with physical therapy one month after February 5, 2013; (3) if Petitioner was working as a wrestling coach after December 6, 2011, that could have aggravated his left and right shoulders; (4) his right shoulder was at MMI; and (5) his left shoulder needed surgery.

Respondent submitted several utilization review reports into evidence. Such records are summarized as follows:

November 26, 2012 – For Petitioner's right shoulder, Dr. Clarence Fossier certified 1-2 physical therapy sessions per week for an additional 2 weeks and a final visit 2 weeks later. (RX.1)

August 5, 2013 – For Petitioner's right shoulder, Dr. Allan Michael Brecher denied certification for additional physical therapy. He recommended a "active self-directed home PT." (RX.5)

September 16, 2013 – For Petitioner's ***left*** shoulder, Dr. Brecher denied certification for left shoulder rotator cuff repair because "the official report from the radiologist has not been provided for this review." He continued: "if the official MRI report does reveal a partial tear, surgery would be supported to be medically necessary." (RX.6)

CONCLUSIONS OF LAW

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

There is no dispute that Petitioner's right shoulder condition is causally related to the December 6, 2011 work accident. Dr. Rhode's records and Dr. Wolin's reports support this conclusion, and there was no evidence submitted at the hearing to contest the issue.

On May 21, 2013, Petitioner injured his ***left*** shoulder when participating in physical therapy for his right shoulder.

In Dr. Wolin's November 5, 2013 report, he states: "As per my last evaluation, the entire rehabilitation for the right shoulder should have been completed in April 2013. The fact that the subject was doing any activity in physical therapy in May of 2013 was not indicated. If the plan outlined by me previously had been followed, he would not have been in PT at the time of the said episode." (RX.10)

The Arbitrator finds that to the extent that Petitioner's left shoulder was previously injured on August 18, 2009 (RX.7), Petitioner was able to return to work without restrictions, effective September 27, 2010. From September 27, 2010 through May 20, 2013, there is no evidence that Petitioner had a single documented left shoulder complaint.

The Arbitrator finds that the May 21, 2013 left shoulder injury did not constitute an intervening accident. Rather, such injury stemmed from the accidental injury to Petitioner's right shoulder that occurred on December 6, 2011.

A physical therapy injury has been recognized by the Industrial Commission as compensable if the physical therapy treatment involves an injury caused by a separate work-related accident. Walkey v. Streator Brick, Inc., 08 IWCC 0647. Also, please see Torres v. Miami Aircraft Support, 05 IIC 0301, and Maxwell v. C Glass Industries, Inc., 13 IWCC 0199.

Based on the facts and the law, the Arbitrator concludes that Petitioner's current conditions of ill-being of his right and left shoulders are causally related to the accident of December 6, 2011.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the medical services that were provided for Petitioner's right shoulder were reasonable, necessary, and related. Based on RX.11 and the representation of Respondent's counsel, the Arbitrator finds that the charges for the right shoulder treatment have been paid. To the extent that they have not, they shall be paid pursuant to Section 8(a) and subject to Section 8.2 of the Act.

K. Is Petitioner entitled to any prospective medical care?

Since the Arbitrator has found that the Petitioner's ***left*** shoulder condition of ill-being is causally related to the December 6, 2011 accident, the Arbitrator finds that Respondent shall provide reasonable and necessary medical services to treat it.

The September 16, 2013 UR did not certify the need for the left shoulder surgery. However, Respondent did not provide the MRI report of Petitioner's left shoulder. This UR is therefore incomplete.

Both Dr. Rhode and Dr. Wolin agree that an arthroscopy is needed to repair Petitioner's torn ***left*** rotator cuff. Consequently, the Arbitrator finds that Respondent shall pay the cost of said procedure, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

With regard to Petitioner's right shoulder, Dr. Rhode examined the shoulder on July 22, 2013, and opined that his shoulder had plateaued. Dr. Rhode's treatment plan on July 22, 2013, referred to Petitioner's left shoulder, but not to his right shoulder. (PX.2) On July 29, 2013, August 16, 2013, and September 20, 2013, Petitioner was re-evaluated by Dr. Rhode. After each noted evaluation, Dr. Rhode's treatment plan referred to Petitioner's left shoulder but not his right shoulder. (PX.2)

Therefore, the Arbitrator finds that at this time, Petitioner is entitled to prospective medical care for his ***left*** shoulder only.

L. What temporary benefits are in dispute? (TTD)

Respondent did not dispute that Petitioner was entitled to TTD from December 23, 2011 through August 3, 2013, which is the period of disability for his right shoulder injury.

As the Arbitrator has causally related the left shoulder injury to the accident of December 6, 2011, he finds that Petitioner is entitled to TTD benefits for the period of disability for the ***left*** shoulder through the date of the hearing, November 13, 2013.

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 Other (explain)	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KAZIMIERZ MALIK,

Petitioner,

vs. NO: 09 WC 20637

M.P. TRAILER REPAIR LTD., MARCIN PANEK D/B/A MP TRAILER REPAIR LTD., UNITED GLOBAL LOGISTIC, INC., ALEX GIANNOULIAS ILLINOIS STATE TREASURER EX OFFICIO CUSTODIAN OF THE ILLINOIS INJURED WORKER BENEFIT FUND,

15IWCC0290

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of reinstatement following a dismissal for want of prosecution, and being advised of the facts and law, reverses the Decision of the Arbitrator, and remands the matter to the Arbitrator, as stated below.

This matter came before the Commission based on a review of the Arbitrator's denial of Petitioner's Motion to Vacate Dismissal for Want of Prosecution and Reinstate. No hearing was held before the Arbitrator, and thus no evidence was taken with regard to the reasons for the original dismissal, or the reasons for the denial of the reinstatement. As such, the Commission has no way to determine the propriety of the original dismissal or the denial of reinstatement.

The Commission remands this matter back to the Arbitrator, and directs the Arbitrator to hold a hearing on Petitioner's Motion to Vacate Dismissal for Want of Prosecution and Reinstate. Evidence should be taken with regard to the basis for the original dismissal, as well as with regard to the propriety of reinstatement.

15IWCC0290

IT IS THEREFORE ORDERED BY THE COMMISSION that this matter is remanded to the Arbitrator for purposes of holding a hearing on Petitioner's Motion to Vacate Dismissal for Want of Prosecution and Reinstate.

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015
TJT: pvc
o 4/06/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Von Thaden,

Petitioner,

vs. NO. 08WC 05002

Quantum Color Graphics,

15IWCC0291

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, causal connection, prospective medical and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 20, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

15IWCC0291

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

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

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015
SJM/sj
o-2/26/2015
44

Stephen J. Mathis

David L. Gore

Mario Basurto

NOTICE OF 19(b) DECISION OF ARBITRATOR

THADEN, JOHN VON
Employee/Petitioner

Case# **08WC005002**

15IWCC0291

QUANTUM COLOR GRAPHICS
Employer/Respondent

On 3/20/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2208 CAPRON & AVGERINOS PC
DANIEL F CAPRON
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

2837 LAW OFFICES OF JOSEPH A MARCINIAK
ROBERT SABETTO
2 N LASALLE ST SUITE 2510
CHICAGO, IL 60602

STATE OF ILLINOIS)

COUNTY OF COOK)

15IWCC0291

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOHN VON THADEN
Employee/Petitioner

v.

QUANTUM COLOR GRAPHICS
Employer/Respondent

Case # **08** WC **05002**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **January 8, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **November 27, 2007**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,240.00**; the average weekly wage was **$1,120.00**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$233,699.20** for TTD and **$4,032.00** for other benefits, for a total credit of **$237,731.20**.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $746.67/week for 170 1/7 weeks, commencing October 6, 2010 through January 8, 2014, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

15IWCC0291

FINDNGS OF FACT

This matter was previously heard by Arbitrator Richard Peterson, pursuant to Section 19(b) of the Illinois Workers' Compensation Act ("Act") on October 5, 2010. At that time, the petitioner was treating for injuries sustained on November 28, 2007, when his right hand became caught in a printing press. Arbitrator Peterson's decision was reviewed by the Workers' Compensation Commission. In a decision dated May 7, 2012, the Commission determined that the petitioner: 1) had sustained an accident, which arose out of and in the course of his employment; 2) that the accident resulted in injuries to the petitioner's right hand, cervical and lumbar spine; 3) that the injuries remained temporarily totally disabling to the petitioner; and 4) that the petitioner's injuries were in need of additional medical treatment. The Commission's decision was not appealed and is final. The matter now comes before Arbitrator Thompson-Smith, on remand.

At the time of the earlier Section 19(b) hearing, the petitioner was treating with Dr. Charles Wang, a neurologist, and Dr. Dean Karahalios, a neurosurgeon. Both physicians were with NorthShore Medical Group. As noted in the initial arbitration decision, Dr. Karahalios had recommended a cervical fusion in 2009 however, the petitioner had expressed a desire to secure lower back treatment first. He returned to Dr. Wang on October 18, 2010, complaining of neck pain, right arm numbness and lower back pain. Dr. Wang recommended that the petitioner see a pain management physician. PX2, pgs. 28-31.

On November 16, 2010, the petitioner began treating with Dr. Friedl Pantle-Fisher, a pain management physician. She diagnosed cervical and lumbar radiculopathy for which she prescribed Norco and a series of lumbar epidural steroid injections. Over the course of the next five office visits, extending through May 30, 2012, Dr. Pantle-Fisher noted that she was awaiting authorization to proceed with the injections. This corresponds with the period during which the earlier Section 19(b) petition was pending on review before the Commission. PX 1, pgs. 2-13.

On June 18, 2012, Dr. Wang referred the petitioner to Dr. Noam Stadlin, a neurosurgeon, for a surgical consult. He also recommended that the petitioner continue receiving pain management treatment. On June 28, 2012, Dr. Stadlin recommended new MRIs and an EMG. These studies were performed on July 6 and July 12, 2012, respectively. On October 11, 2012, Dr. Stadlin reported that the MRIs of the cervical and lumbar spine showed no root or cord compression of any significance. The EMG reflected bilateral carpal tunnel syndrome but no radiculopathy. Dr. Stadlin felt that the petitioner was not a candidate for surgery. He released the petitioner "to full activity as tolerated" and he recommended a pain consultation with Dr. Khalilah Brown. PX 2, pgs. 6, 10, & 18.

On November 12, 2012, Dr. Pantle-Fisher, having received authorization from the respondent, administered the first lumbar epidural steroid injection. The second injection was administered on December 4, 2012 and the third on January 15, 2013. In the meantime, the petitioner was seen on January 4, 2013 by Dr. Khalilah Brown, on referral from Dr. Stadlin. Dr. Brown noted that Dr. Karahalios, who had previously recommended neck surgery, was no longer accepting workers' compensation patients and that Dr. Stadlin, more recently, had ruled out surgery as an option. Dr. Brown diagnosed cervical radiculopathy, bilateral carpal tunnel syndrome and possible avulsion, radial plexitis. She recommended medication, therapy, a referral to orthopedics for possible carpal

tunnel syndrome, a cervical epidural steroid injection and, if no improvement, a series of brachial plexus blocks. PX1, pgs. 22-27 & PX3, pgs. 18-20.

When the petitioner returned to Dr. Brown on February 12, 2013, she recommended that Dr. Pantle-Fisher coordinate the opiate medication. She also recommended a series of five cervical stellate blocks and the first of these blocks was administered on February 27, 2013. PX3, p. 13 & PX4, pgs. 6-7.

On February 28, 2013, the petitioner was examined by Dr. Alexander Ghanayem, at the request of the respondent, pursuant to Section 12 of the Act. Dr. Ghanayem had previously examined the petitioner in 2009, at which time he felt that the petitioner's injuries consisted of cervical and lumbar strains which had long since resolved, which required no treatment and which would not inhibit the petitioner's ability to return to work, in a full duty capacity. Dr. Ghanayem's opinions at the re-examination substantially mirrored those he previously expressed. RX1.

The petitioner returned to Dr. Pantle-Fisher on March 4, 2013, complaining that the series of lumbar epidural steroid injections had not produced significant relief of his lower back pain. Dr. Pantle-Fisher recommended diagnostic medial nerve branch blocks, which would help determine if the petitioner's symptoms were stemming from facet arthritis. If the blocks produced temporary pain relief, then radiofrequency thermo ablation of the facet joints would be performed for more prolonged relief. The petitioner's second cervical stellate block was performed by Dr. Brown, on April 17, 2013. PX1, p. 28 & PX4, pgs. 5-6.

The petitioner was examined by Dr. Paul Lamberti, a hand surgeon, on April 25, 2013; by the request of Respondent, pursuant to Section 12 of the Act. Dr. Lamberti also reviewed copies of the petitioner's treating medical records. He felt that the petitioner had developed carpal tunnel syndrome in his right hand and wrist due to the swelling that had resulted from having his hand caught in a printing press. The petitioner's EMGs confirmed the existence of moderate carpal tunnel syndrome. Dr. Lamberti suspected a "double crush" phenomenon involving both the carpal tunnel and the cervical spine. He recommended carpal tunnel surgery, which is less invasive than any procedure involving the cervical spine. Finally, Dr. Lamberti felt that the petitioner should be restricted from reaching, gripping, grasping, pulling, repetitive tasks and from lifting over five (5) pounds with the right arm. RX2.

The petitioner's third, fourth and fifth cervical stellate blocks were administered by Dr. Brown, during May of 2013. PX4, pgs. 2-4.

On June 24, 2013, the petitioner returned to Dr. Pantle-Fisher who renewed his prescriptions for Cymbalta, Norco and Ambien. PX1, pgs. 32-33.

On August 16, 2013, the petitioner reported to Dr. Brown that the blocks had relieved his right arm pain and spasms for a bit more than a month, but had since returned. She recommended that the blocks be repeated and that a psychological evaluation be performed as a prelude to "SCS therapy," which the Arbitrator understands to mean "spinal cord stimulator therapy." PX4, pgs. 2-4.

On August 30, 2013, the petitioner presented to Dr. Charles Carroll, a hand surgeon. Dr. Carroll agreed with Dr. Lamberti's diagnosis of right carpal tunnel syndrome and his recommendation for surgical release. PX5, pgs. 2-5.

On September 10, 2013, the petitioner returned to Dr. Pantle-Fisher who commented that he should not be seeing two different pain management physicians simultaneously; apparently one for his procedures and the other for pain medication. She noted that Dr. Brown would be leaving shortly for another facility. She also obtained an updated MRI of the petitioner's cervical spine, which showed no significant change from the prior study. The petitioner testified that in October of 2013, Dr. Brown left her practice in Chicago. PX1, pgs. 34-36.

The petitioner underwent a surgical release of his right carpal tunnel by Dr. Carroll on October 10, 2013. On October 21, 2013, Dr. Carroll prescribed physical therapy and referred the petitioner to Dr. Frank Clark for pain management. PX5, pgs. 17-20.

On October 29, 2013, the petitioner returned to Dr. Pantle-Fisher. She reported that the petitioner had seen Dr. Frank Clark, who had recommended another series of stellate blocks. The petitioner declined to undergo these blocks because they had not proven to be effective on prior occasions. As an alternative, Dr. Clark recommended a cervical epidural steroid injection and reiterated that the petitioner should only be seen by one pain management physician. She renewed the petitioner's medications and recommended a repeat series of lumbar epidural steroid injections. PX , pgs. 38-39.

The petitioner testified that he has seen Dr. Pantle-Fisher on December 3, 2013 and most recently on January 7, 2014; and that her recommendations for the lumbar epidural steroid injections remains the same. The petitioner also remains in physical therapy and under the care of Dr. Carroll, for his right carpal tunnel syndrome and is next scheduled to see him on January 27, 2014.

The petitioner testified that he desires to undergo both the cervical epidural steroid injections prescribed by Dr. Clark and the lumbar epidural steroid injections prescribed by Dr. Pantle-Fisher, but that he has been unable to secure authorization for these procedures. He also testified that he would be willing to pursue pain management from a single physician, that he only had different physicians because that was how he had been referred, and that he preferred to keep Dr. Pantle-Fisher as his pain management doctor.

15IWCC0291

CONCLUSIONS OF LAW

F. **Is petitioner's current condition of ill-being is causally related to the injury?**

The Commission decision of May 7, 2012 pursuant to Section 19(b) is final. It constitutes the law of the case. That decision determined that the petitioner's accident of November 28, 2007 resulted in injuries to his right hand/wrist, cervical and lumbar spine. Since the Section 19(b) hearing in October, 2010, the petitioner has been continuously under the care of numerous physicians for his right hand/wrist, cervical and lumbar spine. Any gaps in treatment would appear to have resulted solely from difficulties associated with securing authorization to proceed with prescribed treatment. The petitioner testified that he has sustained no intervening accidents or injuries, and there is no evidence to the contrary.

Based on the foregoing, the Arbitrator concludes that the petitioner's right hand/wrist, cervical and lumbar spine problems remain causally connected to the accident of November 28, 2007.

support of the Arbitrator's decision relating to the period of temporary total disability and the amount of credit due the respondent, the Arbitrator concludes as follows:

The petitioner has continued to receive TTD benefits for the entire period of his lost time from work. He has been continuously off work since the Section 19(b) hearing in October, 2010. The parties have stipulated that the petitioner has been temporarily totally disabled for the period from October 6, 2010 through October 11, 2012; and again from April 25, 2013 to the present. At issue is the block of time from October 12, 2012 (the day after the petitioner's visit to Dr. Stadlin) and April 25, 2013 (the date of the petitioner's examination by Dr. Lamberti.)

When Dr. Stadlin saw the petitioner on October 11, 2012 and reviewed the most recent set of MRI films, he concluded--unlike Dr. Karahalios before him--that the petitioner was not a candidate for surgery. His chart note states that he released the petitioner "to full activity as tolerated." The respondent argues that this "release" absolves it, if only temporarily, of the obligation to pay TTD benefits. The respondent's position, however, is belied by at least three factors.

First, the release itself was conditional. It was subject to the limits of the petitioner's tolerance. The treating records during the period from October, 2012 until April, 2013 are replete with notations regarding the petitioner's ongoing symptoms, particularly with regard to his cervical and lumbar spine. When these symptoms are considered in light of the petitioner's regular trade as a pressman, it is unlikely that a return to work would have been conceivable.

Second, Dr. Stadlin's involvement in this case was solely for the purposes of a surgical consult. The petitioner's treating physicians were Dr. Pantle-Fisher and Dr. Brown. The petitioner testified that at no time have those doctors released him to return to work. Indeed, there is no such release contained within those treating records.

Finally, the diagnosis arrived at by Dr. Lamberti, the respondent's examining physician, is one that has existed since the time of the accident. According to Dr. Lamberti's report, the petitioner's carpal tunnel syndrome had gone untreated for years and it warranted the imposition of significant

restrictions: no reaching, gripping, grasping, pulling, repetitive tasks or lifting more than 5 pounds with the right hand. To the extent that the petitioner's condition had existed long prior to the IME and to the extent that it has gone untreated, then it is logical to conclude that the restrictions associated with that condition would have been appropriate prior to the time of the examination.

In any event, the treating records simply do not support the conclusion that the petitioner's longstanding problems with his neck, lower back and right hand improved for a period of six months, bookended by lengthy periods of stipulated total disability.

As for the opinions of Dr. Ghanayem, the respondent's examining spinal surgeon, those opinions are identical to the ones he expressed at the time of the initial Section 19(b) hearing. They were considered by the Commission at that time and were regarded as less credible than those of the petitioner's treating physicians. To adopt the opinions of Dr. Ghanayem, at this juncture, would be inconsistent with the law of the case, particularly in light of the chronicity of the petitioner's problems and the ongoing efforts of several physicians to address and resolve them.

Based on the foregoing, the Arbitrator concludes that the petitioner has been temporarily, totally disabled for the period from October 6, 2010 through January 8, 2014. All amounts paid by the respondent properly credit that obligation.

J. Were the medical service that were provided to petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The petitioner is not currently a candidate for surgery and remains under the care of Dr. Carroll for carpal tunnel syndrome. Dr. Brown, primarily treating the petitioner's cervical spine, recommended additional stellate injections and a work-up for spinal cord stimulation prior to her departure from Chicago. Her successor, Dr. Clark, noted the petitioner's reluctance to pursue another set of stellate injections and instead recommended a cervical epidural steroid injection. Dr. Pantle-Fisher, meanwhile, has recommended a series of epidural steroid injections to the petitioner's lumbar area. Dr. Ghanayem stands alone in recommending no treatment.

The Arbitrator notes with approval the strong recommendation of Dr. Pantle-Fisher that the petitioner be under the care of a single pain management physician. In so noting, the Arbitrator does not assign blame or sinister motives to the petitioner as the treating records reflect that he was referred to Dr. Pantle-Fisher by his original neurologist, Dr. Wang; and he was referred to Dr. Brown by the surgical consultant, Dr. Stadlin. In any event, it makes no sense for the petitioner to divide his care between multiple pain management physicians. When queried, the petitioner stated a preference to remain under the care of Dr. Pantle-Fisher and a willingness to have her serve as his sole pain management physician.

To the extent that the respondent is relying upon the opinions of Dr. Ghanayem to deny further care to the petitioner for his cervical and lumbar problems, the Arbitrator finds that the record will not support such a denial. The numerous physicians who have treated or examined the petitioner since the initial Section 19(b) hearing, i.e., Drs. Wang, Pantle-Fisher, Stadlin, Brown, Lamberti, Carroll and Clark-and all are unanimous in their opinions that the petitioner requires ongoing care. As such, the

Arbitrator expressly rejects Dr. Ghanayem's opinion to the contrary. The harder question is precisely what type of treatment is warranted at present. It is hoped that the consolidation of the petitioner's treatment under a single physician will lend logic and continuity to answering that question. For now, therefore, the Arbitrator concludes that the respondent shall authorize a return visit to Dr. Pantle-Fisher for the purposes of determining what, if any, additional treatment would be warranted to cure or relieve the effects of the petitioner's ongoing cervical and lumbar problems. In addition, obviously, the petitioner is entitled to continue treating with Dr. Charles Carroll for his carpal tunnel syndrome.

Based on the foregoing, the Arbitrator concludes that the petitioner is entitled to ongoing care under the supervision of Drs. Pantle-Fisher and Carroll. The Arbitrator further concludes that those medical expenses previously incurred by the petitioner as reflected in Petitioner's Exhibit 6, be paid by the respondent pursuant to the Medical Fee Schedule and that credit shall be allowed for any amounts previously paid.

15IWCC0291

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
08WC05002
SIGNATURE PAGE

Signature of Arbitrator

March 20, 2014
Date of Decision

MAR 20 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Hurlburt,

Petitioner,

vs. NO. 10WC 29798

Helfrich Painting Company,

15IWCC0292

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 15, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $62,200.00.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015

Stephen J. Mathis

Mario Basurto

David L. Gore

SJM/sj
o-3/25/15
44

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

HURLBURT, JOHN
Employee/Petitioner

Case# **10WC029798**

HELFRICH PAINTING CO
Employer/Respondent

15IWCC0292

On 5/15/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

BROWN & BROWN
DAVID J JEROME
5440 N ILLINOIS ST SUITE 101
FAIRVIEW HTS, IL 62208

0299 KEEFE & DePAULI PC
GREGORY KELTNER
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

15IWCC0292

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOHN HURLBURT
Employee/Petitioner
v.
HELFRICH PAINTING CO.
Employer/Respondent

Case # 10 WC 29798

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 26, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 29, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$57,698.68**; the average weekly wage was **$1,109.59**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$550.00** for TTD, **$0.00** for TPD, **$0.00** maintenance, and **$0.00** for other benefits, for a total credit of **$550.00**.

Respondent is entitled to a credit of $550.00 to be applied towards temporary total disability, as allowed under Section 8(j) of the Act (see above).

ORDER

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 6 (and as delineated in the Memorandum of Decision of Arbitrator), as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $739.73/week for 17 2/7 weeks, commencing March 26, 2009 through July 24, 2009, as provided in Section 8(b) of the Act. Respondent shall be given credit for $550.00 to be applied towards temporary total disability, as allowed under Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 75 weeks, because the injuries sustained caused the 15% loss of use to the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

05/09/2014
Date

MAY 15 2014

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

15IWCC0292

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOHN HURLBURT
Employee/Petitioner

v.

Case # 10 WC 29798

HELFRICH PAINTING CO.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, John Hurlburt, has worked as a painter for 32 years. He worked at Southern Illinois University Edwardsville (SIUE) from May through July 2008. Petitioner began working for Respondent, Helfrich Painting Co., on August 4, 2008, as a painter/foreman. He thereafter began experiencing increased pain and weakness in his right shoulder. Petitioner testified that a significant amount of his job activities with Respondent were performed at or above shoulder level and that he worked on the ground and on ladders and scaffolding. His activities involved interior and exterior power-washing, scraping, painting with brush and roller, and carrying ladders. Petitioner testified that, at times, up to 75% of his daily activity was performed at or above shoulder level. Petitioner testified that he used his dominant right hand to perform power washing, painting and other work activities.

Petitioner began experiencing right shoulder problems in 2001. He had intermittent medical treatment to his right shoulder over the years leading up to his claimed date of accident at issue, September 29, 2008.[1] Petitioner underwent a course of shoulder treatment in 2001 with his primary care physician, Dr. Mary Agne. Only conservative treatment was provided. Petitioner again underwent a course of conservative shoulder treatment in 2002. Petitioner again underwent a course of conservative treatment for his shoulder in 2006. (See generally Petitioner's Exhibit (PX) 2). Dr. Agne provided no ongoing work restrictions between 2006 and September 29, 2008. (PX 2, p. 12). Dr. Agne testified that she saw Petitioner several times in 2007 and 2008 for medical orthopedic conditions. During that time, Petitioner voiced no ongoing problems with his shoulder. (PX 2, pp. 10-13). Dr. Agne testified that if Petitioner was having ongoing problems with his shoulder, she would have been advised. (PX 2, p. 11).

Petitioner testified that he first began noticing problems with his right shoulder again in November 2007, prior to starting work for Respondent. However, he did not seek medical treatment for this condition as it was not significant but rather consisted of minor aches and pains. When Petitioner began working for Respondent in

[1] Petitioner initially claimed a date of accident (or manifestation date in this case) of November 12, 2008. (Arbitrator's Exhibit (AX) 2). An Amended Application for Adjustment of Claim was filed on August 1, 2012, indicating a claimed manifestation date of September 29, 2008. (AX 3).

August 2008, he testified that he was still having some of those aches and pains in the right shoulder but it was not severe enough for him to seek any medical treatment. Petitioner was able to continue performing all of his work activities as a painter, including extensive overhead painting, scraping, and pressure washing. However, after he began working for Respondent, his shoulder problems progressively worsened to the point that he eventually required medical treatment with Dr. Agne on September 29, 2008.

Prior to the visit with Dr. Agne, Petitioner testified that he advised Tim Helfrich, Respondent's owner and President, of the problems with his shoulder. At that point, he did not tell Mr. Helfrich that he wanted to file a workers' compensation claim or that he was even thinking about whether it was work related. Since there was no specific injury or accident, he simply thought that it was part of his normal aches from work and simply placed it under his health insurance as he had done in the past. Petitioner testified that when he was first examined by Dr. Agne, he advised her that he believed his problems were being worsened with work duties.

During the September 2008 visit to Dr. Agne, the doctor noted that Petitioner complained of right shoulder pain which was exacerbated with work activities. She testified that although she had treated Petitioner in the past for right shoulder problems, his examination findings and complaints of decreased range of motion, anterior shoulder and AC joint pain were not present at previous visits. (PX 2, pp. 15-18, 23). The diagnoses were biceps tendinitis and shoulder pain. (PX 2, p. 18). Dr. Agne ordered a right shoulder MRI, which was performed on October 19, 2008. It revealed a full thickness tear of the supraspinatus tendon. (PX 2, p. 19). Dr. Agne thereafter referred Petitioner to Dr. Gregory Simmons. Dr. Agne testified that Petitioner's work activities with Respondent could have caused or aggravated the pathology which appeared on the October 2008 MRI. (PX 2, pp. 29-31).

During the 30-day period following Dr. Agne's September 2008 evaluation, Petitioner testified that he engaged in work at Jim Helfrich's home. Jim Helfrich was Tim Helfrich's father. Petitioner testified that he knew Jim Helfrich at that point as long as he had been a painter, which was almost 28 years. It was Petitioner's understanding that Jim Helfrich was a co-owner of Respondent with his son, Tim. Petitioner identified Petitioner's Exhibit 7, which was a business card of Respondent, indicating a double "H." It was Petitioner's understanding that the two "H's" represented both Helfrichs, Jim and Tim. When working at Jim Helfrich's house, Petitioner testified that he informed Jim Helfrich about his shoulder condition and his belief that it was work-related.

In conjunction with Dr. Simmons' examination on November 12, 2008, Petitioner completed patient intake forms which denied a work injury. (RX 5). Petitioner testified that he understood the forms to request information regarding a specific episode of trauma. Petitioner denied any such episode and explained that his symptoms came on gradually. Dr. Simmons diagnosed a rotator cuff tear and recommended surgical intervention. On November 13, 2008, Dr. Simmons authored a letter to Dr. Agne, indicating that Petitioner reported that he wanted to wait until after the first of the year to proceed with surgery as he would have insurance at that time. Petitioner continued working full duty for Respondent as a painter through approximately March 2009, when he underwent shoulder surgery (see *infra*). Petitioner testified that before the surgery, in approximately February 2009, he advised Tim Helfrich that he was proceeding forward to surgery so that Tim would have enough time to find a replacement.

On March 26, 2009, Dr. Simmons performed an open right rotator cuff repair and acromioplasty. The post-operative diagnosis was a torn right rotator cuff and impingement. (PX 3). Petitioner participated in physical therapy from April 28, 2009 through June 11, 2009. (PX 4). On July 22, 2009, Dr. Simmons recommended that Petitioner work on strengthening exercises and return in six-to-eight weeks time for re-assessment. (PX 3). Petitioner testified that Dr. Simmons released him to return to work on July 24, 2009. Petitioner returned to work as a painter, but not with Respondent.

On January 30, 2012, orthopedic surgeon Dr. Corey Solman examined Petitioner at the request of Petitioner's attorney. Dr. Solman opined that Petitioner's work with Respondent was a contributing factor to the need for the surgery performed by Dr. Simmons. (PX 1, pp. 35-38). Dr. Solman testified that at the time of his examination, Petitioner was at maximum medical improvement, did not need any restrictions and could continue to work as a painter. (PX 1, pp. 38, 47).

Petitioner testified that he continues to have ongoing pain, weakness, and fatigue in his right shoulder in spite of undergoing surgery. When he attempts to perform any brushing or rolling overhead for greater than 15 minutes, his right arm starts to shake. As a result, he has to switch from his right arm to his left arm to give his right arm a rest. He can only lift about 10 pounds overhead. Petitioner also has problems carrying ladders and now must use his left shoulder to carry the ladder and lift it into place. Petitioner testified that he does not believe that he is working as fast as he did before the injury due to the fatigue in his right arm and reliance on his non-dominant arm. As a result, it is taking longer for him to complete his job activities. Petitioner still has pain at the top of the shoulder where the surgery occurred. His pain is mild at a level of 1/10, but sometimes goes as high as a 5/10 if he is performing a lot of overhead activities with spraying, rolling, or brushing. When the symptoms increase, he will take Ibuprofen to reduce his symptoms.

Petitioner testified that all of his medical bills that were identified in Petitioner's Exhibit 6 remain outstanding. Additionally, Petitioner testified that he has never been paid for any of his lost time.

Tim Helfrich testified on behalf of Respondent. Mr. Helfrich testified that he owns 100% of the stock in Respondent, and that his father had no ownership interest in the company, nor was his father ever employed as a supervisor, manager, or foreman. Mr. Helfrich testified that Jim Helfrich did help to "put [Respondent's] name out there" in using his 31-year experience in the painting industry and his political connections to obtain jobs on behalf of Respondent.

Mr. Helfrich testified that Petitioner never advised him that his shoulder problems were related to employment with Respondent. Mr. Helfrich testified that the first time that he found out that there was some form of injury to Petitioner's shoulder is when he received a letter in August 2010. However, Mr. Helfrich was aware that Petitioner was having shoulder problems within the first week of his employment. Mr. Helfrich was also aware that Petitioner had been recommended for shoulder surgery. Mr. Helfrich confirmed that Petitioner worked at Jim Helfrich's house in late 2008 when he was receiving treatment to his shoulder.

Mr. Helfrich testified concerning the two "H's" on Respondent's business card. (See PX 7). Mr. Helfrich testified that he was formerly in business with a Mr. Krabbe, and that the former business cards for Respondent had "HK" listed on the card, representing the names Helfrich and Krabbe. When Mr. Krabbe left the business, Mr. Helfrich testified that he wanted as little change as possible on the card, so in removing the "K," he replaced it with another "H."

Mr. Helfrich testified that Petitioner initially informed him he injured his shoulder during the summer he worked for SIUE. Petitioner testified that when he was working for SIUE, the University had its own health network where he was allowed to receive treatment. Petitioner testified that he had gone to their health service center in July 2008, when he was stung by a bee. Petitioner testified that if he had sustained injury to his right shoulder while working for SIUE, he would have gone to those same health services and received treatment for that shoulder injury. Petitioner admitted that in the summer of 2008 he was having symptoms to his right shoulder. However, the symptoms were not severe enough that he needed medical attention. Petitioner noted

that the first time he had needed treatment for his right shoulder after the onset of symptoms in November 2007 was when he saw Dr. Agne on September 29, 2008.

CONCLUSIONS OF LAW

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

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

Petitioner's medical records reflect isolated instances of medical treatment involving the right shoulder prior to Respondent's hiring of Petitioner on August 4, 2008. Petitioner did not undergo any treatment to the right shoulder between completion of therapy in January 2007 and September 29, 2008. The evidence reflects that Petitioner's shoulder condition deteriorated subsequent to August 4, 2008 to the extent that Petitioner returned to Dr. Agne, underwent an MRI, and thereafter a rotator cuff repair by Dr. Simmons on March 26, 2009. Dr. Agne and Dr. Solman both opined that Petitioner's work activities with Respondent could have caused or aggravated Petitioner's shoulder condition to the extent that the surgery performed by Dr. Simmons was necessary. Respondent did not offer a contrary causation opinion.

Petitioner testified in detail regarding his work activities with Respondent. He testified that much of the work was performed at or above shoulder level. The Arbitrator notes that Tim Helfrich disputed Petitioner's account of the extent to which work was performed at or above shoulder level and the frequency with which Petitioner carried ladders or performed other tasks. Mr. Helfrich did not, however, dispute Petitioner's description of the types of activities he performed while employed by Respondent.

The Arbitrator found Petitioner a credible witness at trial. He testified in an open and forthcoming manner, and appeared to be endeavoring to give the full truth during his testimony. Furthermore, Petitioner's explanations combating Respondent's claimed notion that he received his injury while employed at SIUE is entirely reasonable.

The Arbitrator finds that Petitioner sustained an accident that arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally related to Petitioner's work activity with Respondent.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner testified that he provided notice of his work-related injury to the owner, Tim Helfrich, as well as to Tim Helfrich's father, Jim Helfrich. Petitioner believed that Jim Helfrich was a co-owner of the company and had the power to terminate him. As a result, Petitioner testified that when he provided notice to Jim Helfrich, he was providing notice directly to the employer. The Arbitrator notes Petitioner's credibility, as discussed *supra*, and finds that Petitioner's understanding of the meaning of the dual "H" on Respondent's business card is entirely reasonable, and in fact, more believable given the totality of the evidence then the alternative explanation given by Mr. Helfrich.

Under Section 6(c) of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"), employees must provide notice to the employer not later than 45 days after the accident. However, if there is defective or inaccurate notice, it shall not be a bar to maintaining the proceeding unless the employer can show that it was unduly prejudiced in such proceedings by such defect or inaccuracy.

In the present case, Petitioner testified that he had advised the owner's father, Jim Helfrich, of the work injury and his belief that it was work-related within 30 days after being diagnosed with the condition on September 28, 2008. Petitioner testified that he believed Jim Helfrich was a co-owner of Respondent, as identified with the two "H's" noted on Respondent's business cards. Further, Respondent admitted that Jim Helfrich had held himself out as an agent of Respondent by seeking to use his political and business connections to draw further business into the company. As a result, Jim Helfrich was cloaked with the apparent authority of being an agent of the company, and Petitioner's notice to Jim Helfrich constituted notice to Respondent.

Alternatively, even if it is assumed that Jim Helfrich was not an owner or supervisor of the company, his apparent authority with Respondent created a defective notice provided by Petitioner. At trial, Respondent offered no evidence that it was in any way prejudiced by not obtaining proper notice. The present case involved one of repetitive overhead activities that are inherent in the occupation of a painter. As a result, even if there existed a defect, it in no way prejudiced Respondent in its investigation of this matter.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The the following outstanding medical bills are contained in Petitioner's Exhibit 6:

Provider	Total Charges
Dr. Gregory Simmons	$3,628.00
Dr. Mary Agne	$232.00
Belleville Memorial Hospital	$17,974.94
Anesthesia Assoc.	$1,840.00

After reviewing the medical records introduced into evidence, as well as the evidence depositions of Dr. Solman and Dr. Agne, the Arbitrator finds that the the medical bills submitted by Petitioner for payment as a matter of fact and law reasonable and necessary under Section 8(a) of the Act. Respondent offered no counter medical opinions refuting that Petitioner's repetitive overhead work activities either caused or aggravated the rotator cuff tear leading to the medical services. The Arbitrator therefore orders Respondent to pay $23,674.94 for medical services, as set forth above and as provided in Section 8(a) of the Act. These bills are to be paid pursuant to the medical fee schedule, Section 8.2 of the Act.

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner was taken off work for his rotator cuff surgery on March 26, 2009. On July 22, 2009, Petitioner's treating orthopedic surgeon, Dr. Simmons, was not sure if Petitioner was ready to return to heavy work. However, Petitioner testified that Dr. Simmons allowed him to return to work two days later, on July 24, 2009. Therefore, having found a compensable accident and casual connection, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from March 26, 2009 through July 24, 2009.

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

As a result of the work related full-thickness rotator cuff tear, Petitioner underwent an open right rotator cuff repair and acromioplasty. The post-operative diagnosis was a torn right rotator cuff and impingement. At trial, Petitioner testified that he continues to have ongoing weakness and pain at the top of shoulder stemming from

the torn rotator cuff and its surgical repair. Petitioner rates his shoulder pain a being a constant 1 out of 10 but going as high as 5 out of 10 while completing his painting activities or performing overhead activities. Petitioner has testified that since this work injury, he returned working as a union painter, but has ongoing problems in completing his work activities as a painter as a result of weakness in his right shoulder. Petitioner testified that he must now switch off and use his left arm to brush/roll after about 15 minutes. He testified that if he tries to use his right arm for more than 15 minutes at a time, it begins to shake and become weak. The Arbitrator again notes Petitioner's credibility when assessing his current complaints. As a result, Petitioner has sustained a work injury to his dominant right upper extremity that directly impacts his ability to continue working as a painter.

Based upon the foregoing, the Arbitrator finds that Petitioner has sustained the 15% loss of use to the person as a whole pursuant to Section 8(d)2 of the Act.

Issue (O): Is Petitioner's claim barred by the Statute of Limitations?

Respondent has raised the issue of Statute of Limitations relative to the filing of the Application for Adjustment of Claim and the subsequent filing of the Amendment to the Application for Adjustment of Claim. Since the subsequent amendment refers the same accident and body part, it relates back to the original filing and is not barred by the Statute of Limitations.

The Commission has held that an Amendment to an original Application for Adjustment of Claim relates back to the original filing date so long the Amendment refers to same accident and not to a wholly different accident. *Mauldin v. Halsted Terrace Nursing Home*, 99 IIC 327 (April 15, 1999), citing to *Lake State Engineering Co. v. Industrial Comm'n*, 31 Ill.2d 440, 202 N.E.2d 18 (1964). In *Mauldin*, the Commission held that an Amendment to an original Application to Adjustment of Claim is not barred if filed beyond the three year time period as the Amendment relates back to the original filing date.

In the present case, the original Application for Adjustment of Claim was filed on August 5, 2010, well within the three year time period. The subsequent Amendment to the Application was filed on August 1, 2012, with the only amendment being the change of the manifestation date from 11/12/2008 to 09/29/2008. (AX 2; AX 3).

As a result, the Amendment to the Application for Adjustment of Claim relates back to the original filing date and was therefore properly filed within the three year Statute of Limitations.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bernard M. Keil,

Petitioner,

vs.

NO. 11 WC 46753

Nelson Piping Company, Inc.,

15IWCC0293

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 25, 2014 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,600.00.

15IWCC0293

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015
SJM/sj
o-3/25/15

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

KEIL, BERNARD M
Employee/Petitioner

Case# **11WC046753**

NELSON PIPING COMPANY INC
Employer/Respondent

15IWCC0293

On 8/25/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0147 CULLEN HASKINS NICHOLSON ET AL
JOSE M RIVERO
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0532 HOLECEK & ASSOCIATES
MARY A SAVICH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

15IWCC0293

☐ 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

BERNARD M. KEIL,
Employee/Petitioner

v.

NELSON PIPING COMPANY, INC.,
Employer/Respondent

Case # 11 WC 46753

Consolidated cases: NONE.

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Waukegan**, on **June 27, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **January 16, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$49,920.00**; the average weekly wage was **$960.00**.

On the date of accident, Petitioner was **20** years of age, ***single*** with **one** dependent child.

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

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

Respondent shall be given a credit of $ **43,026.29** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **43,026.29**.

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

ORDER

Respondent shall pay to Petitioner reasonable and necessary medical expenses of **$723.00**, pursuant to the Medical Fee and pursuant to Section 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$576.00**/week for **123** weeks, because the injuries sustained caused the serious and permanent disability to his **left hand** to the extent of **60%** thereof, as provided in Section 8(e) of the Act.

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

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

JOANN M. FRATIANNI
Signature of Arbitrator

August 15, 2014
Date

AUG 25 2014

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

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

Petitioner worked for Respondent as a sprinkler fitter. On January 16, 2009, he fell around 6 feet onto his outstretched left hand. That day he sought medical treatment at the emergency room of Advocate Condell Medical Center. There he was diagnosed with a displaced left wrist distal radius or Colles fracture. Dr. Michael Quinn on that date performed a closed reduction and applied a short arm cast to the left wrist and arm. (Px1)

Following his emergency room treatment, Petitioner saw Dr. Leon Benson, an orthopedic surgeon. On March 11, 2009, Dr. Benson noted the fracture appeared to be healed, but prescribed a left carpal tunnel release to address persistent median paresthesias. (Px2) Petitioner underwent this surgery with Dr. Benson on February 17, 2009. (HUH?)

Petitioner remained under the care of Dr. Benson following surgery, who prescribed physical therapy, and later an MRI examination. The MRI examination of August 3, 2009 revealed an injury to the TFCC and some residual impaction at the fracture site. Dr. Benson prescribed additional surgery to address the ongoing symptoms to the left wrist and arm. (Px2)

On September 1, 2009, Petitioner performed a left distal radius corrective osteotomy with insertion of a plate with screws at the distal radius. On September 23, 2010, Petitioner underwent additional surgery with Dr. Benson for hardware removal at the distal radius, and performed a left ulna shaft shortening osteotomy along with a left distal ulna radial joit arthrotomy and distal ulna osteoplasty.

On March 24, 2011, Dr. Benson performed yet another surgical procedure in the form of a distal left ulna hemi-resection arthroplasty, left wrist TFCC open repair, and left wrist pronator quadratus muscle position. (Px2)

Following the last surgery, Petitioner was laid off due to economic reasons, and found a new job with K & S Automatic, performing the same work he did for Respondent.

Petitioner sought a second opinion with Dr. Chaddia on February 26, 2013. Dr. Chaddia during examination noted persistent symptoms to the left wrist and arm. Dr. Chaddia following examination prescribed that Petitioner undergo a wrist fusion or proximal row carpectomy. (Px3) Petitioner has not undergone such a procedure.

Petitioner saw Dr. Charles Carroll at the request of Respondent on August 2, 2013. Dr. Carroll felt that no further treatment was warranted to address Petitioner's symptoms at that time. Dr. Carroll further was of the opinion that the opinions of Dr. Chaddia were reasonable and there was a causal connection between those findings and this accident. Dr. Carroll found a decrease in rotation, dorsiflexion and palmar flexion to the left hand and wrist during examination, as compared to the right hand. Petitioner also exhibited radial and ulnar deviation of the left wrist.

All of the medical evidence before this Arbitrator supports the findings of a left distal radius osteotomy.

Based upon the above, the Arbitrator finds that a causal connection exists between the injury and treatment described above, and this accidental injury.

Based further upon the above, the Arbitrator finds the condition of ill-being as described above to be permanent in nature.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Petitioner introduced into evidence certain medical charges of Suburban Orthopedics in the amount of $723.00 that were incurred after this accidental injury. These charges were incurred by Petitioner during his visit with Dr. Chaddia.

See findings of this Arbitrator in "F" and "L" above.

Based upon said findings, Respondent is found to be liable to Petitioner for the above charges, which represent reasonable and necessary medical care and treatment that was caused by this accidental injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Felipe Alvarado,

Petitioner,

vs. No. 11 WC 39363

Most Valuable Personnel,

Respondent.

15IWCC0294

DECISION AND OPINION ON REVIEW

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

Petitioner testified via a Spanish interpreter that on October 2, 2011, he was employed by Respondent temporary labor staffing company and assigned to work at a manufacturing facility called Jet Litho. His job was to stack boxes of cards onto pallets. While stacking pallets, Petitioner felt pain in his low back.

The medical records in evidence show that on October 4, 2011, Petitioner received emergency treatment at Saints Mary and Elizabeth Medical Center for right-sided low back pain radiating down the right leg. On October 5, 2011, Petitioner began treating with Chiropractor Victor Gutierrez at Health, Pain & Spine Center. An MRI performed October 6, 2011, showed a 5 mm left paracentral/neural foraminal protrusion at L2-L3, and a 5 mm broad based right paracentral/neural foraminal herniation at L4-L5 with significant caudal extension of disc material within the right lateral recess and severe right lateral recess stenosis. The MRI also showed prominent diffuse lumbar spondylosis. Petitioner received physical therapy/chiropractic

care from Dr. Gutierrez through January 2, 2013. On October 8, 2011, Petitioner saw Dr. Syed Naveed at Neurological Consultants Group on a referral from Dr. Gutierrez. Dr. Naveed diagnosed lumbosacral radiculopathy and recommended continuing physical therapy. On October 22, 2011, Dr. Naveed performed an EMG/NCV, which showed bilateral lumbosacral radiculopathy at L5-S1. After the EMG/NCV, Dr. Naveed performed right facet injections at L4-L5 and trigger point injections at L2-L3 and L3-L4. On November 4, 2011, Petitioner followed up, reporting persistent symptoms. Dr. Naveed performed an epidural steroid injection at L5-S1. On November 18, 2011, Dr. Naveed performed bilateral facet injections at L4-L5 and a second epidural steroid injection at L5-S1.

On January 11, 2012, Dr. Alexander Ghanayem, a spine surgeon, examined Petitioner at Respondent's request. Dr. Ghanayem diagnosed a symptomatic lumbar disc herniation with right-sided radicular pain, noting the herniation appeared of recent onset relative to the MRI date and therefore temporally correlated with the accident. Dr. Ghanayem recommended a discectomy at L4-L5.

Petitioner testified the pain persisted, and he was "sent" for a surgical consultation with Dr. Mark Lorenz, a spine surgeon at Hinsdale Orthopaedics. The medical records from Hinsdale Orthopaedics show Petitioner was referred by his attorney. On March 15, 2012, Petitioner complained to Dr. Lorenz of ongoing pain. Dr. Lorenz interpreted the MRI as showing a fairly large disc herniation at L4-L5 impinging the exiting nerve root and producing severe right lateral recess stenosis. He recommended a right discectomy at L4-L5. On June 1, 2012, Dr. Lorenz and Dr. Stanley Fronczak performed a laminectomy and discectomy on the right at L4-L5 and interforaminal decompression and disc removal at L3. The operative report from Dr. Lorenz explains the procedure at L3 as follows: "The x-ray was repeated once the laminotomy was performed and this demonstrated the probe to be one level high. At that time, the gutter was palpated and was found to be tight, so a decompression of the exiting nerve root was then performed. Dr. Fronczak mobilized the neural elements medially and then a quite lateral, almost interforaminal disc herniation was encountered, which was removed." The operative report from Dr. Fronczak explains the procedure at L3 as follows: "A sharp incision was made over what was presumed to be the L4-L5 interval through the skin and subcutaneous tissues. *** An intraoperative x-ray was taken, but of relatively poor quality; nevertheless, upon palpation it was presumed that we were at the correct interspace. Because of the poor quality of the x-ray, a second x-ray was performed; however, in the interval between performance of the x-ray, a laminotomy was performed at the presumed correct interspace. *** A this point, the second x-ray was returned which was also of relatively poor quality, demonstrating what appeared to be the interspace at L5-S1. ¶ Returning to the laminotomy site which was initially performed, the neural elements were retracted medially and a sizeable disc herniation was encountered at this level. It was presumed that this was the correct level and therefore *** a large amount of disc material along with calcified disc was also removed ***. At this point with the probe placed in the intervertebral space, and additional x-ray was taken *** demonstrating that the discectomy had in fact been performed at the L3-L4 level."

Postoperatively, Petitioner complained of persistent pain in the back and occasional pain in the right leg. During a follow-up visit on November 26, 2012, Petitioner complained of increased low back pain and recurrent numbness in the right leg. Dr. Lorenz's physician's assistant ordered an MRI. The MRI, performed December 14, 2012, showed: a central herniation at T10-T11; a left-sided herniation at T12-L1; a bulging disc at L1-L2 narrowing the foramina; left-sided herniation at L2-L3 with underlying bulge narrowing the foramina; postoperative changes at L3-L4 and L4-L5 with a residual bulge narrowing the foramina; foraminal narrowing at L5-S1; and mild to moderate spinal stenosis. Except for the postoperative changes, the radiologist found the MRI findings to be similar to those on October 6, 2011. On January 21, 2013, Petitioner rated his low back pain a 6/10 and complained of chronic numbness in the right leg. Dr. Lorenz's physician's assistant ordered a functional capacity evaluation (FCE).

The FCE report shows the evaluation was performed on February 8, 2013, at Best Practice Physical Therapy and pronounced valid. The physical therapist mainly relied on Petitioner's statements regarding his limitations. Petitioner reported poor tolerance of standing, sitting, walking, carrying, pushing and pulling, and demonstrated poor crouching, reaching with the right arm, kneeling and crawling. Further, Petitioner reported a complete inability to lift. The physical therapist concluded: "Based on the strength classifications as established by the Dictionary of Occupational Titles, [the patient] is currently unable to return to work at any capacity. He is not capable of lifting anything at all. His maximum carrying capacity is 5.0 pounds. According to the DOT-RFC battery, [the patient] must be capable of meeting the Demand Minimum Functional Capacity for both lifting and carrying strength categories in order to return to work at any capacity."

On March 11, 2013, Petitioner followed up at Hinsdale Orthopaedics, rating the back pain a 5-9/10 and complaining of pain in the right leg. Dr. Lorenz's physician's assistant noted the FCE results. The physician's assistant's note further states: "The FCE and the MRI were reviewed by Dr. Lorenz. At this point in time, the patient is unable to return to any work in any capacity based on his FCE. He is at maximum medical improvement. No further surgical intervention is recommended. He is discharged from our service."

On May 20, 2013, Dr. Ghanayem reexamined Petitioner. Dr. Ghanayem's report states that Petitioner related the pain was a little bit better after the surgery. However, he complained of ongoing numbness in the right leg. Physical examination findings were as follows: "[H]e stands with a normal posture and walks with a slight limp on the right side. His lumbar incision is well healed. He has some tenderness at the lumbar base. Range of motion is 45 degrees of lumbar flexion and 20 degrees of extension. Neurologically, he has no motor deficits in the lower extremities. He has decreased sensation in the L5 distribution in the right leg. His tension sign is negative for radicular pain." Dr. Ghanayem reviewed the FCE and the MRI from December 14, 2012, and opined: "[The patient] underwent his lumbar decompressive procedure, which included an extra level than I thought was necessary, that being L3-L4. The L4-L5 level was something that I believe needed to be done relative to the work injury. At this point, he has

residual numbness and occasional pain in his right leg. He is neurologically without any motor deficits and has some decreased sensation. I would disagree with the FCE stating that the patient cannot do anything. Clearly for a gentleman in his age group with residual symptoms after a technically well done discectomy and no motor deficits, he can return back to work at least at the sedentary, most likely the light demand level, with the ability to sit, stand, and move about throughout the course of the workday. He has reached MMI."

Petitioner testified that Respondent offered him a part-time light duty position at its office in Cicero. Petitioner worked as a bathroom attendant four hours a day from 5 p.m. until 9 p.m., five days a week. Petitioner testified he had difficulty working in that position because there was no place for him to sit down. Also, he had problems with transportation to and from work. Petitioner explained that it took 20 to 30 minutes for him to walk from his home to the bus stop because he needed to often stop and rest. The bus ride was approximately 40 minutes. Petitioner did not feel well during the bus ride because the bus shook as it hit potholes. It took him another 20 to 30 minutes to walk from the bus stop to Respondent's office. Petitioner stated he fell down twice while walking to work because his leg gave out. Petitioner worked at Respondent's office for three months or longer before quitting. Petitioner stated he quit because his back gave out. Upon further questioning, Petitioner testified he worked for Respondent through October 28, 2013. The wage records show Petitioner's last day was November 1, 2013.

On April 23, 2014, a utilization review was performed by Dr. Gary Shapiro, an orthopedic surgeon, with the focus on the validity of the FCE. Dr. Shapiro opined the FCE was invalid, explaining: "This claimant's resting heart rate was 83 bpm and during Functional Capacity Evaluation testing rose to 96 bpm. If a person is giving maximum effort, they should reach 75% of age adjusted heart rate. The calculated 75% age adjusted heart rate for this patient who is 54 years of age, who weighs 190 lbs would be 124 bpm. Using the Karvonen formula, the 75% age adjusted heart rate would be 145 bpm. This claimant's heart rate only rose to 96 bpm, hence demonstrating poor effort. Therefore the Functional Capacity Evaluation did not show this claimant's maximum capabilities."

Regarding his condition at the time of the arbitration hearing, Petitioner testified that he lives with his daughter, whereas before the accident he lived alone. Petitioner further testified he does not sleep well because the pain wakes him up. He also has difficulty with activities of daily living. He takes over-the-counter Ibuprofen to help alleviate the pain. Petitioner rated the pain a 5-6/10 without medication.

Regarding his employability, Petitioner testified he has lived in the United States for 25 years and is a permanent resident. He understands some English, but cannot read or write in English. Petitioner has undergone a vocational evaluation through Vocamotive. The report from Vocamotive, dated February 24, 2014, shows that Kari Stafseth, a vocational rehabilitation counselor, performed a vocational evaluation and a labor market survey. Petitioner reported ongoing pain and very significant functional limitations. Ms. Stafseth reviewed the FCE report, the report from Dr. Lorenz's physician's assistant from March 11, 2013, and the report from Dr.

Ghanayem from May 20, 2013. She further noted Petitioner's almost complete inability to speak and understand English, as well as his lack of secondary school education, transferrable skills or driver's license. Ms. Stafseth opined that, assuming Petitioner is able to work at the sedentary physical demand level, he would not have access to a gainful labor market because of his lack of secondary education, transferrable skills and English language skills, as well as his age. Ms. Stafseth further opined that, assuming Petitioner is able to work at the light physical demand level, he would still not have access to substantial gainful employment for the same reasons.

Respondent introduced into evidence a labor market survey from CorVel dated May 12, 2014. The vocational case manager reviewed the FCE report and the reports from Dr. Ghanayem, but did not meet with Petitioner. The vocational case manager opined Petitioner could work in the areas of food preparation, telemarketing and inspection. She was evidently unaware of Petitioner's lack of secondary education, transferrable skills and English language skills.

On cross-examination, Petitioner admitted that Respondent had offered him a light duty job at Segherdahl Graphics (Segherdahl). Petitioner did not accept the job because he could not get a ride or get there via public transportation. Respondent then offered him a light duty job at its office in Cicero. As a bathroom attendant, Petitioner did not mop or sweep. Rather, he monitored the bathrooms and kept them clean. Shortly before Petitioner left that job, Respondent offered him a job at Stampede Meat Factory (Stampede). Petitioner did not accept the job because he had no way of getting there. Regarding his vocational assessment by Vocamotive, Petitioner testified he told the vocational rehabilitation counselor he was looking for a job, but no one would hire him because of his restrictions. Petitioner stated he did not bring his job search logs to the arbitration hearing because he forgot them in his daughter's car. On redirect examination, Petitioner maintained he stopped working at Respondent's office in Cicero because he was physically unable to continue.

Bill Gonzalez, Respondent's safety and workers' compensation director, testified that he relied on Dr. Ghanayem's report in determining what light duty jobs to offer Petitioner. First, Mr. Gonzalez offered Petitioner a job as a cafeteria and bathroom monitor at Segherdahl, located in Wheeling. As a monitor, Petitioner was to make sure no one was "making a mess." The job did not require any lifting. Petitioner did not accept the job. Mr. Gonzalez then offered Petitioner a job at Respondent's Cicero office. In addition to monitoring the bathrooms, Petitioner's job duties included "possibly sweeping, cleaning the windows [and] assisting the staff there with possibly filing some paper work." Petitioner could sit and stand as needed. Next, Mr. Gonzalez offered Petitioner a cafeteria and bathroom monitor job at Stampede, at its Oak Lawn location. Petitioner could sit or stand as needed while performing the monitoring duties, and the job did not require much walking. Petitioner did not accept the job at Stampede.

Mr. Gonzalez further testified that at the time of the arbitration hearing, he had requests for a monitor from American Marketing, located in Mundelein, and Georgia Nut Company, located in Skokie. Mr. Gonzalez indicated that monitor jobs would also be available at Blommer

Chocolate, located near downtown Chicago, and Gold Standard Bakery, located at 3700 S. Kedzie in Chicago. Lastly, Mr. Gonzalez testified the Jet Litho facility where Petitioner worked at the time of the accident is located in Downers Grove.

On cross-examination, Mr. Gonzalez testified Petitioner worked four hours a day at Respondent's Cicero office, earning $8.25 an hour, the minimum wage. On redirect examination, Mr. Gonzalez testified that had Petitioner accepted a job at Segherdahl or Stampede, he would have also worked four hours a day, earning $8.25 an hour.

Respondent's main argument on review pertains to permanent disability. The Arbitrator found Petitioner both medically and "odd-lot" permanently totally disabled. Respondent argues that Petitioner failed to prove either kind of permanent total disability.

The Commission adopts the opinions of Dr. Ghanayem and Dr. Shapiro that Petitioner is not medically permanently totally disabled. The Commission finds the FCE did not truly test Petitioner's physical abilities. The Commission gives little weight to the opinion of Dr. Lorenz that Petitioner is medically permanently totally disabled, as Dr. Lorenz based his opinion solely on the invalid FCE.

Even so, the Commission affirms the Arbitrator's finding of "odd-lot" permanent total disability. Under the odd-lot doctrine "a claimant is not required to demonstrate total incapacity or helplessness before a permanent total disability award may be granted." Interlake, Inc. v. Industrial Comm'n, 86 Ill. 2d 168, 176 (1981). Rather, a claimant may be regarded permanently totally disabled "when he cannot perform any services except those that are so limited in quantity, dependability or quality that there is no reasonably stable market for them." Interlake, 86 Ill. 2d at 176. "The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market." Westin Hotel v. Industrial Comm'n, 372 Ill. App. 3d 527, 544 (2007). Once the claimant makes an initial showing that he falls in the odd-lot category, the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. Valley Mould & Iron Co. v. Industrial Comm'n, 84 Ill. 2d 538, 547 (1981).

In the instant case, Ms. Stafseth credibly opined that Petitioner does not have access to substantial gainful employment due to his lack of secondary education, transferrable skills and English language skills, as well as his age. The Commission gives little weight to the labor market survey from CorVel because the positions listed in CorVel's labor market survey required good English language skills, the transferrable skills Petitioner did not posses, or exceeded Petitioner's physical abilities per Dr. Ghanayem. Turning to Respondent's job offers to Petitioner of three similar part-time monitor positions, the Commission finds these job offers do not truly reflect Petitioner's long term employment prospects in a competitive labor market. The Commission further notes Petitioner's testimony about his persistent symptoms, long and

difficult commute to Respondent's Cicero office, and that he quit working there because his back gave out. The Commission therefore awards odd-lot permanent total disability benefits, beginning November 2, 2013.

The Commission vacates the award of maintenance benefits. Petitioner did not introduce into evidence any job search logs. The record shows Petitioner stopped working and left the workforce on November 2, 2013.

Turning to temporary partial disability benefits, the Arbitrator awarded temporary partial disability benefits of $46.53 per week from October 24, 2011, through June 24, 2012, and from May 31, 2013, through November 1, 2013. However, a close review of Respondent's Exhibit 7 shows that from October 24, 2011, through June 24, 2012, Petitioner's average weekly wage was comparable to his pre-accident average weekly wage of $305.80. Accordingly, the Commission vacates the award of temporary partial disability benefits from October 24, 2011, through June 24, 2012, as unsupported by the evidence. With respect to the time period from May 31, 2013, through November 1, 2013, Petitioner testified he worked 20 hours a week. Mr. Gonzalez testified Petitioner's hourly wage was $8.25. Thus, Petitioner earned $165.00 a week, which Respondent's Exhibit 7 confirms. This yields a weekly benefit of $93.87 (($305.80 - $165.00) x 2 / 3). The parties stipulated Respondent paid to Petitioner $2,652.21 in temporary partial disability benefits.

Turning to the issue of medical expenses, Respondent argues the Arbitrator erred in awarding certain medical bills. Respondent also takes exception to the Arbitrator's award of the medical bills pursuant to a purported medical fee schedule stipulation, a document which is not signed by either party. Having carefully reviewed the medical bills, the Commission affirms the award of the medical bills in evidence, but not the fee schedule calculations. The Commission finds the medical bills in Petitioner's Exhibits 1 through 3 and Petitioner's Exhibit 10 sufficiently correlate with the medical records in evidence to establish causal connection and medical necessity, and contain enough information to adjust pursuant to the medical fee schedule. With respect to the charges in Petitioner's Exhibit 6, Respondent contends it is not liable for the surgery at the L3-L4 level because the procedure was medically unnecessary. Having carefully reviewed the operative reports, the Commission finds that although the procedure at the L3-L4 level was unplanned, it appears medically justified intraoperatively, as Dr. Lorenz and Dr. Fronczak stated they removed a large amount of disc material along with a calcified disc.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 23, 2014, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $220.00 per week for a period of 48 3/7 weeks, from June 25, 2012, through May 29, 2013, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary wage differential benefits in the sum of $93.87 per week for a period of 22 1/7 weeks, from May 31, 2013, through November 1, 2013.

IT IS FURTHER ORDERED BY THE COMMISSION that the awards of temporary partial disability benefits from October 24, 2011, through June 24, 2012, and maintenance benefits from November 2, 2013, through May 12, 2014, are vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills in evidence pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing November 2, 2013, Respondent pay to Petitioner the sum of $473.03 per week for life under §8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of Petitioner. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 3 2015
o-04/09/2015
SM/sk
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALVARADO, FELIPE
Employee/Petitioner

Case# **11WC039363**

WORKFORCE MVP
Employer/Respondent

15IWCC0294

On 6/23/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

3231 ENCINAS & ORNELAS PC
MARIO ENCINAS
2656 S KILDARE AVE SUITE 1918
CHICAGO, IL 60623

4944 KOREY RICHARDSON LLC
NICHOLAS J TATRO
20 S CLARK ST SUITE 500
CHICAGO, IL 60603

15IWCC0294

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Felipe Alvarado
Employee/Petitioner

v.

Workforce MVP
Employer/Respondent

Case # **11** WC **39363**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **05/13/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/02/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** 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 **$4,587.00**; the average weekly wage was **$305.80**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$16,434.00** for TTD, **$2,652.21** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$19,086.21**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$220.00**/week for **48 4/7** weeks, commencing **06/25/12** through **05/29/13**, as provided in Section 8(b) of the Act. ARB EX 1

Temporary Partial Disability

Respondent shall pay Petitioner temporary partial disability benefits of **$46.53**/week for **57 1/7**weeks, commencing **10/24/11** through **06/24/12**, and again from **05/31/13** through **11/01/13**, as provided in Section 8(a) of the Act. ARB EX 1.

Maintenance

Respondent shall pay Petitioner maintenance benefits of **$220.00**/week for **27 3/7** weeks, commencing **11/02/13** through **05/12/14**, as provided in Section 8(a) of the Act.

Medical

Respondent shall pay reasonable and necessary medical services of **$69,397.41**, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Total Disability

Respondent shall pay Petitioner permanent and total disability benefits of **$473.03**/week for life, commencing **05/13/14**, as provided in Section 8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

Carolyn Doherty
Arbitrator

6/17/14

JUN 23 2014

FINDINGS OF FACT

At trial, the parties stipulated to the issues of accident and notice. ARB EX 1. Petitioner, Felipe Alvarado, is 56 years of age, single and has no minor dependent children. He testified at trial via a Spanish interpreter. Petitioner was working on October 2, 2011 for Respondent MVP Workforce. He was working as a packer at Jet Litho in Downers Grove. Jet Litho is a paper goods manufacturer. Petitioner testified that he would lift up finished boxes of product weighing 15-20 pounds from the ground, twisting, rotating and then stacking them onto a wooden pallet. On 10/2/11, while performing these job duties, Petitioner felt a sharp pain in his low back. Petitioner reported this injury to respondent and continued to work that day and the following day as well.

Two days following the accident, October 4, 2011, Petitioner sought emergency treatment at Saints Mary and Elizabeth Medical Center (PX1, 2). Petitioner was given pain medication, x-rays were taken and was diagnosed with lumbago (PX1, 2). Petitioner followed up the next day, October 5, 2011, with Dr. Victor Gutierrez at Health, Pain & Spine Center (PX3). Dr. Gutierrez started physical therapy and referred petitioner for an MRI (PX3, 4).

The MRI was performed on October 6, 2011 at MRI Lincoln Imaging Center (PX4). The MRI demonstrated a "5 mm paracentral/neural foraminal protrusion at L2-3, a 5 mm broad-based right paracentral/neural foraminal herniation at L4-5 with significant caudal extension of disc material within the right lateral recess. Severe right lateral recess stenosis." (PX4).

Petitioner was then referred to Dr. Syed Naveed at Neurological Consultants Group. Dr. Naveed reviewed the MRI and ordered continued physical therapy (PX5). Petitioner continued physical therapy with Dr. Victor Gutierrez (PX3). Petitioner felt that physical therapy did provide temporary relief from his radicular symptoms. Petitioner returned to Dr. Naveed with continued complaints of low back as well as radicular pain (PX5). Dr. Naveed ordered an EMG study (PX5). The results of the EMG were consistent with bilateral L5-S1 lumbosacral radiculopathy (PX5). Dr. Naveed recommended facet as well as trigger point injections and later on, epidural steroid injections (PX5). Dr. Naveed ultimately performed two set of injections. Petitioner was again provided with temporary relief from his symptoms after the injections and the continued physical therapy. Physical therapy continued through February of 2012 (PX3). Petitioner followed the recommended course of treatment, however only temporary relief was provided. Petitioner was then referred for a surgical consult with Dr. Mark Lorenz of Hinsdale Orthopaedics.

Prior to the respondent authorizing this referral, petitioner was scheduled for a Section 12 examination with Dr. Alexander Ghanayem at Loyola Medical Center (RX1). Petitioner saw Dr. Ghanayem on January 11, 2012. Dr. Ghanayem agreed with the MRI report and opined that the injury was causally related to his work, that he has failed conservative treatment, that all treatment to date has been reasonable and finally recommended surgical intervention at the L4-5 level in the form of a lumbar discectomy (RX1). Dr. Ghanayem went on further to indicate that petitioner's pre-existing diabetes and hypertension had no role in the causation issue (RX1).

Respondent authorized the surgical consult and petitioner saw Dr. Mark Lorenz on March 15, 2012. Dr. Lorenz agreed that the MRI demonstrates a fairly large disc herniation at L4-5 that impinges the exiting nerve root (PX6). Dr. Lorenz also agreed with Dr. Ghanayem's recommendation of a lumbar discectomy at L4-5 (PX6). Petitioner decided to proceed with the recommended surgery.

The surgery was performed on June 1, 2012 at Adventist Hinsdale Hospital (PX6, 7, 8, 9). Dr. Lorenz performed an L4-5 laminectomy and discectomy, right side and an L3 interforaminal decompression and disc removal (PX6, 7).

Postoperatively, petitioner continued his physical therapy with Dr. Gutierrez and follow up visits with Dr. Lorenz. (PX3, 6). Petitioner continued to have complaints of lower back pain and occasional leg pain (PX6). Dr. Lorenz notes that petitioner states that physical therapy has helped, but he is having increased low back pain and a return of numbness in his right leg (PX6). Dr. Lorenz ordered a repeat MRI of petitioner's lumbar spine (PX6). The MRI was repeated on December 14, 2012 at MRI Lincoln Imaging Center (PX4). The MRI report indicates that the surgical changes at L3-4 and L4-5 are new, and the other findings are similar to previous MRI (PX4). Dr. Lorenz reviewed the MRI and recommended a functional capacity evaluation (PX6).

Based on Dr. Lorenz' recommendations, respondent authorized a formal functional capacity evaluation. Petitioner underwent the evaluation on February 8, 2013 at Best Practice Physical Therapy (PX10). The results of the evaluation indicated that "[b]ased on the strength classifications as established by the Dictionary of Occupational Titles, Mr. Alvarado is currently unable to return to work at any capacity" (PX10). Petitioner is not capable of lifting anything at all (PX10). His maximum carrying capacity is 5.0 pounds (PX10). The results went on to say that [a]ccording to the DOT-RFC battery, Mr. Alvarado must be capable of meeting the Demand Minimum Functional Capacity for both lifting and carrying strength categories in order to return to work at any capacity" (PX10). Finally, the FCE was also determined to be "valid and reliable" in that petitioner provided full and consistent effort throughout the FCE testing as evidenced by increasing vitals to increasing effort (PX10). Petitioner did not present self-limiting behaviors. PX 10.

After the FCE, petitioner returned to see Dr. Lorenz. On March 11, 2013, Dr. Lorenz' PA Pittman reviewed the FCE, determined it to be valid, and placed the petitioner at maximum medical improvement with the inability to return to work at any capacity (PX6).

During this period of treatment, Petitioner was either off of work or on light duty as evidenced by the records of his treating doctors (PX3, 5, 6). While he was on light duty, he was accommodated working fewer hours than pre-accident and was paid TPD. After surgery, he was off of work and was paid TTD. After petitioner reached MMI, he was paid maintenance. Petitioner was then sent back to Dr. Ghanayam for a second Section 12 examination.

Dr. Ghanayem examined petitioner on May 20, 2013. Dr. Ghanayem indicated that petitioner does have residual numbness and occasional pain in his right leg (RX2). Dr. Ghanayem disagrees with the FCE and believes that Petitioner can return to work at least sedentary, most likely the light demand level, with the ability to sit, stand and move throughout the day (RX2).

On physical examination, Dr. Ghanayem noted that Petitioner stood with a normal posture, walked with a slight limp on the right side, range of motion was 45 degrees of lumbar flexion and 20 degrees of extension, his tension sign was negative for radicular pain and he had no motor deficits in the lower extremities. *Id.* Dr. Ghanayem also reviewed Petitioner's post-surgical MRI and noted post-surgical changes to L3-4 and L4-5. *Id.* Dr. Ghanayem noted that Petitioner had underwent an extra level of lumbar decompression that he had not recommended be done, namely the L3-4 level. *Id.* Additionally, Dr. Ghanayem disagreed with the FCE report and stated that "[c]learly for a gentleman in his age group with residual symptoms after a technically well done discectomy and no motor deficits, he can return back to work at least at the sedentary, most likely the light demand level, with the ability to sit, stand, and move about throughout the course of the workday." *Id.*

After the results of this Section 12 re-evaluation were available, Petitioner's maintenance benefits were terminated. Petitioner was offered a job by Respondent working at Segerdhal as a bathroom monitor. This job was in Wheeling, Illinois and Petitioner lived in Chicago. Petitioner was unable to physically get to this job because of lack of transportation, both public and private. Petitioner testified that he would get a ride with a co-worker to his previous employment at Jet Litho in Downers Grove. Petitioner was then offered another position at Respondent's office in Cicero, Illinois on Roosevelt road working only 4 hours a day, 5 days a week. Petitioner testified that he accepted this job as he was in financial need. Petitioner was to do light cleaning and any job he thought he could perform including bathroom monitoring. Petitioner testified that while performing this work his body "felt bad" and that he had buttock pain.

At trial, Petitioner testified to his efforts to get to the job in Cicero. He testified that it would take him about 30 minutes to walk to the bus stop even though it was only a few blocks away. Petitioner had to stop to rest every block. After walking to the bus stop he would have to wait for the bus to arrive. While on the 40 minute bus ride, the bus would bounce up and down, hitting bumps or potholes and this would cause much discomfort to the Petitioner's back. Finally, after arriving at his stop, he had to walk 20 minutes to Respondent's office. Petitioner testified that he actually fell on two occasions walking to the office due to pain and loss of strength in his right leg.

Petitioner testified that he worked the job in Cicero for approximately 3 months from July to October 28, 2013, in order to help cover his living expenses. Wage records indicate that he worked from May 30, 2013 through October 27, 2013, nearly five months of work. Petitioner testified that he stopped working the job due to his back pain. Petitioner was paid through November 2, 2013 which was his last day. On cross exam, Petitioner testified that while at the Cicero office job for Respondent, Respondent offered him another position at Stampede Wheat factory in Oak Lawn. Petitioner testified that he did not accept that position as it was full time and he had no transportation.

Respondent called Bill Gonzalez to testify in his capacity as the safety and Workers' Compensation Coordinator for Respondent. According to Mr. Gonzalez, Petitioner was offered the job at Stampede while working in the Cicero office. According to Mr. Gonzalez, this position consisted of monitoring bathrooms and an employee break area involving no lifting whatsoever, and would have afforded Petitioner the opportunity to sit and stand as needed. Mr.

Gonzalez testified that Petitioner refused this position stating it was too far from his house. According to Mr. Gonzalez, Respondent has frequent requests for temporary laborers to perform the task of bathroom or break room monitor, a job that requires no lifting, no English language skills, and allows the worker to sit and stand as needed. Mr. Gonzalez testified that in addition to Segerdahl and Stampede, Respondent currently has requests for temporary laborers to fill such a position at American Marketing in Mundelein, Georgia Nut Company in Skokie, Blommer Chocolate in Chicago and Gold Standard Bakery in Chicago. Mr. Gonzalez stated that at no time had Petitioner been fired and that if Petitioner wanted, he could be placed at any of these job sites immediately and that there were morning, afternoon and evening shifts available according to Petitioner's preference and need.

Petitioner testified that he attended a vocational meeting with Vocamotive for a vocational evaluation and labor market survey. The meeting was arranged by Petitioner's counsel and an interpreter was used. PX 11. Petitioner has been in the United States for 25 years and is a permanent resident. Petitioner speaks and understands some English but is unable to read or write in English. He completed 6 years of education in Mexico with no further educational training. Petitioner's prior job experience is all within the range of unskilled physical labor performing light, medium and heavy duty work. It was noted that the FCE determined that Petitioner could not work in any capacity and that Dr. Ghanayem disagreed stating the Petitioner could perform sedentary to light duty. Petitioner was determined to have no transferable skills. He had no driver's license. The vocational consultant determined that if Petitioner functioned at a sedentary level he would not have access to a gainful labor market due to his lack of education, transferable skills and limited English. Most of the sedentary jobs were noted to be higher skilled office positions. The consultant determined that if Petitioner functioned at a light level with the need to alternate sitting, standing and walking, Petitioner was still without "access to substantial gainful employment as he would require accommodations in any labor market." Finally, the conducted labor market survey indicated prospective available positions given Petitioner's limited education and skills in the area of cashier, fast food worker and assembler. However, the consultant noted, "Based upon review of the result of the labor market survey, those entities contacted required physical capabilities and/or English literacy that was outside of Mr. Alvarado's ability. Thus, it is the opinion of this consultant that if the opinion of Dr. Ghanayem is accepted as accurate and true, it would remain the opinion of this consultant that Mr. Alvarado would not have access to a gainful labor market." PX 11.

Petitioner further testified that his daughter drove him to the Illinois Workers' Compensation Commission for the hearing and that during his period of temporary total disability Petitioner's daughter drove him to pick up his TTD checks. During the course of his testimony, Petitioner sat for over thirty minutes and then stood for the remainder of the hearing, which lasted about an additional hour.

Respondent submitted Petitioner's FCE report for utilization review in April 2014. Rx3. According to the utilization review report, authored by Dr. Gary Scott Shapiro, Petitioner's FCE as conducted by Best Practices Physical Therapy was invalid. *Id.* According to Dr. Shapiro, Petitioner's heart rate during the FCE testing rose from 83 beats per minute to 96 beats per minute. *Id.* Dr. Shapiro explained that "[i]f a person is giving maximum effort, they should reach 75% of age adjusted heart rate. The calculated 75% age adjusted heart rate for this

patient... would be 124 [beats per minute]." *Id.* Because Petitioner's heart rate never rose above 96 beats per minute, Petitioner clearly demonstrated poor effort during his FCE. *Id.* Without demonstrating full effort, Dr. Shapiro believed that the FCE results were invalid and that Petitioner was capable of doing more than his FCE results showed. *Id.* In light of the utilization review results, Respondent attempted to send Petitioner to a second FCE, in order to obtain valid results. A letter was sent to Petitioner informing him that a second FCE had been scheduled for him and stated that transportation would be provided. Rx5. Ultimately, Petitioner did not attend this FCE.

In May 2014, Respondent retained Corvel to prepare a Labor Market Survey and transferable skills analysis. RX 6. According to the report, Petitioner was qualified for jobs in the food preparation and telemarketing/inspecting arenas. RX 6. An initial vocational evaluation report was not completed and it does not appear that Petitioner's education level or language barrier were assessed.

Finally, Petitioner testified that because of this accident, he can no longer live by himself. Under the recommendation of his surgeon, Dr. Mark Lorenz, he moved in with his daughter and her family. Petitioner has difficulty sleeping throughout the night due to pain. Petitioner ultimately has to sleep in a "sitting-up" position. Also, Petitioner has great difficulty getting dressed, showering, and using the bathroom. Petitioner takes over the counter Ibuprofen to help control his pain. He testified that his pain increases to 5-6/10 if he does not take Ibuprofen. Changes in the weather continue to cause the petitioner pain and discomfort in his low back from time to time.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S FINDINGS AS TO (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Arbitrator finds credible Petitioner's testimony concerning his ongoing complaints and the manner in which the accident has affected his life. All medical providers agree that the injury sustained that necessitated surgery was causally related to petitioner's work related accident on October 2, 2011. Petitioner has not had any prior medical treatment to his lumbar spine, nor has his lumbar spine prevented him from being gainfully employed in the labor market prior to his accident on October 2, 2011. In finding causal connection for Petitioner's current and continued condition of ill-being subsequent to Respondent's proposed date of May 20, 2013, the Arbitrator places greater weight on the opinion of Petitioner's treating surgeon Dr. Lorenz as supported by the findings of the FCE than on the opinion of Dr. Ghanayem. Accordingly, the Arbitrator finds that Petitioner's current and continued condition of ill-being is causally related to the accident of October 2, 2011.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J) WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES; THE ARBITRATOR CONCLUDES AS FOLLOWS:

The Petitioner's treating physicians, Dr. Victor Gutierrez, Dr. Syed Naveed, Dr. Mark Lorenz, and Respondent's Section 12 physician, Dr. Alexander Ghanayem from Loyola University Medical Center opined that the Petitioner's work accident caused his condition of ill-being with regard to his low back (PX3, 5, 6, RX1). The Arbitrator notes that Dr. Ghanayem agreed that surgery was reasonable and necessary to treat Petitioner's condition at L4-5. RX 1. The Arbitrator notes Dr. Ghanayem's subsequent comment that the surgery included an "extra level" than he thought necessary (L3-4) per the injury. However, the Arbitrator does not find that comment provides a sufficient basis to deny any portion of the surgical bill. The Arbitrator further notes that Respondent's medical expense dispute was based on liability and specifically notes the Request for Hearing form which indicates a dispute based on "liable for bills pursuant to IME and Fee Schedule." ARB EX 1.

Based on the Petitioner's treating doctors records and having found causal connection, the Arbitrator further finds that all treatment rendered to the Petitioner was reasonable and necessary. Therefore, the Arbitrator orders Respondent to pay $69,397.41 in outstanding medical expenses. Respondent shall receive credit for any payments made. See Medical Fee Schedule Agreed Stipulation (Arb.X1).

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, AND (O) WHETHER THE PETITIONER IS ENTITLED TO PERMANENT TOTAL DISABILITY BENEFITS, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Based on the record in its entirety, the Arbitrator finds that Petitioner is permanently and totally disabled pursuant to Section 8(f) of the Act. The Arbitrator finds that Petitioner has met his burden to prove by a preponderance of the credible evidence, that he has been determined medically permanently and totally disabled as of March 11, 2013, when Dr. Lorenz' PA Pittman reviewed the FCE, determined it to be valid, and placed the petitioner at maximum medical improvement with the inability to return to work at any capacity (PX6). In relying on the determination of medical permanent total disability set forth by Dr. Lorenz, the Arbitrator places greater weight on the valid FCE relied on by Dr. Lorenz which determined that "[b]ased on the strength classifications as established by the Dictionary of Occupational Titles, Mr. Alvarado is currently unable to return to work at any capacity." (PX10). Petitioner is not capable of lifting anything at all. (PX10). His maximum carrying capacity is 5.0 pounds. (PX10). The results went on to say that [a]ccording to the DOT-RFC battery, Mr. Alvarado must be capable of meeting the Demand Minimum Functional Capacity for both lifting and carrying strength categories in order to return to work at any capacity" (PX10). This FCE was determined to be valid based on Petitioner's effort put forth at the exam.

The Arbitrator finds that Petitioner has established by medical evidence that he is permanently and totally disabled. All doctors in this case, including respondent's Section 12 doctor, agreed to causation, diagnosis and need for an invasive surgery. The surgery was performed, Petitioner's complaints of pain and numbness continued, an FCE was ordered, it was completed, it was valid and Dr. Mark Lorenz placed petitioner at MMI without the ability to return to work (PX3, 4, 5, 6, 10). Petitioner has demonstrated through his medical history, records, valid FCE, and his

testimony that he is a medical permanent total. The Arbitrator finds that Petitioner is entitled to permanent total disability benefits in the amount of $473.03 per week, the applicable minimum rate for permanent total disability, from May 13, 2014 forward and for the duration of his life pursuant to Section 8(f) of the Act.

The Arbitrator further finds in the alternative that Petitioner has met his burden to prove permanent total disability under an "odd-lot" theory. When a claimant's disability is not so limited in nature that he is not obviously unemployable or if there is no medical evidence to support a claim of total disability, the claimant can establish that he is entitled to permanent total disability benefits under the "odd lot" category by proving the unavailability of employment to persons in his circumstances. Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 204 (1st Dist. 2009). A claimant can satisfy his burden of proving that he falls into the "odd lot" category by showing a diligent but unsuccessful attempt to find work or by showing that he will not be regularly employed in a well-known branch of the labor market. Westin Hotel v. Industrial Commission, 372 Ill.App.3d 527, 544 (2007).

The Arbitrator finds that petitioner fall into the "odd lot" category by virtue of his lack of formal education, his lack of facility in English, his limited work history, his valid functional capacity evaluation, his permanent restrictions that Drs. Lorenz and Ghanayem imposed following his FCE and Section 12 re-examination, his ongoing lumbar spine and radicular complaints and his vocational assessment and labor market survey. Via this evidence, the burden shifted to Respondent to show that some kind of suitable work is regularly and continuously available to him. Such a showing was not provided.

In so finding, the Arbitrator considered the testimony of Respondent's safety and workers' compensation director, Bill Gonzalez, regarding available jobs within Petitioner's restrictions of sedentary to light duty as imposed by Dr. Ghanayem. The Arbitrator finds that such jobs were likely available to Petitioner within Respondent's organization and commends Respondent's attempts to provide such work. However, the Arbitrator further notes that Petitioner attempted to work the modified duty for 3 to 5 months at the Cicero offices and that he was unable to continue working even in the accommodated capacity based on the increased pain caused by job duties combined with the difficult commute. The additional positions outside of the Cicero offices offered to Petitioner required the same job duties and similar or further commutes. The Arbitrator places little weight on the labor market survey report at RX 6. According to the report, Petitioner was qualified for jobs in the food preparation and telemarketing/inspecting arenas. RX 6. An initial vocational evaluation report was not completed and it does not appear that Petitioner's education level or language barrier were assessed. The Arbitrator finds that based on the vocational assessment performed at Vocamotive, Petitioner's educational, language and physical barriers disqualified him from these employment types. Accordingly, the Arbitrator finds that no stable continuous labor market exists for Petitioner.

The Arbitrator finds that Petitioner is entitled to permanent total disability benefits in the amount of $473.03 per week from May 13, 2014 forward and for the duration of his life pursuant to Section 8(f) of the Act.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K) WHAT AMOUNT OF MAINTENANCE BENEFITS IS DUE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

The parties agree that Petitioner was temporarily totally disabled from June 25, 2012 through May 29, 2013. The parties further agree that Petitioner was temporarily partially disabled from October 24, 2011 through June 24, 2012 and again from May 31, 2013 through November 1, 2013. ARB EX 1.

Respondent disputes Petitioner's claim for maintenance from November 2, 2013 forward. ARB EX 1. In disputing maintenance, Respondent relies on the opinion of Dr. Ghanayem who disagrees with the FCE and states that Petitioner can work sedentary or most likely light duty. This report was authored on May 20, 2013. Respondent also offered a "peer/medical record review" into evidence drafted in April 2014 wherein FCE was determined to be invalid (RX3). The Arbitrator notes that report was authored more than one year after the FCE in February 2013. The Arbitrator places greater weight on the FCE, coupled with Petitioner's credible testimony and the opinion of his treating physicians, than on the opinion of Dr. Ghanayem and the peer review of the FCE in finding Petitioner unable to return to his former occupation or to work in any capacity. The Arbitrator further finds further support in Petitioner's failed effort to return to the modified duty work offered by Respondent as discussed above. The Arbitrator rejects the argument that Petitioner abandoned the modified duty or rejected any attempts at additional modified duty by not accepting the positions in facilities requiring similar duty and/or longer commutes. The Arbitrator finds that Petitioner is entitled to maintenance benefits from November 2, 2013 through May 12, 2014, a period of 27 2/7 weeks.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WILLIAM MULLIGAN,

Petitioner,

vs.

NO: 95 WC 015351
04 WC 032338

RAND MCNALLY,

15IWCC0295

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to the Circuit Court's Amended Opinion and Order dated October 27, 2014 (2012 L 51417). The Court affirmed the Commission's October 10, 2012 (12 IWCC 1097) Decision in part, and reversed in part. The Court found that Mr. Mulligan is totally and permanently disabled as of October 10, 1996. The case was remanded to the Commission to determine the amount of credit due to Respondent.

The Commission's decision dated October 10, 1996 (12 IWCC 1097) contains a complete recitation of all facts relative to both accidents. The Commission adopts the findings of facts contained within 12 IWCC 1097 and incorporates them by reference herein. No new facts have been presented to the Commission since the prior decision of October 10, 2012. The Commission is unaware of any unpaid medical expenses.

This matter came before Commissioner Michael J. Brennan on March 27, 2015 and a record of the proceeding was made. All parties were represented by counsel and the Petitioner personally appeared. Petitioner's attorney requested an Order from the Commission finding his

client, William Mulligan, permanently and totally disabled. Respondent stated they have no further evidence to offer relative to the issue of permanent and total disability.

Pursuant to the Order of the Circuit Court, the Commission is obligated to enter a finding that Petitioner is permanently and totally disabled effective October 10, 1996 as a result of his work-related injuries, representing 963-2/7 weeks of disability as of March 27, 2015.

The parties represented to the Commission that certain benefits have been paid and Respondent is entitled to a credit. The hearing is continued to April 29, 2015, at which time the parties will present evidence regarding the credit due to Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission's Decision, 12 IWCC 1097 (October 10, 2012), is hereby reversed in part, and affirmed in part. This matter is continued to April 29, 2015, at which time evidence of credit due will be presented.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing October 10, 1996, Respondent pay to Petitioner the sum of $712.92 per week for life under Section 8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of Petitioner.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay all reasonable and necessary medical expenses pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay Petitioner's out-of-pocket medical expenses of $20,488.18 and travel expenses of $4,143.89.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit under §8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 4 2015

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

MJB/tdm
4-9-15
052

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN FISERS,

Petitioner,

15IWCC0296

vs.

NO: 12 WC 031965

WILLIAM HUBER CABINET WORKS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident and medical expenses and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the Decision of the Arbitrator only to extent that it vacates the medical expenses incurred for Petitioner's February 22, 2012, visit to Dr. Adrian Deme of the Arlington Heights Internal Medicine and for cost incurred for the MRIs taken of Petitioner's spine on February 27, 2012, at Northwest Radiology Associates. In neither instance did Petitioner prove these charges were causally related to his compensable injury.

On February 21, 2012, Petitioner experienced an anxiety attack and shortness of breath that resulted in him undergoing a chest x-ray the following day at Imaging Service Consultation. The x-ray revealed, among other things, evidence of a mild compression of the lower thoracic

vertebra. In response to the anxiety attack, Petitioner was seen the following day by Dr. Adrian Deme of Arlington Heights Internal Medicine where it was recorded that Petitioner denied having any muscle, joint or bone pain. Of particular relevance is that Petitioner's visit did not result in his spine being examined. Implicitly, it is concluded that no segment of Petitioner's spine was symptomatic as of February 22, 2012. Dr. Deme, nevertheless, ordered Petitioner to undergo an MRI scan of his lumbar spine. Two MRI scans of Petitioner's spine were performed at Northwest Radiology Associates on February 27, 2012.

The admitting diagnoses at the time the MRI scans were taken were an abnormal thoracic fracture x-ray and lower back pain. No history was provided in the MRI report that would explain the etiology of the lower back pain that had not been present when Petitioner was seen by Dr. Deme five days earlier. The Commission concludes that whatever caused Petitioner's lower back pain as of February 27, 2012, was not attributable to Petitioner's work activities as he claims that his work-related lower back pain manifested itself on July 23, 2012, almost five months later.

As noted above, the Commission finds Petitioner failed to prove that his treatment with Dr. Deme on February 22, 2012, or his undergoing MRI scans on February 27, 2012, was causally related to his compensable work-related injury of July 23, 2012, and the Commission modifies the awarding of medical expenses contained in the Decision of the Arbitrator accordingly.

The Commission affirms and adopts all other findings of the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that, as provided in §19(b) of the Act, there shall be no bar to a further hearing and determination of a further amount of medical expenses, temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the decompression and fusion at L5-S1 as prescribed by Dr. Bernstein under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $5,109.43 for medical expenses under §8(a) of the Act, the total amount of money owed to AthletiCo, Dr. Avi Bernstein, Illinois Bone & Joint Institute and Advocate Illinois Masonic Medical Center

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 4 2015
KWL/mav
O: 04/07/15
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

15IWCC0296

FISERS, JOHN
Employee/Petitioner

Case# **12WC031965**

WILLIAM HUBER CABINET WORKS
Employer/Respondent

On 10/7/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0247 HANNIGAN & BOTHA LTD
KEVIN S BOTHA
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

0507 RUSIN & MACIOROWSKI LTD
LINDSAY A BEACH
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

15IWCC0296

JOHN FISERS
Employee/Petitioner

Case #12 WC 31965

v.

WILLIAM HUBER CABINET WORKS
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on September 16, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☐ What temporary benefits are due: ☐ TPD ☐ Maintenance ☐ TTD?

L. ☒ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On July 23, 2012, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- On this date, the petitioner sustained injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $46,768.28; the average weekly wage was $899.39.
- At the time of injury, the petitioner was 42 years of age, married with two children under 18.

ORDER:

- The medical care rendered the petitioner for his lumbar condition was reasonable and necessary and is awarded. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.
- The petitioner is entitled to have from the respondent the reasonable and necessary cost for a decompression and fusion at the L5-S1 level.
- The petitioner's request for penalties and fees is denied.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

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

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

Robert E. Williams

Signature of Arbitrator

October 7, 2014
Date

OCT 7 - 2014

FINDINGS OF FACTS:

The petitioner, a 20-year cabinet/door carpenter, machined doors with some doors weighing from 100 to 200 pounds. On February 21, 2012, he received emergency care for an anxiety attack. An x-ray of his chest revealed a mild compression of a lower thoracic vertebra. The petitioner saw his primary care physician, Dr. Adrian Deme, of Arlington Heights Internal Medicine the next day for his anxiety. MRIs that day of his lumbar and thoracic spine revealed a grade 1 anterior spondylolisthesis of L5 on S1 due to bilateral spondylolysis, mild bilateral neuroforaminal stenosis at L5-S1, minimal bilateral neuroforaminal stenosis at L4-5 and a minimal right paracentral and lateral disc protrusion at T10-11. Dr. Quinn Regan of Illinois Bone and Joint saw the petitioner on June 4th for moderate middle and lower back pain that started in December/January 2011/2012 and is aggravated by lifting, bending, position changes and repetitive activities. The petitioner denied any severe trauma. Dr. Regan's diagnosis was mechanical low back pain, grade I to II spondylolisthesis at L5-S1 and significant disc degeneration at L5-S1, for which he recommended limiting lifting to 90 pounds and a fine tuned set of exercises.

On June 26th, Dr. Deme noted complaints of back pain radiating to the petitioner's front lower abdomen and diagnosed lumbago. Dr. Avi Bernstein saw the petitioner on July 23rd and assessed a chronic pre-existing degenerative and congenital lumbar spine condition of an L5-S1 spondylolisthesis. He recommended physical therapy and restricted lifting to 100 pounds. He followed up with Dr. Bernstein on August 27th and reported some improvement while on vacation for a week and a return of symptoms after returning to work. The petitioner started physical therapy on August 31st and complained

of central lumbar pain with intermittent radiation into the right gluteal region. Dr. Bernstein recommended a decompression and fusion at the L5-S1 level on January 10, 2013. Dr. Deme noted upper back pain on June 3rd. At the petitioner's last visit with Dr. Bernstein on May 22, 2014, he reported bilateral posterior thigh radiation and numbness, tingling in the areas of his knees and worsening low back pain.

On November 2, 2012, the petitioner was evaluated by Dr. Julie Wehner at the request of the respondent. Dr. Wehner's diagnosis was chronic low back pain with a radiographic finding of L5-S1 spondylolisthesis and that was not caused by any specific work activity.

Gary Huber, vice-president of the respondent, denied that around July 23, 2012, the petitioner reported back pain to him and stated that he learned of the petitioner's back pain near the end of August 2012. Daniel Huber denied a report of a work injury by the petitioner around July 24, 2012.

FINDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained a repetitive aggravation of his pre-existing lumbar condition on July 23, 2012, arising out of and in the course of his employment with the respondent.

The petitioner had a pre-existing degenerative L5-S1 spondylolisthesis. He did not report or seek medical care for back symptoms prior to the discovery of the lumbar abnormality on February 21, 2012. Except for the reason reported for performing the MRIs on February 22, 2012, there is no notation in Dr. Deme's treating records of a complaint of any back symptoms. The first documented report of lumbar pain was on June 4, 2012, when the petitioner started care with Dr. Regan and reported non-traumatic

lumbar pain. He told Dr. Regan that his lumbar pain started in December/January 2011/2012 and that lifting, bending, position changes and repetitive activities aggravated his lumbar pain. On July 23, 2012, the petitioner reported more severe pain over the last few months to Dr. Bernstein, which he attributed to his work duties requiring lifting, flipping and moving heavy doors. And on August 27, 2012, he reported some improvement while vacationing for a week and a return of symptoms after returning to work. Dr. Bernstein's assessment on July 23, 2012, was that the petitioner's work activities aggravated his lumbar condition. The evidence establishes that the petitioner's work duties aggravated his pre-existing degenerative L5-S1 spondylolisthesis and that the manifestation date for the repetitive injury was July 23, 2012.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his lumbar condition was reasonable and necessary and is awarded.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being is causally related to the work injury.

FINDING REGARDING PROSPECTIVE MEDICAL:

The petitioner proved that a decompression and fusion at the L5-S1 level recommended by Dr. Bernstein is reasonable medical care necessary to relieve the effects of the work injury. The petitioner is entitled to have from the respondent the reasonable and necessary cost for a decompression and fusion at the L5-S1 level.

FINDING REGARDING PENALTIES AND FEES:

The petitioner's request for penalties and fees is denied. There was a genuine dispute regarding whether the petitioner's pre-existing degenerative L5-S1 spondylolisthesis was aggravated by his work duties. The petitioner failed to prove that the respondent's conduct was unreasonable or vexatious.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Monica Saranga a/k/a Monica Renteria Martinez,

Petitioner,

vs. NO: 09WC 52457

15IWCC0297

Hot Mama's Foods,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical, temporary total disability, prospective medical, credit and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 28, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $7,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 27 2015

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Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

SARANGA, MONICA A/K/A RENTERIA MARTINEZ, MONICA
Employee/Petitioner

Case# **09WC052457**

HOT MAMA'S FOODS
Employer/Respondent

15IWCC0297

On 5/28/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2553 LAW OFFICE OF JAMES P McHARGUE
MATTHEW C JONES
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

0238 WOLFE & JACOBSON LTD
DAVID WOLFE
25 E WASHINGTON ST SUITE 700
CHICAGO, IL 60602

15IWCC0297

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Monica Saranga a/k/a Monica Renteria Martinez
Employee/Petitioner

v.

Hot Mama's Foods
Employer/Respondent

Case # 09 WC 52457

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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **October 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 10, 2009**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$19,173.96**; the average weekly wage was **$368.73**.

On the date of accident, Petitioner was **35** years of age, *single* with **2** dependent children.

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

Respondent shall be given a credit of **$14,587.55** for TTD, and **$0** for other benefits, for a total credit of **$14,587.55**.

ORDER

Respondent shall pay the reasonable and necessary medical services, in accordance with the fee schedule, as outlined above:

1.) The bills from Dr. Gireesan attached as Petitioner's Exhibit 5; and

2.) The bills from ATI attached as Petitioner's Exhibit 7; and

3.) The bills from therapy from Marque Medicos from 12/21/2009-2/19/2000 as indentified in Petitioner's Exhibit 1; and

4.) The bills from 3 lumbar injections on 2/10/2010, 3/1/2010 and 3/18/2010 from Medicos Pain and Surgical Specialists; and

5.) The bills from Specialized Radiology indentified in Petitioner's Exhibit 16.

Petitioner's request for prospective medical care is denied.

Petitioner's request for additional TTD as provided in what has been identified as period two, August 25, 2012, through October 11, 2013, is denied.

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

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

15IWCC0297

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.

Deborah L. Simpson
Signature of Arbitrator

May 28, 2014
Date

ICArbDec19(b)

MAY 28 2014

15IWCC0297

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Monica Saranga, a/k/a Monica Renteria Martinez,	)	
Petitioner,	)	
vs.	)	**No. 09 WC 52457**
Hot Mama's Foods,	)	
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on November 10, 2009, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that on that date the Petitioner sustained accidental injuries that arose out of and in the course of her employment and that she gave the Respondent notice of the accident which is the subject matter of the dispute within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $19,173.96, and that her average weekly wage was $368.73.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (2) Were the medical services provided to the Petitioner reasonable and necessary medical services; Has the Respondent paid for all reasonable and necessary medical treatment; (3) Is Petitioner entitled to TTD from August 25, 2012 through October 11, 2013; and (4) Is Petitioner entitled to prospective medical treatment including the sacroiliac injection recommended by Dr. Erickson and Dr. Engel.

Prior to the taking of evidence the parties entered into a stipulation regarding the question of the unpaid medical bills which are delineated in Petitioner's Exhibit 16. Some of the bills may have been paid prior to the hearing, any of the bills that are awarded at the conclusion of the hearing would be subject to the fee schedule and the Respondent would be given credit for the bills which have been paid.

With respect to the question of TTD the parties also stated that they have an agreement with respect to the first time period alleged which is described as "period one" December 21, 2009 on and off returning April 9, 2011. During this time period the Petitioner returned to light duty off and on, during that time she was off for a total of 52 4/7 weeks and both parties agree that Petitioner was paid for her time off. The total amount of payment was $14,587.55, there is no dispute about the time or the amount of TTD paid with respect to period one. The time period labeled "period two" is the time period of August 25, 2012, through October 11, 2013, this is the

period for which Petitioner is claiming to be entitled to TTD payments which the Respondent is challenging and claiming they are not liable for TTD payments for any of the time that Petitioner was off for treatment during period two.

STATEMENT OF FACTS

Petitioner, Monica Renteria Martinez, was employed by Respondent, Hot Mama's Foods, on November 10, 2009. According to her testimony, she had been working for Respondent for multiple months prior to the alleged injury. Petitioner was not sure of the date that she started working for the Respondent. Petitioner explained that she packed products for Respondent.

Petitioner testified that two containers would come out at the same time. She would first assemble the box, then fill the box, lift it up, tape it closed, lower the box to the floor and place it on a skid. She then more specifically described the job explaining that items would come down on a conveyer belt which was at or about waist level. These items would then be placed into a box. The box, when filled, would then be moved onto a pallet. According to Petitioner, she was not sure how much the boxes weighed but thought that approximately 10 to 20 pounds sounded right. The Arbitrator notes Petitioner's version of her job is generally consistent with the job analysis submitted as Respondent's Exhibit #3.

According to Petitioner, as a result of her work activities, she claimed pain in multiple body parts including her neck, shoulders, middle back and lower back. Petitioner did not testify to any specific incident that caused these injuries. Petitioner testified that she originally went to Silver Cross Hospital on November 10, 2009. The Arbitrator notes Petitioner had very poor recollection of her treatment, the dates of the treatment, or the specific complaints that she sought treatment for. According to the testimony of the Petitioner she continued to work during November and December when she was treating at Silver Cross Hospital and with Dr. Alexander.

According to the medical records, Petitioner was treated at Silver Cross Hospital on November 10, 2009. The records from Silver Cross Hospital indicate that Petitioner complained of pain in her neck and scapula on that date. She was given some medication and discharged. (PX #1).

Petitioner returned to Silver Cross Hospital on November 30, 2009. At that time Petitioner complained of back pain that radiated down into her legs. There were no complaints of neck or shoulder pain on this particular visit. (PX #1).

Petitioner treated one final time at Silver Cross Hospital on December 8, 2009. At that time, she was simply diagnosed with a right shoulder strain. (PX #1). According to Petitioner, she next sought treatment with Dr. Michelle Alexander. Dr. Alexander sent her for an MRI of her right shoulder and neck.

The MRI of Petitioner's right shoulder was completed on December 14, 2009. It did not show any tearing of the rotator cuff or labrum. The MRI of the cervical spine was completed on

December 15, 2009. The radiologist, Dr. Baladad interpreted the MRI as completely normal. (PX #22).

Despite a referral to a different physician, Petitioner then began treating with Marque Medicos, located at 4176 W. Montrose Ave, in Chicago, on December 21, 2009. She traveled from Joliet to this facility in Chicago, rather than seek treatment in the area where she lived or worked. Petitioner claims she heard an ad on the radio. Petitioner did not recall when she moved from Chicago to Joliet, however, the December 21, 2009, intake form from Marque Medicos indicates that she already lived in Joliet when she began her treatment with the practice. It is unclear why Petitioner, who worked in Elk Grove and lived in Joliet, would ignore a referral from Dr. Alexander to treat at a local facility, near where she was living, to treat with Marque Medicos.

The voluminous records from Marque Medicos were submitted as Petitioner's Exhibit #2. The Arbitrator notes that Petitioner was referred to many doctors and therapists within the Marque Medicos network. Petitioner testified that she underwent chiropractic treatment and physical therapy at the request of Dr. Ramirez, a chiropractor. Dr. Ramirez sent Petitioner to Pain Management at Marque Medicos. There Petitioner was treated by Dr. Chunderi. Dr. Chunderi immediately sent Petitioner for MRI's of the lumbar spine, mid-back and another MRI for her neck. There is no explanation in the records as to why a cervical MRI would need to be repeated.

The Arbitrator notes that the MRI of the cervical spine taken on December 29, 2009, was interpreted as showing mild posterior annular disc bulges/protrusions at C5-C6 and C6-C7. This reading is contrary to the reading done on an MRI taken only two weeks earlier. The MRI of the thoracic spine was completed on the same day. It showed no indication of any herniated disc or bulging disc. It showed mild thoracolumbar scoliosis. The MRI of the lumbar spine showed a right sided disc protrusion and herniation at L5-S1. (PX #2)

Despite the normal cervical MRI performed at the request of Dr. Alexander, and the absence of any radicular type complaints at Silver Cross Hospital, Chiropractor Ramirez recommended nerve conduction studies. These studies were not performed by a neurologist. Instead, they were performed by a chiropractor, Dr. McCaffery also of Marque Medicos. The neurological testing was completed on January 8, 2010. It showed evidence of a problem at L5-S1. However, there was no evidence of any cervical or upper extremity problems.

Petitioner was referred to Dr. Engel at Marque Medicos. Dr. Engel than performed a series of 3 epidural injections to the lumbar spine in February and March of 2010. Interestingly, Petitioner testified that she received absolutely no benefit from the injections. In fact, according to Petitioner, she had not received any benefit from the therapy or injections done at Marque Medicos. However, Dr. Engel's notes directly contradict Petitioner's testimony. These notes purport that Petitioner had as much as 80% improvement in her pain and symptoms. It is difficult to correlate Petitioner's alleged history of no improvement with Dr. Engel's notes of improvement.

Dr. Engel continued to treat Petitioner in of April 2010. He performed a discography. He also ordered a CT scan of the lumbar spine. After Dr. Engel exhausted months of physical

therapy and chiropractic treatment, injections which purportedly gave no relief, discographies and multiple repeat MRI scans, he finally referred Petitioner to Dr. Gireesan. Dr. Gireesan is a board certified orthopedic surgeon. He specializes in spine trauma and spinal deformity. Approximately 98% of his practice deals with patients with spine problems. (PX #8 at p. 6).

Dr. Gireesan testified, and his notes reflect that he first saw Petitioner on June 2, 2010. At that time, she complained of low back pain and pain in the upper back area. The history was done through a translator to insure the history was accurately taken. There were no complaints of neck pain.

Dr. Gireesan specifically reviewed the MRIs that had been done in this case. He also reviewed the discography. He felt that the cervical spine MRI did not show any significant disc herniations in the neck. However, he felt that the MRI of the lumbar spine showed a herniated disc at L5-S1 on the right. (PX #8 at p. 8). Dr. Gireesan opined that Petitioner sustained an aggravation of a pre-existing degenerative condition in her lumbar spine as a result of her work activities. (PX # 8 at pp. 12 – 13). Dr. Gireesan performed a L5-S1 lumbar fusion surgery on August 5, 2010. Dr. Gireesan noted that post operatively Petitioner did fairly well. *Id. at p. 16.*

Dr. Gireesan testified that he referred Petitioner for therapy. This therapy was performed at ATI. (Despite the referral from Marque Medicos, Dr. Gireesan recommended Petitioner treat at a different facility.) Petitioner eventually underwent a functional capacity evaluation on March 10, 2011. (PX ##7 and 8). This showed that Petitioner could work at a light physical demand level and could occasionally be able to lift 24 pounds and frequent lifting of 15 pounds. Dr. Gireesan testified that it would be his hope that Petitioner could return to work in a medium duty capacity.

Dr. Gireesan did admit that Petitioner had quite a bit of subjective complaints. *Id. at p. 37.* The bottom line is that Dr. Gireesan felt that Petitioner sustained an injury to her lumbar spine which necessitated the fusion and eventual hardware removal. However, he clearly felt that Petitioner was capable of returning to work and that she would progress to medium duty work. Furthermore, he felt that if there was any injury to the thoracic spine, it was simply a soft tissue sprain/strain that would have resolved in a couple of weeks. He held the same opinion as to Petitioner's neck. Giving Petitioner the benefit of the doubt, she may have simply sustained a sprain/strain of the neck which resolved within several weeks. *Id. at p. 37-39.*

Dr. Gireesan was specifically provided the job analysis submitted as Respondent's Exhibit # 3. He testified that Petitioner was capable of working that job. Despite the discharge from care from Dr. Gireesan, Petitioner continued to treat with Dr. Engel.

Dr. Engel performed additional injections and MRI scans. He eventually referred Petitioner to Dr. Erickson. On August 19, 2011, Dr. Erickson recommended a cervical fusion surgery. Petitioner continued to seek treatment at Marque Medicos for approximately another year. She also continued to work for Respondent during that time. Petitioner was only taken off of work as of August 25, 2012, the day after Dr. Erickson performed a cervical fusion. Petitioner testified that Dr. Engel and Dr. Erickson are now also treating her lower back and giving her injections.

The Arbitrator notes that Petitioner testified that Dr. Engel performed various injections between her neck, shoulder and down the right side of her back. According to Petitioner, none of these injections helped. Petitioner testified and the records certainly reflect that Petitioner was examined by Dr. Nam during 2010 for complaints of shoulder pain. Dr. Nam did not find anything significantly wrong with Petitioner's shoulder.

Also in 2010, Dr. Gireesan indicated that Petitioner was off of all pain killers. According to the records from Dr. Engel, Petitioner appeared to be improving in late 2010. On January 17, 2011, Dr. Engel felt that Petitioner could even work full-duty with regards to her neck and shoulder. He deferred any treatment of the lumbar spine to Dr. Gireesan.

Petitioner then returned to treat with Dr. Engel on February 7, 2011. At that time, it was specifically noted that she had been in a motor vehicle accident where her car was rear-ended. This increased her lower back pain and also increased her neck and shoulder pain. The records reflect a clear change in condition following this accident.

The Arbitrator notes that on direct-examination Petitioner specifically denied any intervening incidents. However, upon cross-examination, after being confronted with the history given to Dr. Engel she then admitted that she had this motor vehicle accident. However, she denied that it increased the pain. The Arbitrator notes that this is directly contrary to Dr. Engel's records.

Petitioner testified that she was capable of working from April 2011, all the way through August 25, 2012. Now, after all of the treatment done by Marque Medicos, she has allegedly been incapable of working since August 25, 2012, to the present. In other words, she is actually worse after the treatment from Dr. Engel and Dr. Erickson then she was before the treatment they rendered.

Petitioner also underwent five independent medical examinations. The first independent medical examination was performed by Dr. Steven Mash. Dr. Mash is a general board certified orthopedic surgeon. Dr. Mash gave his evidence deposition on May 30, 2013.

Dr. Mash first examined Petitioner on April 27, 2010. At that time, he saw absolutely no objective evidence of any injury to the neck. (RX #2 p. 8). However, he did agree that Petitioner sustained an injury to her lumbar spine. He felt that the treatment rendered by Marque Medicos was unreasonable. He specifically testified that Petitioner needed to go to a board-certified orthopedic surgeon. He felt that at most, the first two months of therapy would be reasonable and necessary.

Dr. Mash also felt the cervical MRI done was completely normal. Dr. Mash saw Petitioner again on November 16, 2010. At that time, he agreed with Dr. Gireesan that Petitioner should undergo real physical therapy. He agreed with the referral to ATI. Again, he did not see any evidence of any neck or shoulder problem that required treatment. He testified that all of the treatment at Marque Medicos was unreasonable, not necessary and unrelated. He saw no medical reason to perform chiropractic treatment, injections, or medial branch blocks. He specifically opined that the treatment by Dr. Engel to the cervical spine is not reasonable, necessary, or related to the November 10, 2009, incident.

Dr. Mash performed his final examination on May 2, 2011. He once again noted no objective evidence of any injury to the neck or right shoulder. *Id. at p. 21.* He felt that Petitioner could continue to work and other than potentially removing the hardware at some later date she had reached MMI.

Dr. Mash's opinions, as well as Dr. Gireesan's opinions were further supported by the two IMEs with Dr. Carl Graf. Dr. Graf presented for his evidence deposition on December 28, 2012. He is a board certified orthopedic surgeon. He concentrates his practice on treatment of the spine. He examined Petitioner on August 8, 2011, and April 2, 2012. On both examinations he found absolutely no positive objective finding related to the cervical spine. He reviewed the MRI's of the cervical spine that were taken on December 15, 2009, and December 29, 2009. He found no basis to have the MRI repeated. He also found the second reading, done at the request of Marque Medicos to be completely wrong. (RX #1 at p. 17).

Dr. Graf testified that there was nothing on any imaging study, or his physical exam which would suggest an orthopedic problem with Petitioner's neck. *Id. at p. 20.* He felt that she may have sustained a cervical strain. However, this would have resolved within 4 to 6 weeks of appropriate physical therapy. *Id. at p. 21.* Dr. Graf opined that all of the treatment performed by Dr. Engel, Dr. Erickson, or Marque Medicos with regard to the neck was not reasonable, necessary or causally connected to any incident which occurred on November 10, 2009.

These opinions were reinforced on his second examination of April 2, 2012. Again, she had no objective signs of any cervical problem. *Id. at p. 30.* She had pain to light touch indicating over reaction. She had full strength and full range of motion. All objective testing was normal. In addition, there were inconsistencies between the straight leg raising test and the distracted straight leg raising test. In other words, when the test was performed without telling Petitioner what he was doing, she reported no pain. However, when she was told that it was supposed to cause a problem with the nerves she reported pain. In other words, there was no objective, organic problem.
Id. at p. 34.

Dr. Graf opined that Petitioner had reached maximum medical improvement at least by the date of his examination, if not before. She continued to work. She was not in need of any additional medical treatment. He certainly did not believe that any surgery or treatment to the cervical spine was reasonable and necessary.

Dr. Erickson also testified in this matter. He gave his evidence deposition on January 8, 2013. Dr. Erickson admitted that he has a business relationship with Dr. Engel. He actually sees patients at Dr. Engel's facility. He considers himself "an independent contractor" to Marque Medicos. However, he generates bills through Marque Medicos. Dr. Erickson admitted that he did not review the medical records that were generated before his evaluation. Dr. Erickson also agreed that the SSEP testing that he did is fairly controversial. (PX #21 at p. 35). He also agreed that Petitioner had some guarding and pain behaviors. *Id. at p. 39.*

Dr. Erickson also admitted that when he followed up with Ms. Saranga on September 21, 2012, she expressed to him that she was worse after surgery. *Id. at p. 43.* On November 6, 2012, she reported very little relief from the procedure. Id. at p. 43. In fact, she now complained

of pain extending below the area that he operated on. *Id. at p. 43.* In other words, her neck pain seemed to be similar to what it was before surgery and she now had a new problem. *Id. at p. 44.* Dr. Erikson admitted that in hindsight, Dr. Mash, Dr. Graf and Dr. Gireesan may have been correct that Petitioner did not require cervical surgery. *Id. at p. 44.*

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987)

The burden of proving disablement and the right to temporary total disability benefits lies with the Petitioner who must show this entitlement by a preponderance of the evidence. *J.M. Jones Co. v. Industrial Commission,*71 Ill.2d 368, 375 N.E.2d 1306 (1978)

For treatment of an employee's workplace injury to be compensable under workers' compensation laws, Petitioner must establish the treatment is necessitated by the work injury and not some other cause or condition. *Hansel & Gretel Day Care Center v Industrial Commission,* (1991) 215 Ill.App.3d 284, 574 N.E.2d 1244.

An employer's liability for benefits cannot be based on guess, speculation or conjecture. *Illinois Bell Telephone* v. *Industrial Commission*, 265 Ill.App.3d 681, 638 N.E.2d 207 (1994).

To be compensable under the Act, the injury complained of must be one "arising out of and in the course of the employment". *820 ILCS 305/2*(West 1998). An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury. *Parro v. Industrial Comm'n,* (1995) 167 Ill. 2d 385,393, 212 Ill. Dec. 537, 657 N.E. 2d 882.

On the issue of an intervening cause, the courts have consistently held that for an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition. *Boatman v. Industrial Commission,* 256 Ill.App.3d 1070, 628 N.E.2d 829, 195 Ill.Dec. 365 (1st Dist. 1993).

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

The parties do not appear to dispute a causal connection between the lumbar surgeries and this accident. Dr. Gireesan, Dr. Graf and Dr. Mash all agree that the work activities caused or contributed to the eventual need for lumbar surgery.

However, what certainly appear to be in dispute are the ongoing complaints of pain. The Arbitrator weighed Petitioner's credibility as well as the credibility of the doctors in this

particular case. Here, Petitioner's primary treating surgeon, Dr. Gireesan felt that Petitioner had a solid fusion and had reached MMI. He felt that she could work in a light to medium duty capacity. Dr. Gireesan did not believe that Petitioner sustained any significant injury to her thoracic spine or her cervical spine. He felt everything would have resolved within a couple of weeks of November 10, 2009. Likewise, the independent medical examiners, both board certified orthopedic surgeons, Dr. Mash and Dr. Graf felt that Petitioner had reached MMI. Neither of them felt that Petitioner was in need in any of additional medical treatment to her cervical spine or thoracic spine. The doctors from Marque Medicos disagreed with Dr. Gireesan, Dr. Graf and Dr. Mash.

The Arbitrator also notes that Petitioner's testimony helps support the opinions of Dr. Gireesan, Dr. Mash and Dr. Graf. She was capable of working for over a year after the surgery performed by Dr. Gireesan. She specifically denied being involved in any motor vehicle accidents. However, the facts clearly demonstrate she was involved in a motor vehicle accident and this made her pain worse. Petitioner was capable of working from April 2011 through August 2012, but now, after additional treatment and medical procedures performed by Marque Medicos Petitioner is allegedly not capable of working at all.

The Arbitrator finds that Petitioner has failed to establish that her current condition of ill being is causally connected to the November 10, 2009 accident. The Arbitrator finds that the opinions of Dr. Gireesan, Dr. Graf and Dr. Mash are more credible than the opinions rendered by the physicians at Marque Medicos. The Arbitrator finds that Petitioner's injuries to her neck and thoracic spine, if any were simply minor soft tissue sprain/strains which would have resolved within a couple of months after this accident. Petitioner sustained an injury to her lumbar spine which necessitated a lumbar fusion and eventual hardware removal. She then reached MMI. She was capable of working in a light/medium duty capacity at that time. Any problems she has had after that point in time are unrelated to the accident of November 10, 2009.

In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent paid all appropriate charges for reasonable and necessary medical treatment, the Arbitrator makes the following conclusions of law:

As stated in the statement of facts as well as the prior section, Petitioner underwent a great deal of medical treatment. She clearly sustained an injury to the lumbar spine. The Arbitrator finds that the medical bills from Dr. Gireesan attached as Exhibit 5 and the medical bills from ATI attached as Exhibit 7 are reasonable, related and necessary. These medical bills should be paid in accordance with the fee schedule.

The Arbitrator also notes that Dr. Gireesan, Petitioner's treating surgeon was unwilling to send Petitioner back to Marque Medicos for physical therapy. This further supports the Arbitrator's opinion that the treatment rendered at Marque Medicos was not reasonable, necessary and related. The Arbitrator notes that the physicians associated with Marque Medicos have run up excessive medical bills. First, they have provided and charged for transportation. Petitioner was capable of driving to work on a regular basis. She testified that she drove to work.

The records reflect that she drove from Joliet to her place of employment in Elk Grove. She worked from April 2011 through August 2012. During this time she demonstrated the ability to drive to and from work. There is nothing in the records to substantiate any need for transportation. Instead Marque Medicos simply offered transportation and then attempted to generate bills for $500.00 per visit. The Arbitrator finds that these transportation expenses are unreasonable and unnecessary.

The Arbitrator also notes that Petitioner's treatment, as quarter-backed by Marque Medicos is excessive and unreasonable. Again, the Arbitrator finds the opinions of Dr. Gireesan, Dr. Mash and Dr. Graf are more credible than those of Marque Medicos. This is reinforced by the lack of any justification for multiple MRIs to the cervical, thoracic, and lumbar spine. It is further reinforced by Petitioner's own testimony that none of the treatment rendered by Marque Medicos really helped her. Despite this fact, over the recommendations of Dr. Gireesan, Dr. Mash and Dr. Graf, Marque Medicos and related facilities continued to run up medical bills in excess of $250,000.00.

The Arbitrator does note that all of the physicians seemed to believe that 4 to 8 weeks of physical therapy following this incident would have been reasonable. Giving Petitioner the benefit of the doubt, the Arbitrator awards Petitioner the medical bills for therapy incurred from December 21, 2009 through February 19, 2010 as stated in Petitioner's Exhibit 1. The remaining medical bills from Marque Medicos are denied as not reasonable, necessary or causally connected to any incident of November 10, 2009.

The Arbitrator also notes the more than $100,000.00 bills from Medicos Pain and Surgical Specialists. The Arbitrator notes that Dr. Mash believes the trial of epidural injections was reasonable. Likewise, Dr. Gireesan appears to agree that this was reasonable. Accordingly, the Arbitrator awards the 3 lumbar epidural injections that were performed. These injections took place on February 10, 2010, March 1, 2010 and March 18, 2010. It appears that all other treatment rendered by Medicos Pain and Surgical Specialists is not reasonable, necessary, or causally connected to any injury Petitioner sustained on November 10, 2009.

The Arbitrator notes the bill from Specialized Radiology identified as Petitioners Exhibit 16 for imaging studies completed on December 23, 2009. The Arbitrator finds that this treatment is reasonable and necessary and Respondent shall pay those bills in accordance with the fee schedule.

The Arbitrator notes that the imaging studies performed at Archer MRI appear to be duplicative of other imaging studies. There is no evidence in the record as to why additional MRIs were needed. Likewise, there is no credible evidence in the records Petitioner required injections to her shoulder as a result of this accident. Accordingly, the Arbitrator finds that the bills identified in Petitioner's Exhibit 18 are not reasonable, necessary or causally connected to any injury Petitioner sustained on November 10, 2009.

The medical bill from IMS Experts (Petitioner's Exhibit # 19) appears to be for some type of DVT pump. This is for treatment on August 24, 2012. This treatment is for long after Petitioner had reached MMI and for a condition other than what was causally connected to the

November 10, 2009 accident. The Arbitrator finds that this bill is not reasonable, necessary or related to the incident of November 10, 2009.

The Arbitrator notes that the bills identified in Exhibit 17 are for a cervical MRI performed on April 27, 2011. This is at least a third cervical MRI performed in this case. The Arbitrator finds no basis for this treatment to have been performed. Accordingly, the Arbitrator finds that this treatment is not reasonable, necessary or related to this accident.

The remainder of Petitioner's medical bills that have been submitted all appear related to treatment recommended or performed by Dr. Engel or Dr. Erickson at Marque Medicos. The Arbitrator has already found that this treatment is not reasonable, necessary and related, as Petitioner did not sustain any significant injury to her shoulder, cervical spine or thoracic spine. Accordingly, all other bills submitted by Petitioner other than noted herein, are found to be unreasonable, unnecessary and/or not causally connected to this incident.

In support of the Arbitrator's decision with regard to the amount due for temporary total disability, the Arbitrator makes the following conclusions of law:

At the beginning of the hearing the parties agreed that all TTD was paid for the period from December 21, 2009 through April 9, 2011 when Petitioner returned to work. Petitioner worked various dates during this period of time. Based on the records, it appears that she worked a significant period of time from December 21, 2009 through April 9, 2011. She then returned to work on April 9, 2011 through August 25, 2012. TTD during this time period is not disputed.

The reason Petitioner was taken off of work, in August of 2012, had nothing to do with her lumbar spine injury. She was off of work the day following her cervical surgery. Petitioner's treating physician, Dr. Erickson agreed that in hindsight Dr. Mash, Dr. Graf and Dr. Gireesan were correct, the Petitioner did not require the cervical fusion that he performed. The Arbitrator finds pursuant to the Arbitrator's discussion in the prior sections that the treatment to the cervical spine is not related to the November 10, 2009 injuries. The Arbitrator finds that surgery was not reasonable and not necessary or causally connected to the November 10, 2009 incident. Accordingly, the reason Petitioner has remained off of work does not have anything to do with the November 10, 2009 accident. The Arbitrator finds that the opinions of Dr. Mash, Dr. Graf and Dr. Gireesan that Petitioner could continue to work in a light/medium duty capacity is more persuasive then the opinions of the physicians of Marque Medicos. Accordingly, Petitioner is not entitled to any additional TTD.

In support of the Arbitrator's decision with regard to prospective medical treatment that the Petitioner is seeking, the Arbitrator makes the following conclusions of law:

Petitioner requested a sacroiliac injection recommended by Dr. Erikson and Dr. Engel. For the reason stated in the prior sections, this request is not reasonable, not necessary or related to the original accident. There is no evidence that Petitioner sustained a sacroiliac injury. In fact, there is no evidence in the record that this is related to any type of treatment to the lumbar spine. The fact of the matter is Dr. Gireesan, Dr. Graf and Dr. Mash all found that Petitioner had

reached MMI long before this trial took place. There is no credible evidence in the record that Petitioner requires any additional injections. In fact, according to her own testimony, none of the injections or any of the treatment recommend by Marque Medicos has benefited Petitioner. Accordingly, the Arbitrator denies Petitioner's request for prospective medical care as not reasonable, related or causally connected to any injury on November, 10, 2009.

ORDER OF THE ARBITRATOR

Respondent shall pay the reasonable and necessary medical services, in accordance with the fee schedule, as outlined above:

1.) The bills from Dr. Gireesan attached as Petitioner's Exhibit 5; and

2.) The bills from ATI attached as Petitioner's Exhibit 7; and

3.) The bills from therapy from Marque Medicos from 12/21/2009-2/19/2000 as indentified in Petitioner's Exhibit 1; and

4.) The bills from 3 lumbar injections on 2/10/2010, 3/1/2010 and 3/18/2010 from Medicos Pain and Surgical Specialists; and

5.) The bills from Specialized Radiology indentified in Petitioner's Exhibit 16.

Petitioner's request for prospective medical care is denied.

Petitioner's request for additional TTD as provided in what has been identified as period two, August 25, 2012, through October 11, 2013, is denied.

Signature of Arbitrator

May 28, 2014
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Luis Orozco,
Petitioner,

15IWCC0298

vs.

NO: 09WC 28501

Fresh Express,
Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 10, 2014, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 27 2015

Charles J. DeVriendt

Michael J. Brennan

Ruth W. White

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CJD/jrc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

OROZCO, LUIS
Employee/Petitioner

Case# **09WC028501**

FRESH EXPRESS
Employer/Respondent

15IWCC0298

On 3/10/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

2553 LAW OFFICE OF JAMES P McHARGUE
MATTHEW C JONES
123 W MADISON ST SUITE 1000
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
GRANT ELLIS MILLER
20 N CKLARK ST SUITE 1000
CHICAGO, IL 60602

COUNTY OF COOK) SS.)

☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

15IWCC0298

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

LUIS OROZCO,
Employee/Petitioner

Case # 09 WC 28501

v.

Consolidated cases: N/A

FRESH EXPRESS,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on December 3, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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 Is the Petitioner entitled to prospective medical treatment?

15IWCC0298

FINDINGS

On 6/13/2009, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$28,497.04**; the average weekly wage was $ **548.02.**

On the date of accident, Petitioner was **48** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of $40,743.87 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $ 40,743.87 and $ 1,644.05 for a PPD advance.

ORDER

Credits
Respondent shall be given a credit of $40,743.87 for TTD, and $48,541.65 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent shall be given credit for $1,644.05 and $15,169.60 for permanency benefits paid under Section 8(d)2 of the Act.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $365.37/week for 70 weeks, commencing June 13, 2009 through October 16, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from June 13, 2009 through October 16, 2010, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $40,743.87 for temporary total disability benefits that have been paid.

Medical benefits
Respondent shall pay reasonable and necessary medical services of $4,790.21, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $479.00 to Elmhurst Radiologists, $ 4,186.78 to Lake Shore Open MRI, and $2,822.28 to Metro Anesthesia, and $681.84 to Norwegian Hospital, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $48,541.65 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Permanent Partial Disability: Schedule Injury
Respondent shall pay Petitioner permanent partial disability benefits of $328.81 per week for 33.4/7 weeks, because injuries sustained caused the 20% loss of us of the left foot, as provided in section 8(e) of the Act.

Permanent Partial Disability: Person as a whole
Respondent shall pay Petitioner permanent partial disability benefits of $ 328.81 per week for 25 weeks, because the injuries sustained caused 5% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act for Petitioner's fractured ribs.

Respondent shall pay Petitioner permanent partial disability benefits of $ 328.81 per week for 15 weeks, because the injuries sustained caused 3% loss of use of a person as a whole, as provided in Section 8(d)2 of the Act for Petitioner's back contusion.

Prospective Medical Benefits
Petitioner has not proven, by a preponderance of the evidence, that his current condition of ill-being is related to the subject accident therefore, he is not entitled to prospective medical care, pursuant to the Act.

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

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

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability; 5) nature and extent; 6) prospective medical treatment and 7) the reasonableness and necessity of Petitioner's medical treatment. *See*, AX1.

Direct Examination of Luis Orozco

Mr. Luis Orozco, (the "Petitioner") testified through an interpreter that he worked for Fresh Express (the "Respondent") on June 13, 2009 and had been working for Respondent for approximately three years. He further testified that his daily job duties were to take out vegetables, put them in a basket, weighing approximately four hundred and thirty (430) pounds. He then would push the basket and dump the vegetables into a hopper.

The petitioner testified that on June 13, 2009, a basket of vegetables became stuck and that he had to push it to release it; and it came back at him. He then testified that he does not remember what happened but did think that he felt a hit to his ribs, on the left side, and his left foot. *See,* Tr. pg. 13.

The petitioner testified that the basket was like a big dish or pan that had vegetables inside. He testified that the basket was hung at chest level; and that he believes that it was the basket that hit him. When asked to describe the injury again, the petitioner testified that the only thing he remembers is "when he was pushing it and it came back at him". He testified the next thing he remembered was waking up in the hospital and he felt that he had been hit in his ribs and his foot because he felt a collision from an object to his ribs, his foot and back.

The petitioner testified that he was released one day after being admitted to the hospital and he felt like he was "completely ripped." Petitioner testified that his whole body was in pain.

He further testified that he then presented to Advanced Occupational Specialists, complaining of neck and rib pain. He was treated and advised to return to work, with light duty restrictions, on June 15, 2009. On June 17, 2009, the petitioner chose to treat with Marque Medicos. *See*, Tr. pg. 20; PX3.

Petitioner present to Dr. Ramirez, a chiropractor at Marque Medicos. He testified that she took him off work and recommended physical therapy. He further testified that he was referred for a series of MRIs to his left foot, lumbar spine and chest; then sent to Dr. John Kane, a foot specialist, on June 25, 2009.

The petitioner testified that when he first saw Dr. Kane, his left foot was numb. Dr. Kane performed surgery on the fifth toe on the left foot on July 1, 2009 and in the weeks following his surgery, Dr. Kane sent him for additional testing and ultrasounds, on his left leg.

The petitioner testified that he was then seen by Dr. Andrew Engel at Marque Medicos, for treatment of his lower back. Dr. Engel performed multiple injections from 2009 to 2010 and Petitioner testified that he felt no relief from the injections performed by Dr. Engel. *See*, Tr. pg. 23.

The petitioner also testified that he received physical therapy treatments from Marque Medicos for his neck because his neck started hurting six months after his alleged work accident. The petitioner testified that Dr. Engel performed a series of injections for his rib fractures and that he did not feel any relief from the injections. *See,* Tr. pg. 24.

In December of 2009, he returned to Dr. Kane for treatment for his left foot because of the pain. He testified that his left foot was dark and discolored. He continued receiving medical care from Dr. Kane through November of 2013. He testified that he was given a continuous motion machine and an electrical unit to use at home for his left foot and that neither the motion machine or the electrical unit helped him. He testified that his left foot was numb and that the pain travels up his leg. *See,* Tr. pg. 26.

At trial, the petitioner removed his socks and shoes from both feet so that the Arbitrator could observe of the appearance of his left foot in comparison to the right. The Arbitrator noted that there was a crescent shaped scar of approximately four inches on the petitioner's left foot and that there was no difference, in terms of discoloration, between the left or right feet because both seemed to be discolored. The Arbitrator also noted that the pinkie toe on the left foot was one-half inch shorter when compared to the pinkie toe on the right foot. The Arbitrator noted on the record, that the petitioner's toenails had been clipped and that there was no marked swelling on either of the petitioner's feet. *See,* Tr. pg. 30.

The petitioner had a cane with him at trial and testified that Dr. Kane had prescribed the cane and that he uses it daily. He also testified that his left leg currently hurts; that this pain started four to five months after his foot surgery; and that his current back complaints include a burning sensation and numbness.

The petitioner testified that Dr. Engel referred him to Dr. Gireesan in 2010. The petitioner testified that Dr. Gireesan recommended a course of conditioning therapy. The petitioner testified that he underwent this conditioning therapy at Elite Physical Therapy and that he felt the same after the therapy, as he did before he took it. The petitioner testified that Dr. Gireesan recommended a lumbar fusion surgery. *See,* Tr. pg. 36.

The petitioner testified that Dr. Engel referred him to Dr. Robert Erickson in July of 2007. The Arbitrator notes that the medical records reflect the petitioner began treating with Dr. Erickson in July of 2011. The petitioner underwent a low back surgery on August 17, 2011. The Arbitrator notes that medical records reflect that this surgery was a hemilaminectomy performed by Dr. Erickson. The petitioner testified that he felt no improvement in the months following his surgery. *See,* PX8 & Tr. pg. 37.

The petitioner testified that Dr. Erickson is currently recommending both lumbar and cervical fusion surgeries and that he wishes to have both surgeries. The petitioner further testified, relative to his

neck condition, that he feels pain running down his left arm and that his arm becomes numb. The petitioner testified that he has been taken off work by Dr. Erickson. The petitioner further testified that after his accident of June, 2009, he had never had any other accidents or injuries involving his neck, low back, left foot or ribs and throughout his treatment at Marque Medicos, he was given prescription medications directly prescribed by their doctors and that these medications did not help him. *See*, Tr. pg. 40.

Cross Examination of Luis Orozco

The petitioner testified that he is unable to do household chores. He testified that he cannot walk without feeling pain, he cannot lift a bag of groceries not even a gallon of milk. He testified that he cannot do yard work, that he cannot bend at the waist without feeling pain and that he cannot and does not drive.

The petitioner testified that he had never had a previous injury to his ribs and then admitted that he told Dr. Lorena Ramirez on June 17, 2009, that he had had a 2008 workers' compensation claim for injury to his ribs.

The petitioner testified that after pushing a basket on June 13, 2009, he does not remember what happened. The petitioner testified that he does not remember speaking to paramedics through an interpreter immediately after his accident, despite the fact that the medical records show that the petitioner was alert, oriented and spoke to the paramedics through an interpreter. *See*, PX1.

The petitioner testified that when he was discharged from Elmhurst Memorial Hospital, he felt completely ripped apart and that if medical records from June 15, 2009 from Advanced Occupational Specialist reflect that he only complained of rib and foot pain, they were not accurate.

The petitioner testified that he treated with Marque Medicos because they treated workers' compensation injuries and that he was referred to Drs. Kane, Engle, Erickson, Gireesan and Nam by Marque Medicos. He was referred to different doctors because the treatment he was receiving was not helping him. The petitioner further testified that Marque Medicos provided transportation for him but he does not remember if Marque Medicos provided him with a translator, when he treated with these medical providers. The petitioner testified that he uses his cane constantly and on a daily basis. The Arbitrator notes that the medical records reflect that the petitioner was provided a translator by Marque Medicos; and that Dr. Erickson testified during his evidence deposition that the petitioner was provided a translator, by Marque Medicos. *See*, PX13 & Tr. pg. 51.

The petitioner testified that he presented to Dr. Kane on November 4, 2013 and if the medical records reflected that Dr. Kane released him from care and indicated that he could work in a full duty capacity, they would be incorrect. The medical records of Dr. Kane state that the petitioner was released to return to work, full duty, on November 3, 2013. The Arbitrator notes that the petitioner came to trial with a cane, exhibited dramatic facial expressions, constant grimacing, heavy breathing; and

requested to move from a seated position to a standing position while giving his testimony. *See*, PX15.

The petitioner testified that he saw Dr. Levin on July 9, 2009, Dr. Noren on October 16, 2010 and Dr. Mather on February 23, 2013, at the requests of Respondent.

Independent Medical Evaluation with Dr. Jay Levin

On July 9, 2009, the petitioner was examined by Dr. Jay Levin, pursuant to a request by the Respondent. Dr. Levin notes that the petitioner denied any complaints to his left toe, left ribs, low back or cervical spine or any work related injuries prior to his June 13, 2009 accident. The petitioner told Dr. Levin that he awoke in the ambulance and that he had numbness in his feet. He said that he felt okay during therapy but felt no improvement afterward. He complained of pain in his left ribs, left fifth toe, low back and anterior cervical areas and stated that his worse pain was in his left ribs. He complained of pain going down his left leg into his knees and toes and cervical pain going into both of his shoulders. He denied arm pain. He told Dr. Levin that he did not drive.

Dr. Levin indicated that the petitioner was approximately four weeks post injury and that his rib fractures would have taken 6 to 8 weeks to heal. Dr. Levin stated that the chiropractic treatment the petitioner underwent would not have improved his fractured ribs. Dr. Levin estimated maximum medical improvement ("MMI") for the petitioner's foot injury to be approximately six to eight weeks following his surgery. Dr. Levin indicated that the petitioner had no neurologic deficit in his lower extremities to correspond with any significant radiculopathy; and that the MRI findings were consistent with annular tears that would have healed within 6 to 8 weeks from the time of the occurrence on June 16, 2009. Dr. Levin also indicated that, at maximum, the petitioner sustained a cervical contusion that did not require any additional medical care and that the petitioner could certainly work a sedentary job and progress to full duty work in the near future. *See*, RX1.

Independent Medical Evaluation with Dr. Richard Noren

On October 16, 2010, the petitioner was seen by Dr. Richard Noren, at request of Respondent. The petitioner filled out a pain diagram and indicated that he only had pain in his low back. When questioned by Dr. Noren, the petitioner then told Dr. Noren that he has pain in his back and in his left leg, which shoots down to his foot. Dr. Noren's report indicates that the petitioner told him that he has had injections performed by Dr. Engel, all without benefit. During physical examination, Dr. Noren noted that Petitioner had multiple episodes of facial grimacing and complaints of back pain when all motor groups were tested in the lower extremities. He had equal vein patterns in both feet and there were no changes in his toenails. The petitioner reported severe pain with light touching of his lumbar spine and Dr. Noren examined EMG nerve conduction studies of Petitioner's lumbar and cervical spines, which were read as normal.

Dr. Noren then noted that the petitioner had received medial branch blocks and other pain management treatment from Dr. Engel and opined that these pain management techniques had not been indicated. Dr. Noren stated that Petitioner had no physical examination findings consistent with

a diagnosis with CRPS however; he had multiple findings consistent with symptom magnification. Dr. Noren stated "the sensory findings, motor findings, the tenderness to light touch in the lumbar spine, the facial grimacing and the overall behaviors are primarily consistent with symptom magnification and possible malingering." Dr. Noren noted that the petitioner has been receiving multiple interventional injections, which had not provided any benefit. In addition, he had received 90 visits of chiropractic care over the course of his treatment through March of 2010, also without any benefit. Dr. Noren opined that the petitioner should not receive any further injections for treatment of subjective pain complaints and placed the petitioner at MMI. *See,* PX2.

Medical Records Review, Independent Medical Evaluation and Testimony of Dr. Mather

On February 14, 2013, the petitioner then presented to Dr. Mather for an independent medical evaluation. Petitioner told Dr. Mather that while he was working, a basket unlatched and fell on top of him. He told Dr. Mather that he had received chiropractic treatment, physical therapy, cortisone shots in his back and surgery. He stated that the surgery did not help his back and that he has pain in his back that radiates down both legs, and a numbing sensation in the lateral aspect of his left foot. The petitioner also told Dr. Mather that he still had left chest pain from broken ribs, nearly four years after his work accident and that Dr. Engel had performed a laser procedure on his chest and that did not help his pain.

Dr. Mather noted that Petitioner appeared to be exquisitely tender to light touch on the left trapezial muscle though there was no spasm detected. Dr. Mather indicated that Petitioner stated that he could minimally rotate his neck to the left because of the pain, though later during their examination, when Dr. Mather spoke to him in Spanish, he freely moved his head to the left about 50 degrees, with no signs of pain.

During physical examination, Petitioner was unable to complete pronation or supination even when Dr. Mather offered zero resistance. Petitioner claimed that he could not turn over Dr. Mather's hand, under direction. The petitioner complained of numbness in the lateral aspect of his left foot, yet with pinprick, he withdrew his foot, secondary to pain. Dr. Mather noted that the petitioner had markedly positive Waddell signs.

Dr. Mather diagnosed the petitioner with a healed left rib fracture at T8, 9, 10, and 11, a low back contusion and psychogenic pain and functional overlay. He indicated that the petitioner's injuries had healed and he was able to return to work, without restrictions. Further, Dr. Mather indicated that Petitioner told many of his medical providers that he lost consciousness despite the fact that this is not reflected in his Elmhurst Emergency Room records. Dr. Mather also indicated that Petitioner was complaining of rib pain three and a half years after his rib fractures had healed which is not explainable on an organic level. Dr. Mather pointed out that Petitioner had multiple positive Waddell signs and had poor range of motion with his neck until the doctor spoke with him in Spanish and he freely rotated his neck. The petitioner's mild disc degeneration and protrusion at L5-S1 was a typical

finding in a person with Petitioner's age and that his discogram was non-specific as he subjectively had severe pain, greater than 10 out of 10, on a disc that by MRI was read as normal.

Dr. Mather further opined that the decision to perform surgery on the petitioner, on the left at L5-S1, did not make any sense and was neither reasonable or necessary. Further, Dr. Mather noted that the petitioner did not have radicular complaints for about two years following his work injury and pointed out that Petitioner's discogenic pain would not radiate all the way down his leg or be associated with numbness.

Dr. Mather opined that the petitioner was at MMI and required no further diagnostic testing or medical treatment. Dr. Mather found the extreme use of multiple epidural steroid injections, sympathetic blocks and a discogram by Dr. Engel to be inappropriate. Dr. Mather indicated he would have released the petitioner to regular work three months post injury and felt that any treatment that Petitioner received after three months following his injury, i.e. September 2009, would have been unrelated to his work injury. Dr. Mather testified that Dr. Erickson is the only medical provider that he is aware of that uses SSEP results to diagnose back conditions and recommend surgery. He further testified that, during his independent medical evaluation, Petitioner did not put forth full effort.

Dr. Mather explained that the petitioner had discordant pain on his discogram and testified that when generating a diagnosis for a patient, he relies on their physical examination, subjective complaints and the diagnostic imaging. He testified that once those three link up, he has a diagnosis. He testified that the petitioner's objective findings, subjective complaints and diagnostic studies did not coincide with a diagnosis.

He testified that Petitioner's August, 2011 back surgery was not reasonable or necessary and was not appropriate. He testified that Mr. Orozco does not need additional surgeries related to the work injury and that the petitioner's Oswestry score, from his disability evaluation from his FCE, was not appropriate as it indicates that Petitioner is bedridden, which of course he is not. *See,* RX4.

Testimony of Casey Raisbeck

The respondent's witness, Casey Raisbeck testified that he was a field investigator and that he had performed surveillance on approximately three hundred (300) people. Mr. Raisbeck testified that he drafts detailed reports when he completes surveillance assignments and that on September 10, 2013, he had the opportunity to complete surveillance on the petitioner.

Mr. Raisbeck testified that, on September 10, 2013, he reported to Petitioner's residence where he observed a GMC Yukon parked across the street, which was registered to the petitioner. He testified that he saw the petitioner during his surveillance and pointed him out, during the trial.

Mr. Raisbeck testified that on September 10, 2013, he observed the petitioner walking from his house

to his GMC Yukon SUV, with the aid of a cane. Mr. Raisbeck testified that he did not notice the petitioner showing any evidence of pain while he walked. Mr. Raisbeck testified that he observed the petitioner, an unidentified female and several children enter the car and petitioner drove off. He lost sight of the car near a school and returned to the residence where the petitioner arrived a short time later. Then Mr. Raisbeck testified that he observed the petitioner carrying what looked to be a five-gallon bucket of water. Mr. Raisbeck then testified that the petitioner proceeded to bend over and splash the flowers with water. Mr. Raisbeck further testified that the bucket appeared to be full or near full and when the petitioner picked up the bucket, Mr. Raisbeck observed water splash out of it.

Mr. Raisbeck testified that the petitioner simply tipped the bucket over and water splashed out of the top and that the petitioner did not utilize his cane for several trips, when refilling the water bucket. Mr. Raisbeck testified that the five-gallon bucket of water appeared to be heavier than a gallon of milk and that Petitioner used both arms while watering the plants. Mr. Raisbeck then testified that when the petitioner was getting into his SUV, he had to step up into the vehicle and that he stepped up with his left foot followed by his right. The Arbitrator notes that this would require the petitioner to put all of his weight on his left foot. The Arbitrator finds the testimony of Mr. Raisbeck to be credible and corroborated by the surveillance report and DVD. *See,* RX6.

Initial Medical Treatment

The records from Franklin Park Fire Department's ambulance, which transported Petitioner from his place of employment to Elmhurst Memorial Hospital's ER, reflects that Petitioner spoke with paramedics through an interpreter and that the petitioner told the paramedics that he did not lose consciousness. *See,* PX1.

The medical records from Elmhurst Memorial Hospital state that the petitioner told the doctors that a bin fell on his left foot and these medical records also indicate that the petitioner did not lose consciousness and only complained of chest pain. *See,* PX2.

The Advanced Occupational Health records of June 15, 2009 state that the petitioner complained of rib and foot pain; he did not complain of neck or back pain and did not state that he felt as though he had been "completely ripped apart". *See* PX3.

On June 23, 2009, the petitioner presented to Lakeshore Open MRI and had two MRIs: one of the left foot, which showed a dorsal dislocation of the fifth digit; and one of the lumbar spine, which was read to show a 3-4mm posterior herniation at L4-L5 and L5-S1, indenting the thecal sac. He also underwent a CT scan of his chest, which was read to show fractures of the left 9th and 10th ribs.

Medical Records from Marque Medicos and Medicos Pain and Surgical Specialist

Petitioner then began treating with Marque Medicos on June 17, 2009, two days after his appointment with Occupational Health Medicine. Medical records reflect that the petitioner told the doctors at Marque Medicos that a basket fell on top of him. The medical records also reflect that the

petitioner told the doctors about his previous workers' compensation injury to his ribs. The petitioner complained of back pain radiating down his right leg more so than his left leg. The Arbitrator notes that the petitioner's initial complaints were of pain on the left side of his back, into his left leg. The petitioner told the doctors at Marque Medicos that he lost consciousness on the date of his accident.

The petitioner followed up on June 18, 2009, complaining of radiating pain on both sides of his low back, and for the first time, complained of neck pain radiating down both sides of both of his upper extremities. The petitioner returned on June 30, 2009, this time with no complaint of radiating pain in his legs or his arms. *See,* PX4.

On October 20, 2009, the petitioner presented to Dr. Engle at Marque Medicos, complaining of pain in his low back, worse on the right than the left and pain on the right side of his neck. Petitioner returned to Dr. Engel on January 26, 2010 and complained of pain radiating into both legs. On February 9, 2010, the petitioner returned to Marque Medicos and claimed that he had no radicular symptoms. His pain was localized in the middle of his low back. On February 23, 2010, the petitioner returned to Dr. Engel, complaining of pain on the right side of his neck.

Medical Records from Dr. John Kane

Petitioner presented to Dr. John Kane, a podiatrist on June 25, 2009. He had taken an MRI of his left foot, which indicated that Petitioner had a dorsal dislocation involving the fifth digit at the metatarsophalangeal joint. Dr. Kane noted swelling and resolving ecchymosis of the left ankle and opined that the petitioner needed surgery of the dislocated toe on his left foot because it was pointing straight up and preventing him from wearing shoes. Dr. Kane performed a surgery on Petitioner's left foot, fifth toe. Dr. Kane recommended that Petitioner use a cane to assist with walking. Petitioner continued to complain of pain and Dr. Kane ordered a venous flow study and other tests to rule out DVT. DVT was not found however, petitioner continued to complain of pain in and swelling of the left ankle.

Dr. Kane's diagnosis of Petitioner's ongoing pain complaints in his left foot changed several times, initially being a dislocation of the MP joint of the fifth toe, and later being complex regional pain syndrome. Later, that diagnosis was reassessed and changed to ongoing pain in the left foot. The petitioner was discharged from care by Dr. Kane on November 4, 2013 and instructed to return to work in a full duty capacity.

Medical Records from Dr. Gireesan

The petitioner then began treating with Dr. Gireesan and was referred for work conditioning. The petitioner had a functional capacity evaluation ("FCE") on September 20, 2010. The FCE indicated that the petitioner had significant exaggerations of subjective complaints in combination with his physiological responses. The petitioner had positive Waddell signs in several categories during his FCE.

The petitioner then followed up with Dr. Gireesan on October 13, 2010 and was diagnosed with a left-sided disc herniation at L4-5. Dr. Gireesan indicated that Petitioner might be a candidate for surgery

only after having another MRI. The petitioner was referred to Dr. Gireesan by Marque Medicos and when asked about the accident, he told Dr. Gireesan that he had loss unconsciousness after his accident.

On February 14, 2011, the petitioner followed up with Dr. Gireesan and indicated that he could walk without a cane. He asked Dr. Gireesan to perform a surgery on him. At all of his visits with Dr. Gireesan, The petitioner stated that he wanted to receive surgery. *See,* PX12.

Medical Records and Testimony of Dr. Erickson:

On July 22, 2011, the petitioner then began treating with Dr. Erickson who performed a surgery on the petitioner after two appointments with him. The petitioner saw Dr. Erickson on October 11, 2011 and complained of neck pain. This is the first time he had mentioned neck pain since treating with Dr. Erickson.

When Petitioner saw Dr. Erickson on October 14, 2011, he complained of right-sided gluteal pain. The petitioner had a negative straight leg raise test when he saw Dr. Erickson on February 27, 2012. *See,* PXs 8 & 13.

On May 25, 2012, the petitioner followed up with Dr. Erickson, complaining of numbness in his right arm radiating into his fingers. At trial, the petitioner complained of pain in his left arm.

The petitioner's pain complaints continued to wax and wane and move from one side of the body to the other for the rest of the duration of his treatment. By January 28, 2013, he was complaining of left-sided greater than right-sided neck pain; and pain radiating down his left leg greater than his right leg. However, his straight leg raise tests was negative, bilaterally.

On August 15, 2013, Dr. Erickson testified that he was in frequent communication with Dr. Engel while treating the petitioner. Dr. Erickson also testified that he receives up to 10% of his patient visit work and 5% of the surgical work from Marque Medicos. He testified that he uses Marque Medicos forms when writing "off work" slips and that Marque Medicos coordinated transportation for and his appointments with Petitioner. Dr. Erickson also testified that Marque Medicos provided a translator when the petitioner came to see him.

Dr. Erickson testified that Dr. Engel performed the discograms that he used to diagnose the petitioner's condition and that he has some concern that the discogram he used was two years old however, he used it for diagnosis. Dr. Erickson also testified that he used somatosensory evoked potential (SSEP) testing to diagnosis the petitioner and that less than 10% of his colleagues rely on SSEP testing when diagnosing back and neck disorders and the necessity for surgery. Dr. Erickson also testified that a person with positive Waddell signs is not a good candidate for surgery. *See,* PX 3, p. 73.

Dr. Erickson testified that he first saw the petitioner on July 8, 2011, and he did not see again for two

years after the accident. He stated that he would defer to physicians who had examined the petitioner closer to the accident date. Dr. Erickson testified that he did not review the medical records from Elmhurst Memorial Hospital or Franklin Park Fire Department and that his physician's assistant had performed physical examinations on the petitioner. Dr. Erickson testified that SSEP tests revealed that there was a possible problem at C4-5, though he is recommending a cervical fusion surgery at C5-6.

On July 22, 2011, Dr. Erickson testified that he recommended a hemilaminectomy at L5-S1 on the second appointment that he had with Mr. Orozco. Dr. Erickson also testified that at his March 16, 2012 appointment with the petitioner, he told the petitioner to see him on an "as needed" basis.

Dr. Erickson testified that the petitioner's symptoms did not line up perfectly. Further, Dr. Erickson testified that on November 6, 2012, he would not offer the petitioner additional surgery without further testing and that he recommended Petitioner have his arms studied, because of a lack of correlation between his arm complaints and his neck EMG. Dr. Erickson testified that Petitioner had discordant pain at L4-5 during his discogram from 2010.

Dr. Erickson further testified that the December 4, 2012 visit was the first time the findings on Petitioner's MRI correlated with his SSEP results. At this appointment, Dr. Erickson recommended both lumbar and cervical fusion surgeries. Dr. Erickson also testified that there was confusion regarding Petitioner's SSEP results. He testified that a "fresh reading" of the SSEP showed a C6 problem, not a C5 problem. He stated that this information was different in the prescribed report and that this difference needed to be discussed. Dr. Erickson testified that he knew about the nerve narrowing at C5-6 because of the MRI and that he had written a note that a prior study had suggested a C5 problem; while this new study suggested a C6 problem, "so this needs to be sorted out". When questioned further, Dr. Erickson stated "I don't know. I think at this point in time, we have to take all the studies in concert and try to put them together into a meaningful pattern...there has been a cervical disk problem at C4-C5, with a more recent MRI scan showing a more discrete problem at C5-C6, one level lower." Dr. Erickson continued to testify that there was "similar confusion" about the electrical testing, with one prior study suggesting a C5 problem and one new study suggesting a C6 problem. In spite of this confusion, Dr. Erickson continues to recommend a surgery at C5-C6.

Dr. Erickson also testified that several studies revealed ongoing radiculopathy from L5, despite earlier surgery at L5-S1. Further, Dr. Erickson testified that the problems in Petitioner's low back, taken separately, are "not large." Despite this confusion and the issues being "not large," Dr. Erickson continues to recommend a lumbar fusion surgery. Lastly, Dr. Erickson testified that the petitioner could consider physical therapy as an alternative to surgery. *See*, PX 13, pgs. 39-89.

Utilization Review Report

Respondent's utilization review, prepared by Medical Review Institute of America, indicates that only eighteen (18) sessions of chiropractic therapy followed by one to two visits every four to six months

was reasonable and necessary for the petitioner's injuries. Further, the medical records reflect that the initial thoracic inter-costal blocks were reasonable and necessary. The remaining blocks and RFA procedures were not. The utilization review also indicates that epidural steroid injections, lumbar synthetic blocks and medial branch blocks were neither reasonable nor necessary. Further, the reports indicate that the proposed lumbar and cervical surgeries are not supported by credible medical evidence and are not reasonable or necessary. The utilization review report was prepared after examining treating records and diagnostic reports.

Medical Fee Schedule Analysis

The medical fee schedule prepared by the respondent indicates that the overall liability for medical records to date, is $105,300.02. The Arbitrator notes that $55,289.37 of this outstanding balance is from Marque Medicos Fullerton and $38,556.29 is from Medicos Pain and Surgical Center.

The Medical Fee Schedule analysis indicates that the total charges for the petitioner's medical treatment, following his June 13, 2009 work accident, are $645,419.66. At this time, payments made by workers' compensation insurance amount to $48,541.65 and payments from Public Aid are $16,414.10. The outstanding balance pursuant to the fee schedule is $235,794.21. The petitioner's alleged outstanding bills, without a fee schedule reduction are $533,382.18. *See,* RX8.

CONCLUSIONS OF LAW

15IWCC0298

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

The Arbitrator finds that on June 13, 2009, the petitioner sustained an accident arising out of and in the course of his employment. The Arbitrator finds that the petitioner's description of the accident was limited as he indicated that he does not remember anything after pushing a basket. Further, the Arbitrator notes that the petitioner's description of feeling that the crate hit him in his back, ribs and left foot is confusing, as the basket could not hit all these places at once. Despite this confusion and the nature of his testimony, the Arbitrator finds that Petitioner has satisfied his burden in proving that he sustained an accident arising out of and in the course of his employment on June 13, 2009.

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

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

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).
It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved

credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances support the decision. *See generally, Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), *see also, Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980).

The Arbitrator finds that the petitioner has stated inconsistent histories of his accident and inconsistent recollection of whether he lost consciousness. The Arbitrator finds that there are inconsistent results in his medical records mainly due to the petitioner's subjective complaints: some records show that he exhibited pain at an unremarkable level; and some assessments indicate that he should be bedridden.

The surveillance footage shows him performing tasks that he testified he was unable to perform, the reports from three different independent medical evaluators indicate symptom magnification and positive Waddell signs; and his confusing diagnostic tests do not correlate to his pain complaints.

The Arbitrator finds that the petitioner failed to prove, by a preponderance of the evidence, that his alleged condition of ill-being, is causally related to the work accident. Further, the Arbitrator finds that the petitioner could have returned to work at a much earlier date of September 13, 2009, per the IME of Dr. Mather.

The Arbitrator finds the opinions of the independent medical evaluators; Drs. Noren and Mather, to be more persuasive than those of Marque Medicos and the Marque Medicos related medical providers, i.e., Drs. Engel, Nam, Gireesan, Kane and Erickson. Most importantly, the Arbitrator is concerned by the level of confusion regarding Petitioner's diagnoses by his treating doctors and the high potential for surgical mistake. This is supported by the fact that Dr. Erickson relied upon a two-years-old discogram to performed a hemilaminectomy on Petitioner after just two visits with him.

The Arbitrator also notes Petitioner's presentations of inconsistent histories of his accident to the doctors at Marque Medicos, i.e. indicating that he lost consciousness, which is contrary to many of his medical records; and that an item fell on him on the date of accident, which is contrary to his testimony at trial. The Arbitrator finds that this inconsistencies, as well as inappropriate diagnoses, based on migrating pain complaints and extreme subjective complaints, reflect a dim view of petitioner's credibility.

The Arbitrator also relies on the fact that Petitioner's IMEs revealed that he had positive Waddell findings and subjective pain complaints that were not supported to any objective findings. The Arbitrator also notes that Respondent's witness and surveillance evidence indicate that the petitioner is capable of more physical activity than he testified that he is able to perform at trial. The Arbitrator

finds that the petitioner has failed to prove that his present condition of ill-being is causally related to his work accident.

J. Were the medical services that were provided to the petitioner reasonable and necessary? Has respondent paid for all reasonable and necessary medical treatment?

The Arbitrator finds that the petitioner's medical treatment including medial branch blocks, epidural steroid injections, pain management treatment, chiropractic treatment, physical therapy and prescription medications was not reasonable or necessary. It is clear from the medical records that Petitioner received an inordinate amount of treatment that were over-prescribed and over-used.

Further, the Arbitrator relies on the credible testimony of Drs. Levin, Noren and Mather as well as the utilization review which indicates that only eighteen (18) sessions of chiropractic therapy and one to two visits every four to six months were appropriate. That indicates that a total of 12 extra visits for a total of 30 visits of chiropractic therapy were reasonable and appropriate in this case.

The Arbitrator finds that the Respondent is given a credit for medical bills already paid, in the amount of $48,541.65. Further, the Arbitrator finds that medical bills from Marque Medicos are neither reasonable or appropriate as they included transportation, interpreter's fees and over-prescribed pain management. The Arbitrator finds that it would be appropriate to deduct this amount from the outstanding balance from October 16, 2010 when the petitioner was placed at MMI by Dr. Noren relative to his foot injury; and had already been placed at MMI relative to his other, previously injured body parts.

The Arbitrator finds that $93,845.66 in treatment from Marque Medicos was neither reasonable or necessary, or was $5,763.12 from Prescription Partners, leaving a balance of $4,790.21 in medical treatment to be paid pursuant to the medical fee schedule. Supporting this finding, the petitioner testified that none of the pain management treatment or chiropractic care he received from Dr. Engel and Marque Medicos helped his pain. Further, he told Respondent's Section 12 examiners that the pain management interventions had failed to help him. In addition, Petitioner testified at trial that the prescription medications he was prescribed did not assist him, and he consistently told independent medical evaluators that he was not regularly taking this pain medicine.

The Arbitrator finds that the surgery performed, i.e., an L5-S1 hemilaminectomy by Dr. Erickson, was neither reasonable or necessary. The Arbitrator relies on the credible testimony of Dr. Mather in finding that the petitioner did not need this surgery and furthermore, the petitioner testified that this back surgery did not improve his condition.

Further, the Arbitrator finds that the prospectively recommended surgeries of cervical and lumbar fusions are neither reasonable, necessary or indicated in this case. As such, the Respondent will not

be held responsible for any further medical treatment for Petitioner. This finding is supported by the utilization review, the independent medical evaluations and the credible testimony of Dr. Mather.

K. Is Petitioner entitled to additional total temporary disability benefits?

The petitioner claims entitlement to total temporary disability benefits from June 14, 2009 through December 3, 2013, which is 233-3/7ths weeks of TTD benefits. The Respondent is given a credit for $40,743.87 in TTD benefits already paid.

The Arbitrator finds that, based on the IMEs of Drs. Richard Noren, Steven Mather and Jay Levin, Petitioner could have returned to work by October 16, 2010. Thus, the Arbitrator finds that the petitioner is only entitled to TTD benefits from June 13, 2009 through October 16, 2010, the date of Dr. Noren's IME, which is the date that the petitioner was found to be at MMI for all of his alleged work-related pathologies. This computes to seventy (70) weeks of benefits due to the petitioner. Given Petitioner's TTD rate of $365.37, this yields a TTD award of $25,574.27. As Respondent is entitled to a credit for $40,743.87 in TTD already paid, the Respondent is not responsible for paying additional TTD to the petitioner. The Arbitrator finds the TTD overpayment of $15,169.60 to be a credit to respondent for permanency payments.

L. What temporary benefits are in dispute?

As to the nature and extent of Petitioner's injury, the Arbitrator notes that this claim was originally filed as a 19(b) Petition. As Petitioner has requested a finding of the nature and extent of his injuries; and the Arbitrator finds that the petitioner is at MMI, based upon the credible opinions of the Respondent's Section 12 examiners as well as Dr. Kane, Petitioner's treating physician, the Arbitrator finds that it is appropriate to award the petitioner a permanency award at this time; and that this claim is ripe for final disposition.

The petitioner is entitled to 20% loss of use of the foot for his fifth toe digit dislocation with surgical correction ($10,982.25). The Arbitrator further awards 5% loss of use of the person as a whole for Petitioner's rib fractures to T8, T9, T10 and T11 ($8,220.25). Further, the Arbitrator awards the petitioner 3% loss of use of the person as a whole for Petitioner's back contusion as diagnosed by Dr. Mather ($4,932.15). As indicated in Arbitrator Exhibit 1, the Respondent is entitled to a credit of $1,644.05 for a PPD advance.

O. Is the Petitioner entitled to any prospective medical care?

Pursuant to the conclusion stated above, the Arbitrator finds that the petitioner is not entitled to any prospective medical care.

15IWCC0298

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
09WC28501
SIGNATURE PAGE

Signature of Arbitrator

March 10, 2014
Date of Decision

MAR 10 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Thomas,
Petitioner,
vs.

NO: 98WC 48837

Richard and Weyer, Inc.,
Respondent,

15IWCC0299

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 11, 2014, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 7 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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CJD/jrc
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMAS, RICHARD
Employee/Petitioner

Case# **98WC048837**

15IWCC0299

RICHARD AND WEYER INC
Employer/Respondent

On 2/11/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0494 JOSEPH J SPINGOLA LTD
47 W POLK ST
SUITE 201
CHICAGO, IL 60605

4751 DEBORAH L SCHAEFE
ATTORNEY AT LAW
PO BOX 865
ELMHURST, IL 60126

15IWCC0299

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

RICHARD THOMAS
Employee/Petitioner

Case #98 WC 48837

15IWCC0299

v.

RICHARDS AND WEYER, INC.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on January 23 and 24, 2014. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☐ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☒ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☒ Maintenance ☒ TTD?

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

M. ☒ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On July 8, 1997, the respondent was operating under and subject to the provisions of the Act.

- On this date, an employee-employer relationship existed between the petitioner and respondent.

- On this date, the petitioner sustained injuries that arose out of and in the course of employment.

- Timely notice of this accident was given to the respondent.

- At the time of injury, the petitioner was 40 years of age, *single* with no children under 18.

- The parties agreed that the petitioner received all reasonable and necessary medical services.

- The parties agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.

- The parties agreed that the respondent paid $5,059.06 in temporary total disability benefits.

- The parties agreed that the petitioner is entitled to temporary total disability benefits from July 9, 1997, through July 26, 1997.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $442.66/week for 11-3/7 weeks, from July 9, 1997, through September 26, 1997, which is the period of temporary total disability for which compensation is payable.

- The respondent shall pay the petitioner the sum of $398.39/week for a further period of 11.25 weeks, as provided in Section 8(e) of the Act, because the injuries sustained

caused the permanent partial disability to petitioner to the extent of 45% loss of his right ring finger.

- The respondent shall pay the petitioner compensation that has accrued from July 8, 1997, through January 24, 2014, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner through September 26, 1997, was reasonable and necessary and is awarded. The medical care rendered the petitioner after September 26, 1997, was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- The petitioner's request for penalties and attorney fees is denied.

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

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

Robert E. Williams

Signature of Arbitrator

February 10, 2014
Date

FEB 11 2014

FINDINGS OF FACTS:

The petitioner, a brick layer, sustained injuries to his right fourth finger on July 8, 1997, while operating a hammer drill. He received emergency care at Lutheran General Hospital for a comminuted fracture of the proximal phalanx of the right fourth finger. He reported that his hand caught in the grip and rotated and that he began to have bruising and swelling in his right ring finger after he continued to work. The petitioner started care with Dr. Firlet on July 11, 1997, and complained of angulation of the fractured digit. The doctor performed a closed reduction of the fracture and applied a splint. His splint was removed on July 28th and an outpatient hand program was initiated for returning his range of motion. Dr. Firlet noted excellent range of motion and alignment and discharged the petitioner to full-duty work on September 26th. On November 7th, the petitioner reported to Dr. Firlet that he was disappointed in how his finger works and complained of stiffness. The doctor noted that on examination, except for a slight restriction of full flexion of the PIP joint, the petitioner had almost a complete return of function of his ring finger, full extension and no gross angular deformity. X-rays demonstrated progressive consolidation.

On July 20, 1998, the petitioner started treatment at the Nesset Medical Center for difficulty walking, weakness in extremities and weight loss. On August 21, 1998, the petitioner saw Dr. Wayne Rubenstein for an evaluation of progressive bilateral upper and lower extremity weakness and a 50-pound weight loss since May of 1998. The doctor noted that the petitioner manifested a mid-moderate myopathic pattern of weakness affecting his lower more than his upper extremities, slight primary modality sensory loss in the distal lower extremities and weakness/sensory loss in his right median and ulnar

nerve distribution. He opined that an EMG revealed mild peripheral neuropathy, right carpal tunnel syndrome and ulnar neuropathy. Dr. Rubenstein's impression was weakness due to myopathy attributed to nutritional depletion associated with a marked weight loss. On September 25, 1998, the petitioner visited Lutheran General Hospital Hand Center and reported a right elbow, wrist and hand injury on July 8, 1997, from slamming into pipes. Their assessment was polyneuropathy with localized slowing at the right carpal tunnel and right ulnar nerve at the elbow.

The petitioner requested a reassessment from Dr. Firlet on March 3, 1999. Dr. Firlet noted a full range of motion of his hand, negative Tinel's and Guyon's canal at his wrist, a tremor at rest and a well-healed proximal phalanx fracture of the ring finger. The petitioner received some care at Cook County Hospital from May 24, 1999, through January 24, 2000; however, their records are not clearly legible. A functional capacity evaluation of the petitioner at NovaCare on December 1, 1999, revealed a light-medium physical capacity. Dr. Tom Karnezis evaluated the petitioner on February 25, 2000, and opined that the petitioner's right hand paresthesia was of unknown etiology. An EMG/NCV of his right extremity at Resurrection Medical Center on March 2, 2000, was abnormal for involvement of both the median and ulnar nerves near his wrist. On March 29, 2000, the petitioner had a right median and ulnar nerve decompression and neuroplasty at the wrist by Dr. Karnezis. Dr. Karnezis noted progressive improvement at the petitioner's last visit on November 24, 2000, at which time complaints of hand cramping with prolonged writing was noted.

The petitioner returned to Dr. Karnezis on January 3, 2002, and reported dropping items and the inability to hold any items or oppose his fingers and thumb. On February

15, 2002, Dr. Karnezis performed an anterior transposition of the right ulnar nerve with medial epicondyle debridment. At his final visit to Dr. Karnezis on August 13, 2002, the petitioner had regained full digital and wrist motion. The petitioner reported difficulty gripping and pain along the 4th and 5th digits. Dr. Karnezis opined on October 29, 2003, that the petitioner could perform medium-level work in accordance with an FCE on October 3, 2003.

The petitioner elected to be evaluated by Dr. Samuel Chmell on February 15, 2003. The doctor opined that the petitioner has a significant permanent injury with respect to his right arm, he cannot return to his prior work and he cannot perform any repetitive or prolonged activities involving his right arm. On May 29, 2003, and November 18, 2004, the petitioner was evaluated by Dr. Leonard Kranzler, who requested an EMG. A functional capacity on October 3, 2003, revealed a medium physical capacity. An EMG at Consultants in Neurology on February 15, 2005, was abnormal with finding of median mononeuropathy at the right wrist and ulnar neuropathy at the right elbow. An EMG on May 31, 2007, was abnormal in the right ulnar motor nerve and normal for other nerves without any residual carpal tunnel syndrome.

On December 17, 2008, at the request of the respondent, Dr. Jay Pomerance reviewed medical records and opined that the petitioner's injury was limited to a fracture of the proximal phalange of the right ring finger.

On January 15, 2010, Dr. Karnezis noted complaints of pain, discomfort and numbness in the petitioner's right upper extremity, frequently dropping objects, difficulty with activities of daily living and holding objects, and right shoulder pain. An EMG on January 19, 2010, was abnormal with evidence of right ulnar motor neuropathy at right

elbow and right wrist. An MRI on January 2, 2010, of the petitioner's right shoulder was interpreted by Dr. Karnezis on February 3, 2010, as revealing a full-thickness tear. On April 8, 2010, Dr. Karnezis performed an arthroscopic right shoulder debridement, mini rotator cuff tear, revision right ulnar neuroplasty and revision carpal tunnel release. Dr. Karnezis discharged the petitioner on February 15, 2012.

Susan Entenberg saw the petitioner on September 9, 2011, and later opined that the petitioner's earning capacity is about $9.00 to $11.00 per hour. A surveillance video of the petitioner revealed him pushing a powered lawn mower in 2006, yard work and errands on June 26 and July 1, 2007, trimming, edging and mowing his lawn in July 2009, pushing a snow blower, starting a snow blower by pulling a cord with his right hand and snow shoveling on February 22 and 27, 2013, and March 6, 2013.

FINDING REGARDING THE AMOUNT OF WAGES:

In the year preceding the injury, the petitioner worked a four-week period between October 27 and November 23, 1996, a two-week period between May 18 and 31, 1997, and a one-week period from June 30 through July 5, 1997. He earned $3,505.00, $325.52 and $816.80, respectively; a total of $4,647.92 for the seven weeks. There is no evidence of the number of days the petitioner actually worked or didn't work during any of the periods. While it is possible to infer that the petitioner worked less than five days in the weeks beginning May 18, 1997, and May 25, 1997, the number of days he did not work is speculative and therefore, the entire two-week period is included in the determination of his average weekly wage. The petitioner's average weekly wage was $663.99.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

Based upon the testimony and the evidence submitted, the medical care rendered the petitioner through September 26, 1997, was reasonable and necessary and is awarded. The medical care rendered the petitioner after September 26, 1997, was not reasonable or necessary and is denied.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his right ring finger is causally related to the work injury on July 8, 1997. The petitioner failed to prove that his current condition of ill-being with his right hand, arm and shoulder is causally related to the work injury on July 8, 1997.

The petitioner did not seek immediate medical care after his injury and continued performing his work duties. Later, he sought emergency care for bruising and swelling in his right ring finger. His only complaint to Dr. Firlet on July 11, 1997, was angulation of his fractured digit. On September 26, 1997, he had an excellent range of motion and alignment and was discharged to full-duty work. On November 7, 1997, the petitioner's complaints were stiffness and a disappointment in how his finger worked. The petitioner never reported or complained of an injury to his elbow, wrist or shoulder. Nor did he describe rotating and striking his right arm or elbow. The petitioner is not believable or credible. The petitioner's claim for medical and temporary disability benefits after September 26, 1997, is denied.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based on the findings, the petitioner failed to prove that he was temporarily totally disabled after September 26, 1997. The respondent shall pay the petitioner temporary total disability benefits of $442.66/week for 11-3/7 weeks, from July 9, 1997, through September 26, 1997, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The respondent shall pay the petitioner the sum of $398.39/week for a further period of 11.25 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 45% loss of his right ring finger.

FINDING REGARDING PENALTIES AND FEES:

The petitioner failed to prove that the respondent's conduct was vexatious or unreasonable. There were genuine disputes regarding the issues of causal connection, temporary total disability, maintenance, wages and medical bills. The petitioner's request for penalties and attorney fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Anthony Murff,
Petitioner,

vs.

NO: 09 WC 4661

City of Chicago,
Respondent.

15IWCC0300

DECISION AND OPINION ON § 19(H) AND § 8(A) PETITION

Petitioner filed a Petition under Sections 8(a) and 19(h) of the Illinois Workers' Compensation Act requesting additional medical expenses and alleging a material increase in his disability since the decision of Arbitrator Mason dated January 22, 2014 in which she found that as a result of accidental injuries arising out of and in the course of his employment on January 23, 2009 Petitioner was temporarily totally disabled for a period of 71 weeks under §8(b) of the Act and is permanently disabled to the extent of 50% man as a whole under §8(d)2 of the Act. Neither party appealed this Decision and it became final. The issues now before the Commission are whether Petitioner's permanent disability has materially increased since the January 22, 2014 Arbitrator's Decision and whether Petitioner is entitled to additional medical expenses under §8(a) of the Act. The Commission, after considering the entire record, finds Petitioner failed to prove his permanent condition has materially increased since the January 22, 2014 Arbitrator's decision and failed to prove he is entitled to additional amount of medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. At the February 27, 2013 Arbitration Hearing, Petitioner testified he is employed by the City of Chicago in the Streets and Sanitation Department. On January 23, 2009 he was working as a garbage man when he felt a pop in his left shoulder while removing garbage. On August 10, 2009, he underwent cervical surgery. A diagnosis of carpal

tunnel syndrome was made but he never underwent surgery to correct the same. Dr. Bush-Joseph said he could not address his shoulder until the carpal tunnel condition was corrected. He then released Petitioner from his care with restrictions. Petitioner said he return to work on June 8, 2010 and he was worked a job within his restrictions. He has continued to work as a sanitation laborer in rodent control department. His title and rate of pay remained the same. He is currently 53 years old and is left-handed. He currently has good and bad days. There are times when his neck is stiff. His shoulder is getting worse but he has accepted the pain for what it's going to be. He has numbness and tingling in his hands. He has lost a lot of strength and grip, but he is able to function. He feels like post-surgery that he can live with his condition. He has to take more Aleve when the weather is bad. Most of the pain is on the left side at the base of his neck and shoulder. His hands hurt constantly. He experiences difficult with putting his clothes on and specified putting on T-shirts and shoes as well as applying deodorant on his left side. Doing anything overhead is extremely hard. He has to always keep his neck propped. If he is in a car too long, he experience neck problems and spasms. When this happens, he has to pull over and stretch. He experiences difficult writing and he has trouble gripping things tight or doing activity above his shoulder level. He does not fish and hunt as much as he used to. He experiences restrictions with picking up and playing with his grandchildren.

2. Petitioner's medical records show that his February 2, 2009 left shoulder MRI demonstrated a thickening and increased signal intensity in the subscapularis tendon consistent with a partial tear as well as osteoarthritis of the acromioclavicular joint. The March 6, 2009 cervical MRI showed a C5-6 left posterolateral disc herniation causing moderate to severe central spinal canal stenosis and which appeared to be causing left neuroforaminal stenosis at the C5-C6 level. On August 10, 2009 Petitioner underwent cervical surgery. Petitioner's post-surgery December 10, 2009 cervical MRI showed anterior metallic hardware fixation at the C5-6 level. There was a shallow broad-based protrusion seen at C3-4 level flattening the ventral cord surface. There was a tiny central disc protrusion at C2-3 level and mild ventral ridging at C4-5 level, severe foraminal narrowing of left C4 nerve roots, tiny T2 hyper-intensity within the cord centrally at the C5 level which may represent an incidental intramedullary cyst or a tiny syrinx cavity. Petitioner's March 30, 2010 EMG showed bilateral carpal tunnel syndrome with the left being worse than the right. The Arbitrator subsequently found Petitioner's carpal tunnel condition was not related to the January 23, 2009 work accident.

3. On May 14, 2010 Dr. Bush-Joseph noted that Petitioner may return to work with modified restrictions of lifting 20 pounds maximum with frequent lifting and/or carry objects weighing up to 10 pounds. Petitioner returned to work on June 8, 2010. On June 9, 2010 Petitioner was given a work slip from Mercy Works which indicated no lifting greater than 25 pounds and limited use of left arm. In a July 15, 2010 follow visit with Dr. Phillips, the doctor noted that clinically, from a cervical point of view, Petitioner is doing well. He is working light duty with a twenty pound lifting restriction and he

recommended that Petitioner continue at this level. He also recommended that Petitioner see a hand surgeon. On November 11, 2010 Petitioner followed up at Mercy Works and they noted Petitioner is awaiting the Committee of Finance's approval for the carpal tunnel surgery.

4. On August 29, 2011 Petitioner was evaluated by Dr. Chmell who noted Petitioner's diagnosis is a C5-6 disc herniation with cervical radiculopathy post anterior cervical decompression and fusion with internal fixation, left shoulder rotator cuff tendinopathy with aggravation of A-C joint arthritis and traumatic aggravation of the left carpal tunnel along with a double pinch syndrome secondary to the neck and carpal tunnel. Dr. Chmell opined that Petitioner has achieved maximum medical improvement. As a result of his injuries, Petitioner will never be able to return to work as a garbage man and he will require permanent restrictions and ongoing pain medication. He will also require further treatment to determine if his condition is related to his carpal tunnel syndrome or cervical condition. Lastly, he opined that Petitioner has a significant impairment resulting in a disability to his cervical spine, left shoulder and left upper extremity.

5. At the December 22, 2014 Section 19(h)/8(a) Review Hearing, Petitioner testified he is still working for the City of Chicago. At the time of the February 27, 2013 arbitration hearing he had been working in rodent control for over three years. His title is a sanitation laborer. Both the rodent control and garbage removal are part of the sanitation department. On June 11, 2014, Mr. Escavez informed him that as of the next day he was to report to 39th and Iron, which is the sanitation station/refuse collection for garbage. He reported to that location the next day. He saw Gloria, the Superintendent in Garbage. She told him he was supposed to be going on a garbage truck. He told her that he had restrictions and showed her his restriction paperwork. She talked to George at Rodent Control and then said she did not know why they sent him there. She instructed him to go back to 23rd and Ashland, which is the office for rodent control. He reported back to rodent control. At that time Mr. Escavez said he was supposed to be released to garbage and if he could not do it to swipe out and go home or call the union. Upon contacting the union, Petitioner found out the union could not help him. He said an effort was made to put him back onto workers compensation but it was denied. Instead, he was told he could go on ordinary disability, which he did. On July 16, 2014, he made a request for reasonable accommodations and he was told that they did not have such a thing. Mr. Gustes told him that he had permanent restrictions and they probably never bring him back because they are not doing that anymore.

6. At the December 22, 2014 Review Hearing, Petitioner said he had no real treatment for his left shoulder since the trial last year. There is nothing else the doctors can do for his neck. He agreed that his restrictions are the same as when his case was tried last December. He agreed that his condition remains relatively the same. He testified that he has not returned to Dr. Phillips since July of 2010 and Dr. Pithada since October of 2010. In addition, he has not had any more physical therapy or surgery and his work restrictions

have remained the same. He has also made the decision not to go forward with any additional surgeries. Lastly, Petitioner testified he is not currently working and he has not applied for employment with any other employers.

The Commission notes that the parties are correct in contending that after a final award medical benefits are still available to the Petitioner under Section 8(a) of the Act. Petitioner's attorney further contends that part and parcel of the open medical is Petitioner's right to vocational rehabilitation while at the same time Petitioner's attorney correctly acknowledges that there is no case law stating that vocation rehabilitation is medical treatment. While Petitioner's attorney claims that by allowing vocational rehabilitation pursuant to Section 8(a) of the Act, the Commission would be upholding the intent of the Act. The Commission finds that Petitioner's attorney fails to address the opposite side of the issue. Namely, that by allowing vocational rehabilitation to be part and parcel of a request for additional medical under Section 8(a) of the Act it would violate the doctrine of res judicata through allowing the claim to be prolonged, allowing for a potential re-litigation of the permanency issue down the road and subjecting Respondent to additional liability of what was already deemed to be a final decision. Given the fact that Petitioner's attorney was unable to provide any case law supporting its contention that vocational rehabilitation is medical treatment and that the legislature through placing vocational rehabilitation in Section 8(a) of the Act intended that vocational rehabilitation to remain available as part of the open medical, the Commission finds that to allow for the same would be in opposition to the doctrine of res judicata and the Commission denies Petitioner's request for additionally vocational rehabilitation. Furthermore, even if the Commission were to assume arguendo that Petitioner in this case is entitled to vocational rehabilitation as part of the post award medical, the Commission finds that there is insufficient evidence to support the fact that Petitioner proved he is a candidate under the factors expressed in National Tea v. Industrial Commission, 97 Ill.2d 424 (1983). Namely, he failed to prove that vocational rehabilitation would potentially increase his earning and that he would likely obtain employment upon the completion of rehabilitation. Petitioner's attorney is also seeking maintenance at this time. The Commission notes that Petitioner's attorney is seeking maintenance even before Petitioner is in a sanctioned vocational rehabilitation program and without any evidence that Petitioner is performing some sort of self-directed job search. Based on the above, the Commission denies Petitioner's request for vocational rehabilitation under Section 8(a) of the Act and the Commission holds that maintenance is not warranted at this time.

Petitioner's attorney is arguing by virtue of Respondent's actions Petitioner's disability has changed in that Petitioner's position changed from working within his restrictions to being unable to work at all. Additionally, Petitioner's attorney claims that its filing of the Section 19(h) Petition timely. However, because Petitioner is seeking vocational rehabilitation a permanency discussion at this time would be premature. So Petitioner is asking that any permanency discussion be held in abeyance until after the

completion of the vocational rehabilitation. Lastly, Petitioner's attorney argues that, assuming arguendo that the Commission does not accept the above argument, Petitioner be re-instated in a modified job with Respondent.

The Commission finds that in contending that Petitioner's disability has materially increased, Petitioner's attorney claims that the standard that should be applied is not whether Petitioner's employability has changed but whether his disability has changed. Petitioner's attorney further indicates that while the best way to determine whether Petitioner's disability has changed is through medical evidence to substantiate the same, it is not the only way to do so. Petitioner's attorney contends that by virtue of Respondent's actions Petitioner's disability changed from working with restrictions to not being able to work at all. Petitioner's attorney argues that the disability addressed in Section 19(h) of the Act is not just a physical and mental disability but is also one that impacts the claimant's usual and customary line of employment. In short, the legislature in Illinois through Sections 8(d)1 and 8(d)2 of the Act intended to define disability as a hybrid encompassing both a physical and economic component. Lastly, Petitioner's attorney claims that the case law cited by Respondent on this issue is factually distinguishable.

Starting in reverse order, the Commission agrees with Petitioner's attorney that the case law is factually distinguishable from the case at bar. After that, the Commission disagrees with Petitioner's attorney throughout the remainder of his argument. While it is true that the cases are factually distinguishable, in Petrie v. Industrial Commission, 160 Ill. App. 165 (1987), Cassens Transport Company v. Industrial Commission, 354 Ill. App. 3d 807 (2005) and United Airlines v. Workers' Compensation Commission, 407 Ill. App. 3d 467 (2011), the Appellate Court provided the Commission with a thorough analysis of the term disablement both under Section 19(h) and other Sections of the Act. In doing so, the Court acknowledged Professor Larson's broader definition of the term disablement and his inclusion of an economic component contained therein. Having done so, the Court then went on to state that their belief is that the Illinois legislature intended to limit the definition of disablement to physical and mental conditions only. With that standard in mind and noting that Petitioner indicated that he has had no change in his physical condition since the Arbitration's hearing nor has he sought out any additional treatment for the same, to hold as Petitioner's attorney has, that disablement has an economic component as well as physical and mental component and that the same was supported by the evidence placed into the record at the time of the Section 19(h) hearing would be contrary to the Appellate Court's holding. Section 19(h) requires a material increase in one's disability in order to reopen and/or modify a final decision. The term disability contained within Section 19(h) is limited to proving up a physical and mental disability and not an economic disability. In this instance Petitioner testified that his physical disability has been the same since the February 27, 2013 Arbitration hearing, he has not sought any additional medical treatment for the same and, as evidence by the FMLA document, his restrictions have not change. Additionally, he provided no evidence

that there was a mental component to this claim and that his mental condition changed whatsoever between the time of the February 27, 2013 Arbitration hearing and the filing of the Section 19(h) Petition. Therefore, the Commission finds that Petitioner's 19(h) Petition should be denied. Lastly, while Petitioner's attorney is alternatively seeking that Petitioner be placed in a modified job with Respondent, the Commission holds it has no authority to order the same.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under Sections 19(h) and 8(a) of the Illinois Workers' Compensation Act is hereby denied.

The party commencing the proceedings for Review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 27 2015

MB/jm

O: 4/9/15

43

Mario Basurto

David L. Gore

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Arentz,

Petitioner,

vs. NO: 09WC 26448

Lake Zurich School District #95,

Respondent,

15IWCC0301

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 28, 2013, is hereby affirmed and adopted.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 9 2015
o031715
CJD/jrc

Joshua D. Luskin

Ruth W. White

15IWCC0301

DISSENT

I must respectfully dissent. I find that Petitioner credibly testified that on January 16, 2007, he slipped and fell on snow and ice while entering the office on Respondent's property. He testified that he felt immediate pain in his left hip, left knee, and right wrist. He testified that he reported the accident on January 17, 2007, to Karen Logan, Respondent's Director of Transportation. The accident report offered into evidence by Respondent also indicates that Petitioner reported his injury to "Karen Logan" on January 17, 2007, and that it was witnessed by "Tom Sweinton." Respondent has not shown that it was prejudiced by any defect in notice nor did it call either of these employees to rebut Petitioner's testimony. I would, therefore, find that Petitioner gave timely notice of his accident.

I also find Petitioner's testimony credible that he continued working after the date of accident because he felt that it would eventually get better and he was afraid of being terminated. I would note that, although Petitioner suffered a hip dislocation in 1973 and a motor vehicle accident in 1989 which resulted in approximately seven surgeries over 3 ½ years, Petitioner testified that he had not received any treatment for his left leg in the three years prior to his January 16, 2007 accident. He also credibly testified that in the months after this accident he became very limited and had weakness in the leg with pain in the leg and hip area and weakness, grinding, and popping in his left knee. Petitioner testified that he had called to make an appointment with Dr. Gross in May 2007 but that there was a seven to eight week wait to get in to see him.

Dr. Gross opined in his note dated January 28, 2010, that Petitioner sustained a posterior cruciate ligament tear as well as exacerbation of chronic hip arthritis due to his accident in early 2007. I would find the opinion of Dr. Gross, Petitioner's treating physician, to be more persuasive than that of Dr. Cohen, Respondent's Section 12 physician, who opined that Petitioner's left hip and left knee conditions were related to his 1989 motor vehicle accident. I would find that Petitioner's January 16, 2007 work injury was, at the very least, a contributing factor that permanently exacerbated his left hip and left knee conditions and resulted in his need for medical treatment.

Based on the above, I would award medical expenses, temporary total disability, and permanent partial disability benefits to Petitioner.

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ARENTZ, WILLIAM
Employee/Petitioner

Case# **09WC026448**

LAKE ZURICH SCHOOL DISTRICT #95
Employer/Respondent

15IWCC0301

On 10/28/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0347 MARSZALEK & MARSZALEK
STEVEN A GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

0560 WIEDNER & MCAULIFFE LTD
EMILY BORG
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

15IWCC0301

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

William Arentz
Employee/Petitioner

v.

Lake Zurich School District #95
Employer/Respondent

Case # **09 WC 26448**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Waukegan**, on **September 26, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/16/07**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**$23,225.80**; the average weekly wage was $446.65.

On the date of accident, Petitioner was 49 years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

BENEFITS ARE DENIED BECAUSE PETITIONER FAILED TO PROVE HIS CONDITION OF ILL BEING WAS CAUSALLY RELATED TO THE WORKPLACE FALL.

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.

Edward Lee — 10/24/13

Signature of Arbitrator — Date

OCT 28 2013

Attachment to the Arbitration Decision

William Arentz
Employee - Petitioner

CASE NO: 09 WC 26448

Lake Zurich School District #95
Employer - Respondent

STATEMENT OF FACTS

The petitioner, William Arentz, was employed as a bus driver with Respondent, Lake Zurich School District #95, on January 16, 2007. The petitioner testified on that day he was walking into the office from the bus parking lot when his leg slipped out from under him and he fell backwards. The petitioner testified the area where he fell had snow and ice. The petitioner testified he continued working that day. He testified the following day, January 17, 2007, he reported the fall to Karen Logan, and "completed accident forms." The respondent produced the "Employee's Report of Injury," completed and signed by petitioner, dated June 4, 2007. (Res Ex 1) Petitioner admitted on cross examination that this was the only accident paperwork he completed.

The petitioner did not seek medical treatment until July 16, 2007, six months after the alleged fall. Petitioner presented to Dr. Mark Gross reporting a left knee injury on January 17, 2007 from a fall on ice. Dr. Gross noted petitioner's past medical history, including a previous left hip dislocation in 1973, as well as a long history of osteoarthritis in the left hip with a previous complex open reduction and internal fixation of his femur fracture. X-rays obtained on that date revealed severe degenerative arthritis and complete obliteration of the joint space with reactive osteoarthritic spurring of the left hip. The assessment was status post left knee strain with probable PCL injury, severe degenerative arthritis of the left hip and retained extensive femoral fixation of the left femur. Dr. Gross recommended no intervention for the petitioner's knee noting the range of motion was consistent with what he had ever since his injuries years ago. He noted petitioner's arthritis had become quite debilitating, **though this "is not related to his current work-related injury"** and noted petitioner would require total hip arthroplasty.

On August 27, 2007, petitioner returned to Dr. Gross. He was reporting no notable pain in the knee and range of motion that had returned to pre-injury status. Petitioner was still reporting "lots of problems with his left hip." Dr. Gross continued home exercise for the knee and recommended arthropathy of the petitioner's left hip.

Immediately prior to surgery, Dr. Gross completed a Certification of Physician or Practitioner. Dr. Gross noted petitioner required hip resurfacing surgery on October 16, 2007 for degenerative arthritis. The form specifically asked the doctor to "State the approximate date the condition commenced," to which Dr. Gross responded "Chronic, many year onset." There was no mention of the workplace fall on January 16, 2007.

On October 16, 2007, petitioner underwent a left hip arthrotomy attempted with resurfacing arthroplasty with total hip arthroplasty, high complexity removal of retained femoral screw fixation and separate fascial incision. The operative report noted petitioner's case was of high complexity secondary to a previous plate fixation from previous extensive operative intervention for a comminuted femur fracture done 18 years ago. The procedural summary noted a 50-year-old gentleman with a history of severe debilitating arthritis in his left hip with a long history of previous trauma to the left femur. There was no mention of the workplace fall on January 16, 2007.

Following surgery, petitioner was admitted to Lexington Healthcare of Lake Zurich for rehabilitation on October 19, 2007 and discharged on October 26, 2007. A narrative report from Dr. Schneider (PX 2) provides petitioner is a 50-year-old gentleman who is status post left hip arthroplasty by Dr. Gross on October 16, 2007. Petitioner had a significant past medical history, which included multiple fractures secondary to several motor vehicle accidents. He underwent a total hip arthroplasty because of the severe degenerative joint disease after having sustained multiple fractures of his left hip after the motor vehicle accidents many years ago. There was no mention of the workplace fall on January 16, 2007.

Petitioner returned to Dr. Gross on November 8, 2007. It was noted petitioner was not a candidate for resurfacing because of the difficult anatomy present from his previous problems, which included heterotopic bone, much of which was excised. Petitioner was to begin full weight bearing and advance his physical therapy on an outpatient basis. A November 8, 2007 work release note (PX 1) releases petitioner to full-duty work November 19, 2007. On December 6, 2007, petitioner returned to Dr. Gross, reporting he was very pleased with his progress. Dr. Gross stated petitioner was to continue physical therapy and could tentatively return to work in two and one-half weeks.

Petitioner returned to Dr. Gross on January 10, 2008 for his last visit regarding his hip. Petitioner was noted to be doing quite well status post left total hip arthroplasty. Petitioner was actually tolerating stairs better than he had "in years." Petitioner was to return in nine months, at which time, repeat X-rays would be performed of petitioner's hip. At that time, petitioner was asking whether he could return to downhill skiing and water skiing. Petitioner did not return in 9 months.

Gap In Treatment

Petitioner does not present for medical treatment again until January 28, 2010, two years later. At that point, petitioner presented for chronic left knee discomfort. Dr. Gross noted petitioner was status post a previous fall in 2007 where he tore his PCL. He stated at that time, he aggravated his left hip which had fairly severe osteoarthritis. Petitioner reported overall, he was doing wonderfully with regard to his hip and now his knee was the biggest problem. Dr. Gross recommended an X-ray of the petitioner's knee. X-rays were apparently performed, which Dr. Gross, in a note dated February 5, 2010, revealed no substantial joint space narrowing. In light of his intermittent symptoms of instability and discomfort, he felt petitioner would benefit from arthroscopic surgery on the knee. Petitioner did not return for medical treatment until one year and

three months later on May 12, 2011. No specific treatment was recommended with regard to the hip or the knee or the knee at that time. Dr. Gross did not recommend surgery for the knee.

DR. JAMES COHEN – SECTION 12 EXAMINATION

Dr. James Cohen, an orthopedic and joint replacement surgery, evaluated the petitioner on December 17, 2010 and issued 2 reports. Petitioner reported the accident and admitted he did not seek medical attention with Dr. Gross until five months later in June of 2007. Dr. Cohen noted petitioner reported he was doing fine until March of 1989, when he was in a severe motor vehicle accident. Petitioner reported sustaining multiple fractures of both lower extremities and undergoing left hip and thigh surgery. Dr. Cohen diagnosed the petitioner with left hip status post post-traumatic arthritis of his left hip related to a 1989 motor vehicle accident with a well-functioning left total hip. The diagnosis of the left knee was post-traumatic arthritis and laxity secondary to a motor vehicle accident of 1989. It was Dr. Cohen's impression that because of the long gap between January 2007 and the initial medical treatment in July of 2007, it was likely that the traumatic event of 2007 was not sufficient enough to produce any change in the petitioner's underlying post-traumatic condition of his left hip or his left knee. Dr. Cohen specified that he would not relate the need for a left total hip replacement in any way to the January 2007 incident because in his opinion, if the petitioner had a significant pre-existing arthritis of his hip, any trauma that would be likely to change the underlying arthritic condition would warrant immediate or near immediate evaluation by an orthopedist. While the fall may have caused some temporary pain due to manifestation of pre-existing arthritis, this pain resolved and regardless of the fall of January 16, 2007, he would have needed a hip replacement.

With respect to the petitioner's left knee, Dr. Cohen noted that Dr. Gross's records state petitioner's pain was doing much better in his knee as of August 27, 2007 and had returned to pre-injury status. He had no episodes of buckling or giving way, confirming that the current knee condition was not related to the incident in 2007. Dr. Cohen did not see how a fall backwards could cause a posterior cruciate injury to the knee, nor would it produce arthritic changes in the knee. On examination, Dr. Cohen felt significant crepitus. He felt it was very likely that the posterior cruciate laxity was a result of the previous motor vehicle accident and not the fall in 2007. Obviously, the types of injuries he sustained in 1989 were the result of a high velocity injury, unlike the low velocity injury when he fell backwards in 2007. Dr. Cohen noted he did not feel the knee condition was in any way related to the 2007 incident, but was related to the natural history of the significant traumatic injury that occurred in 1989.

In support of the Arbitrator's decision as to: 1) did an accident occur that arose out of and in the course of petitioner's employment by respondent; 2) whether the petitioner gave respondent timely notice of the accident, and 3) whether the condition of ill-being was caused by the injury, the Arbitrator finds as follows.

The Arbitrator finds the petitioner failed to prove he sustained a compensable injury on January 16, 2007 or that he timely reported that alleged injury. The Arbitrator further finds that the petitioner's condition of ill-being, namely the total left hip replacement and left knee injury, are unrelated to the alleged workplace fall on January 16, 2007.

It is fundamental that petitioner has the burden of proving all elements of his right to recover by a preponderance of a greater weight of the evidence. The right to recover must arise out of the facts such established and may not be based on speculation or conjecture. *Deere and Company v. Industrial Commission, 47 Ill.2d, 144.* The courts have consistently held that a claimant has the burden of proving by a preponderance of credible evidence all elements of the claim, including that any alleged state of ill-being was caused by the workplace accident. *Parro v. Industrial Commission, 26 Ill.App.3d, 551 (1993).* The Commission has clearly noted in the past that causal connection opinions are only as good as the facts upon which they are based. If the basis for the causal connection opinion is flawed in any way, the Commission may disregard said opinions. *Sorenson v. Industrial Commission, 28 Ill.App.3d, 373 (1996).*

It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in the medical testimony. *Caterpillar Tractor Company v. Industrial Commission, 124 Ill.App.3d, 650 (1984).* Even when the evidence in the record might sustain a claim, such evidence is insufficient if it appears from all testimony and circumstances shown in the record that a finding is against the manifest weight of the evidence. *Board of Education of City of Chicago v. Industrial Commission, 83 Ill.2d, 475 (1981).*

The evidence introduced at trial establishes that the petitioner did not report a workplace fall occurring on January 16, 2007 until June 4, 2007. Although petitioner testified that he reported the incident to his supervisor the day after the accident, he further testified that he completed accident paperwork that same day. When confronted with the Employee's Report of Injury dated June 4, 2007, the petitioner admitted that this was the only accident form completed. The accident report establishes he did not report the accident until June 4, 2007 and petitioner produced no evidence to the contrary. The credibility of petitioner's testimony that he "told Karen Logan" the next day is in doubt given the contradiction in his testimony regarding when the accident forms were actually completed. Petitioner produced no witness testimony regarding the accident, nor did he request the testimony of Karen Logan to establish that a work-related incident was reported. Petitioner's delay in treatment further supports that the accident was not reported until months after the alleged fall. Finally, petitioner's testimony was contradictory. He testified did not pursue a workers' compensation claim for fear of being terminated. The Arbitrator finds it difficult to reconcile his fear of termination with his allegation that he told his employer about the accident. If he was fearful of reprimand, as unreasonable as that may be given his testimony that he had never been reprimanded in the past, then he wouldn't have reported the fall in the first place.

Even if the Arbitrator were to give the petitioner the benefit of the doubt and find that notice of a slip-and-fall was provided to the employer in a timely fashion, the petitioner has failed to prove his current condition of ill-being is causally related to the January 16, 2007 fall.

HIP

In support of the Arbitrator's finding that the petitioner's total hip replacement is unrelated to his alleged workplace fall, the Arbitrator notes that the petitioner did not seek medical treatment for approximately six months. At the initial visit, Dr. Gross notes in details petitioner's significant prior injuries to his left leg from the motor vehicle accident in 1989. Dr.

Gross's very first medical records contain the specific medical opinion that the left hip degeneration was not work-related. Immediately after stating the condition was not work-related, Dr. Gross recommended left hip surgery. In that first report Dr. Gross mentions nothing about the work accident aggravating or accelerating the petitioner's left hip arthritis. Prior to surgery Dr. Gross opines in a certification form that the need for surgery was due to chronic "many year" condition. Furthermore there is no mention of the workplace injury in the operative report, only continued references to petitioner's 18-year longstanding history with severe osteoarthritis of the left hip and the prior motor vehicle accident in 1989. Immediately after the surgery, Dr. Schneider's notes state petitioner needed hip surgery following the petitioner's 1989 accident resulting in multiple fractures and multiple surgeries. There is no mention of the January 16, 2007 workplace fall.

The only opinion provided by Dr. Gross even hinting to a causal link with the work place fall occurs in January 2010, three years after the fall. At that time, Dr. Gross states the petitioner exacerbated his chronic hip arthritis, and states nothing more. The Arbitrator notes the doctor did not state that the fall hastened the arthritis nor does he ever opine the fall resulted in the need for left hip arthroplasty. Dr. Gross's records are devoid of any opinion that the fall resulted in an aggravation of his degenerative hip resulting in the need for surgery. On the contrary the most contemporaneous records of Dr. Gross clearly offer the opinions that the petitioner's hip condition was not work-related. As noted in the Certification of Physician or Practitioner report, Dr. Gross stated the onset of petitioner's condition requiring the hip surgery to be "chronic, many year onset." That certification form was completed in 2007, immediately prior to the surgery.

Dr. Cohen has clearly opined that petitioner had a pre-existing severe left hip arthritis prior to January 16, 2007. Dr. Cohen clearly opined that the fall in January of 2007 did not have any significant impact on the pre-existing arthritis, as any trauma that would be likely to change the underlying arthritic condition would be severe enough that it would warrant immediate or near immediate evaluation by an orthopedist. The Arbitrator notes again petitioner did not seek medical attention for six months after the fall. Dr. Cohen has specifically opined that regardless of the fall of January 16, 2007, petitioner would have needed a hip replacement as noted by Dr. Gross himself in the first medical record of July 2007. Dr. Cohen supports the original opinion of Dr. Cohen that the hip condition was not work related.

KNEE

As it relates to the petitioner's left knee condition, although petitioner reports left knee pain at the initial July 2007 visit, six months after the fall, Dr. Gross felt petitioner could fully function with his current activity level. He was having no locking or buckling and no intervention was prescribed at that time. In fact, Dr. Gross noted petitioner's range of motion was consistent with what he has had even since his injuries years ago. The medical records are clear petitioner had significant pre-existing left knee injuries following the motor vehicle accident in 1989.

When petitioner sees Dr. Gross a month later in August of 2007 he essentially reports no pain in his knee, and range of motion returned to pre-injury status. The left knee pain is not

mentioned again to Dr. Gross until January of 2010, three years after the alleged date of loss. At that time, Dr. Gross notes petitioner tore his PCL from a fall in 2007. The Arbitrator notes there were no diagnostic studies confirming a PCL tear. Although Dr. Gross recommends arthroscopic surgery during a phone call, he never formally prescribes it. Even still petitioner did not return for knee treatment until May 12, 2011, a year and a half later. Dr. Gross did not prescribe knee surgery at that time, nor has petitioner undergone knee surgery. Dr. Gross has not stated in any medical record that the petitioner's need for left knee surgery is related to the January 16, 2007 fall, nor has he formally prescribed surgery or any treatment. On the contrary, Dr. Cohen has offered a definitive opinion, that the crepitus demonstrated on IME evaluation resulted from the 1989 motor vehicle accident, a finding more consistent with a high velocity injury of that type than the low velocity injury which he alleges in the fall backwards in 2007. Dr. Cohen could not see how the mechanism of injury, namely a fall backwards, would cause a posterior cruciate injury to the knee, nor would it produce arthritic changes in the knee. Furthermore, Dr. Cohen opined that, given the gap in treatment from January 2007 until July 2007, it was unlikely the fall in January 2007 was sufficient enough to produce any underlying change in the post-traumatic condition of the left knee. Dr. Cohen finally opined petitioner's left knee condition was the natural history of a significant traumatic injury that occurred in 1989.

In so finding that neither petitioner's hip nor his knee condition is causally related to the workplace fall, the Arbitrator relies on Dr. Cohen's opinions. Dr. Cohen's opinions are supported by:

- The uncontroverted fact that petitioner waited until six months to present for medical treatment;
- Petitioner worked in a full-duty capacity during that six-month period prior to presenting for medical treatment;
- There are no medical opinions from a treating physician contained in the medical records providing that the left total hip replacement was related to the work fall;
- While Dr. Gross opines petitioner sustained a PCL injury to his knee after the fall petitioner saw the doctor 2 times after the fall, no treatment was recommended and no knee complaints were made again until 3 years after the fall;
- Dr. Gross opined immediately at the initial treatment visit that the petitioner's left hip condition was "not work related";
- The petitioner waited almost six years after the surgical recommendation for a hip replacement was made to present his petition for workers' compensation benefits before the Illinois Workers' Compensation Commission;

Based on the totality of the evidence tendered at trial, the Arbitrator finds the petitioner failed to prove that his condition of ill-being is causally related to the alleged workplace fall on January 16, 2007.

Given this finding, all remaining issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Parker,

Petitioner,

vs. NO: 14WC 7978

Illinois Department of Transportation,

15IWCC0302

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, incurred medical expenses, prospective medical expenses, causal connection, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED:
o040815
CJD/jrc
049

APR 29 2015

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

PARKER, CHRISTOPHER
Employee/Petitioner

Case# **13WC021796**
14WC007978

ILLINOIS DEPT OF TRANSPRTATION
Employer/Respondent

15IWCC0302

On 8/19/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

AUG 19 2014

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

15IWCC0302

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Christopher Parker
Employee/Petitioner

v.

Illinois Dept. of Transportation
Employer/Respondent

Case # 13 WC 21796

Consolidated cases: 14 WC 07978

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Belleville**, on **June 19, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

15IWCC0302

FINDINGS

On the date of accident, **5/9/13 and 8/21/13**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**71,364.00**; the average weekly wage was $**1,372.38**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**6,276.96** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $**6,276.96**.

Respondent is entitled to a credit of $- under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $914.92/week for 19 3/7 weeks, for Petitioner's period of disability from 6/14/13 through 7/31/13 and 12/19/13 through 3/18/14, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's group exhibit, and shall authorize and pay for any further necessary medical treatment recommended by Dr. Mall, as provided in §8(a) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/13/14
Date

AUG 19 2014

ICArbDec19(b)

FACTS

Petitioner filed two separate applications for adjustment of claim for repetitive injuries to the left shoulder and bilateral wrists and elbows which manifested on May 9, 2013, and traumatic injury to his left shoulder sustained on August 21, 2013. (AX1; AX2). These matters were consolidated before the Arbitrator for hearing.

Petitioner is a 47-year-old serviceman mechanic for Respondent. (T.10, 12-13). Petitioner testified that despite him being classified by payroll as a "highway maintainer," his permanent assignment was that of a service/maintenance mechanic and he served in that capacity for 75% of his 13-year career. (T.12-13).

As a mechanic, Petitioner uses pneumatic, vibratory tools such as air/impact wrenches, air cutters and air chisels. (T.13). Petitioner uses these tools to repair State vehicles and equipment such as tractors, mowers, salt trucks and plow trucks. (T.14-15). Petitioner works on all parts of the vehicle, including the tires, brakes, drive shafts, and mower cutting assemblies. (T.14-15). Petitioner testified that he spends his day performing these duties. (T.17). Petitioner also occasionally drives a ton-and-a-half service truck to sites to perform repairs, holding on to a steering wheel that vibrates. (T.17). Petitioner drives approximately 20 miles on days that he must travel. (T.37). Petitioner submitted a detailed job description as Petitioner's exhibit 11, detailing the other job duties which he performed for the 6.5-7 hours of his work day:

> All these task [sic] that are listed are performed on heavy, medium and light duty trucks, tractors, rotary movers, and heavy to light construction equipment.
>
> Services and repairs such as oil changes, all filter replacement, whing [sic] chassis, brake repair and replacement, hydralic [sic] hose making and replacement, tire changing, track repair or replacement on trackhoes and dozers, electrical and wiring repair, metal fabrication or repair, changing gearboxes, driveshafts, and complete mower cutting assemblies, etc.
>
> The list goes on. I perform these tasks on a 6 ½ to 7hr daily basis five days a week using hand tools, pneumatic tools, torches, welders and others. This requires strength, good hand dexterity and knowledge. These tasks can be very light or all the way up to crain [sic] assisted lifting. (PX11).

Respondent's workers' compensation documentation log subpoenaed by Petitioner includes a "Demands of the Job" form purportedly estimating Petitioner's hand and arm usage. (PX12). In light of the testimony given and evidence presented at Arbitration, it is apparent that this estimate pertains to a different job title than the one performed by Petitioner. The Arbitrator notes, however, that even according the inaccurate form in Respondent's log indicates that a Highway Maintainer uses the hands for gross manipulation (grasping, twisting, handling) for 4-6 hours per day. (PX12). It also indicates that Petitioner uses his hands for 6-8 hours per day to lift up to 10lb., 4-6 hours per day to lift up to 20lb., 2-4 hours per day to lift up to 30lb., spends 6-8

hours per day working on or with a moving machine, and spends between 2-4 hours per day working or reaching above shoulder level. *Id.*

Petitioner testified on direct examination and indicated on the form itself that this form's assessment still does not fully encompass the hand-and-arm activity required by his job duties. (T.15-17; PX12). Petitioner also indicated that his actual assignment is that of a "5 man" or maintenance mechanic, rather than a highway maintainer as indicated on the Demands of the Job form. (PX11). Petitioner testified that from the time he begins work day, he is "wrenching, feeding, doing something in a mechanical line all day long." (T.17). Respondent's witness, Mr. Chad Ashmore, was present on behalf of Respondent but called by Petitioner. (T.43). He testified that he has worked with Petitioner since his start with IDOT in 2004. (T.45-46). He stated that jackhammering was minimal, but did not disagree with any details regarding Petitioner's description of his job duties or any of his sworn testimony. (T.46).

During the course of his job duties, Petitioner began developing symptoms of numbness and cramping in his hand and numbness throughout the claimed affected areas. (T.18). Initially, these symptoms were intermittent and dependent upon the position of his hands and the activity engaged in. (T.18). Later, however, Petitioner's symptoms persisted despite being off work. (T.25). Petitioner does not suffer from gout, hypothyroidism, rheumatoid arthritis, or fluctuations in his weight. (T.18-19). Petitioner further testified that he has no hobbies that involve the repetitive use of his hands or shoulders. (T.19). Petitioner formerly owned a motorcycle, but sold same in 2008 or 2009, years before his injuries manifested or required treatment. (T.19, 20). Nevertheless, Petitioner's symptoms progressed, and he ultimately returned to Dr. Gornet, the physician who previously treated Petitioner for an unrelated neck problem, on May 9, 2013. (T.20-21). Dr. Gornet noted that Petitioner was doing well with respect to his neck, but began developing *increasing* left shoulder and arm pain. (PX3). Dr. Gornet referred Petitioner to Dr. Mall, who Petitioner saw on the same day. (T.21; PX3).

When Dr. Mall saw Petitioner on the same day of May 9, 2013, Dr. Mall noted that Petitioner was doing well for two years, until he began experiencing left shoulder pain a month ago that progressively worsened with work activities. (PX4, 5/9/13). Petitioner also reported bilateral hand numbness that awoke him at night and numbness upon resting his elbow or prolonged bending of the arm or wrist. *Id.* Dr. Mall noted Petitioner's overhead work activities and work with machinery worsened Petitioner's symptoms. *Id.* Petitioner initially thought his pain was coming from his neck and a pulled muscle in his shoulder, informed his supervisor, and decided to wait until his follow-up with Dr. Gornet to seek treatment. (T.30-31; PX4, 5/9/13). However, Dr. Gornet believed Petitioner's problem to be related to his shoulder and not his neck and trapezius. *Id.*

Dr. Mall's physical examination demonstrated left shoulder pain with forward elevation and external and internal rotation, and significantly decreased range of motion. *Id.* Petitioner's neck showed no provocative findings on physical examination, but Petitioner did have pain with

palpation of the trapezius muscles bilaterally. *Id.* Examination of Petitioner's bilateral arms and wrists revealed positive flexion/compression tests bilaterally, positive Tinel's over the right elbow and right wrist, and positive Tinel's over the left wrist. Dr. Mall's assessment was left shoulder rotator cuff tendinitis, left shoulder biceps tendinitis, bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. *Id.* He recommended an EMG/nerve conduction study to evaluate Petitioner's carpal and cubital tunnel symptoms. *Id.* With regard to causation, Dr. Mall noted the following:

> We did have a discussion about the fact that patient's [sic] who do repetitive overhead activities or repetitive heavy work, such as he does for the Illinois Department of Transportation as a mechanic, are actually more likely to suffer from carpal or cubital tunnel symptoms than are people that simply do typing type activities. The fact that he has much more work turned to these activities at work rather than at home indicates that this is likely a work related problem . . . In terms of the left shoulder, I do think that he has multiple pathologies going on here, the first of which is rotator cuff tendinitis/impingement. The second would be biceps tendinitis as well as AC joint arthritis. These have been aggravated by his repetitive overhead activities and his shoulder is quite inflamed at this point. *Id.*

Dr. Mall recommended conservative management of Petitioner's shoulder through injection, physical therapy and anti-inflammatory medication. *Id.* He recommended bracing of the elbows and/or wrists for Petitioner's carpal/cubital tunnel complaints. *Id.* The injection was given the same day and Petitioner reported immediate improvement in pain, although orthopedic tests such as O'Brien's and AC joint testing remained positive. *Id.*

Petitioner testified at Arbitration that the May 9, 2013 visit with Dr. Mall was the first time he received a diagnosis for his condition, and the first time he underwent any electrodiagnostic testing for his bilateral hands and arms. (T.28-29). Although Petitioner believed his symptoms to be related to his employment prior to this visit with Dr. Mall, the record clearly shows that Petitioner mistakenly attributed his condition to his former neck injury, as noted by Dr. Mall in his record, for which he previously filed a claim (10 WC 34619); he thus presented to his spine specialist Dr. Gornet first. (T.32-33; PX4, 5/9/13). This is buttressed by the questionnaire upon which Petitioner indicated that he presented with a "comp case" that "started at work" for which he previously received chiropractic care, massage therapy and other conservative care, treatment rendered in his former neck claim, when he had no prior treatment for his currently claimed symptoms. Upon learning differently from Dr. Mall and Dr. Gornet, he immediately notified his employer on May 13, 2013. (PX12).

Petitioner underwent EMG/nerve conduction studies of his upper extremities and a left shoulder MRI on May 17, 2013. (PX7; PX8). Petitioner's MRI confirmed Dr. Mall's former impressions and demonstrated conclusive evidence of partial tearing of the rotator cuff and suggestive evidence of a labral tear needing confirmation. (PX7). Petitioner's neurological

studies demonstrated evidence of bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome. (PX8). Petitioner returned to Dr. Mall on the same day and Dr. Mall reviewed the results. (PX4, 5/17/13). Petitioner continued to experience significant left shoulder pain, and Petitioner's bilateral elbow and wrist examination remained unchanged. *Id.* Dr. Mall's assessment now included left shoulder partial-thickness rotator cuff tear and fatty infiltration and atrophy of the left shoulder nerve to the teres minor in addition to Petitioner's left shoulder biceps tendonitis, bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. *Id.* Dr. Mall recommended further conservative care for Petitioner's compressive neuropathy complaints, and administered another left shoulder injection. *Id.* Dr. Mall also noted in a letter directed to Dr. Gornet that Petitioner's MRI also showed muscle atrophy and fatty infiltration of the teres minor, which can be caused by a condition in which the axillary nerve to the teres minor is compressed and produces these findings, pain and weakness. *Id.* Dr. Mall specifically tested Petitioner's teres minor and found greater weakness on Petitioner's left side compared with his right. *Id.* Petitioner was placed on restricted duty with no repetitive use of his upper left extremity, no use of vibratory pneumatic tools, no lifting over 10lb. overhead, and no lifting over 20lb. from floor to waist. *Id.*

Petitioner failed to improve with conservative care. (PX4, 6/7/13). Dr. Mall recommended left shoulder surgery to address Petitioner's partial thickness rotator cuff tear, biceps tendon sheath and tares minor nerve prior to intervention to address Petitioner's bilateral carpal and cubital tunnel syndrome. *Id.* Dr. Mall reiterated his belief that Petitioner's left shoulder and bilateral hand and wrist conditions were causally related to Petitioner's employment. *Id.* Petitioner remained on restricted duty. *Id.*

On June 27, 2013, Respondent had Petitioner examined under §12 by Dr. Anthony Sudekum. (RX9). Dr. Sudekum noted that occupational activities that involve sustained heavy gripping, grasping, hammering, use of vibratory tools, and/or sustained hyperflexion and hyperextension of wrist or elbow could potentially contribute to the development and/or aggravation of carpal/cubital tunnel syndrome, but felt that most individuals who performed these activities did not develop compression or peripheral neuropathies such as carpal and cubital tunnel syndrome. *Id.* Dr. Sudekum performed his own physical examination and electrodiagnostic testing, the results of which were markedly different from electrodiagnostic findings of Dr. Phillips and Dr. Mall's and Dr. Phillips' physical examination, and concluded his report by stating that he did not believe that Petitioner suffered from either carpal or cubital tunnel syndrome. *Id.* He thus did not feel that surgery or work restrictions were necessary. *Id.* With regard to Petitioner's shoulder, Dr. Sudekum, although a hand specialist, felt that Petitioner could potentially benefit from shoulder surgery rather than carpal/cubital tunnel surgery, but should be evaluated by another shoulder specialist for a second opinion regarding left shoulder pathology or need for left shoulder surgery. *Id.*

Dr. Mall noted that Petitioner's physician examination showed signs of carpal and cubital tunnel syndrome, and also noted that Dr. Phillips' EMG and nerve conduction study was of

impeccable quality. (PX4, 7/3/13). He further expressed concern that the nerve in Petitioner's shoulder was sustaining irreversible damage the longer it remained compressed. *Id.* He stated that Petitioner's need for shoulder surgery was urgent. *Id.* Petitioner's pain continued to increase and his range of motion decrease with delay in addressing the left shoulder. (PX4, 7/31/13). With regard to his carpal and cubital tunnel syndromes, Petitioner continued to have symptoms in all fingers. *Id.*

Although Petitioner remained on restricted duty per his treating physician, Respondent called Petitioner to return to work full-duty based on its IME report, which resulted in the traumatic accident bearing number 14 WC 07978. (T.23-24; PX4, 8/28/13). After Petitioner was told to return to work full-duty by Respondent's workers compensation carrier, he went back in and proceeded to do his job. (T.23-24). While working on a bush hog that needed mowing pins knocked out, he picked up a large, heavy sledge hammer with a 4ft. handle, took a full swing of his body to lay into it, and the pain instantly increased in his left shoulder. (T.24-25). Petitioner returned to Dr. Mall following this incident and noted that there was an aggravation of Petitioner's symptoms as a result thereof. (PX4, 8/28/13). Dr. Mall also addressed some questionable aspects of Respondent's IME. *Id.* Specifically, he noted that the tool used by Dr. Sudekum to evaluate Petitioner's bilateral carpal and cubital tunnel syndrome has received questionable reviews in the medical literature regarding its use and ability to accurately assess carpal and cubital tunnel syndrome. *Id.* He pointedly stated that several national committees and academies, as well as physicians who perform EMG studies, have indicated that this tool is not a substitute for formal nerve conduction studies such as those performed by Dr. Phillips. *Id.* He also noted that Dr. Sudekum omitted all of the literature that supports the fact that carpal and cubital tunnel syndrome is seen in a much higher percentage of patients who perform jobs such as Petitioner, which involve repetitive manual labor or repetitive use of vibratory tools. *Id.* He stated that this shows represents an increased risk for the development of carpal and cubital tunnel syndrome in patients that perform job duties such as those performed by Petitioner. *Id.*

On October 3, 2013, Respondent had Petitioner's left shoulder complaints evaluated under §12 by Dr. Richard C. Lehman. (RX11). Dr. Lehman's examination revealed weakness with rotation, a positive O'Brien's test, pain with adduction, which Dr. Lehman believed to be mild, and demonstrated positive impingement signs, including pain with maximum internal rotation and positive Neer and Hawkins tests. *Id.* Dr. Lehman noted Petitioner's history of complaints with repetitive activities, and the incident of August 21, 2013. *Id.* Although Dr. Lehman believed that the treatment Petitioner received was reasonably necessary for the objective findings, he did not believe these to be related to Petitioner's repetitive job duties. *Id.* He believed Petitioner's complaints of numbness to be related to his cervical spine rather than his shoulder. *Id.* Although he gave no specific opinion with regard to Petitioner's subsequent August 21, 2013 injury, he stated his belief that Petitioner's condition was not of an acute nature but the result of degeneration. *Id.*

Petitioner underwent the recommended shoulder surgery on February 4, 2014. (PX10). On that date, Petitioner underwent open nerve to teres minor/axillary nerve decompression, arthroscopic rotator cuff repair of the subscapularis, extensive intraarticular debridement, subacromial bursectomy and acromioplasty, open biceps tenodesis, open AC joint resection/distal clavicle excision. (PX10). During surgery, Dr. Mall also discovered an upper border subscapularis tear and biceps tendon tear, which were included in his postoperative diagnoses along with nerve to teres minor compression, labral fraying, and subacromial bursitis. *Id.* These objective findings were addressed with the appropriate aforementioned procedures. *Id.*

Petitioner testified at Arbitration that his left shoulder surgery helped his condition dramatically. (T.26). However, his carpal and cubital tunnel syndromes have not been addressed and Petitioner continues to experience symptoms and would like to receive treatment to resolve his complaints. (T.29).

Respondent's examiners and Petitioner's treating physicians testified by way of deposition.

Dr. Lehman continued to believe that Petitioner's left shoulder condition was entirely attributable to degenerative changes; however, Dr. Lehman testified to the possibility of Petitioner's AC joint arthritis being traumatic in nature rather than degenerative. (RX12, p.11). He even testified that this type of pathology is often seen in traumatic injuries sustained by hockey players and NFL football players. *Id.* at 11. He further testified, "And then you can see it in people that have certain types of stresses to their shoulders. Some people are born with it, and some people get it from trauma." *Id.* at 11. When asked whether or not the August 21, 2013 sledgehammer incident aggravated or exacerbated Petitioner's condition in any way, he did not believe any material change occurred. *Id.* at 11-12. Rather, he believed that perhaps a "manifestation" of Petitioner's underlying disease process occurred. *Id.* at 12-13. He further hypothesized that this activity is "irritating his underlying degenerative process," but declined to go as far as to say that there was "truly an exacerbation" of the underlying process. *Id.* at 12-13. Despite the aforementioned statements, he stated that Petitioner's job activities in no way contributed to Petitioner's underlying condition. *Id.* at 14. He agreed that Petitioner should be restricted to no overhead work, but did not believe that these restrictions were related to his employment. *Id.* at 16-17. When asked whether or not there was an urgent need for surgery, he stated, "I don't know." *Id.* at 18.

On cross-examination, Dr. Lehman acknowledged that the presence of fluid in the biceps tendon could be indicative of tendinitis, tearing, or overload. *Id.* at 21. He also acknowledged that the diagnosis of "left shoulder bicipital tendinitis" was made by Dr. Mall. *Id.* at 22. He also acknowledged that Dr. Mall performed a biceps tendon sheath injection done using ultrasound. *Id.* at 22-23. Hence, Petitioner's MRI was not the only evidence in support of Petitioner's diagnosis. *Id.* at 23. He also acknowledged that there was no evidence of significant degenerative change in Petitioner's biceps tendon. *Id.* at 29. He also testified that this diagnosis could be

confirmed interoperatively. *Id.* at 30. Dr. Lehman also acknowledged that Petitioner obtained 80% temporary relief with the left shoulder injections performed by Dr. Mall. *Id.* at 27-28. Although he did not have the operative report or know when Petitioner underwent surgery, when informed of the specifications of the procedure and Petitioner's outcome following surgery, he agreed that Petitioner was a surgical candidate and should be able to return to his employment as a laborer following surgery. *Id.* at 31-32, 34-35.

Dr. Lehman was unaware of the tools that Petitioner used as a maintenance mechanic or the amount of time Petitioner spent using these tools, as Respondent primarily provided him with information pertaining to the job title of highway maintainer. *Id.* at 36-37. His information made no mention of the use of impact wrenches, air hammer, or other heavy construction equipment used by Petitioner. *Id.* at 37-38. Although he acknowledged that Petitioner does overhead work, he did not believe that Petitioner spent a significant amount of time performing overhead work using grip and force according the job description with which he was provided. *Id.* at 38-39. He fully acknowledged that Petitioner provided a verbal description of his job duties, but he relied upon the information provided to him by Respondent. *Id.* at 39. He testified that information provided to him was incorrect, however, and Petitioner had a traumatic injury, which he believed to be the usual cause of teres minor nerve entrapment, his opinion could change. *Id.* at 42.

Immediately thereafter, Dr. Lehman gave a contrary opinion and testified that Petitioner's injuries could have been repetitive in nature:

> Q: And it's your belief that unless there is a traumatic injury, this sort of pathology is degenerative in nature?
>
> A: Well, I don't believe that. I think it can be – I think if you have evidence of a repetitive process causing damage, then it's from the repetitive process. So certainly, there can be evidence of somebody who has got a repetitive process that creates overload or pathology. I just don't believe in this case there is anywhere, any suggestive evidence that that's the case. *Id.* at 43.

Dr. Sudekum also testified by way of deposition with regard to Petitioner's bilateral carpal and cubital tunnel syndrome. (RX10). In explaining carpal tunnel syndrome and factors considered when making a recommendation for surgery, Dr. Sudekum only testified to anatomical or non-occupational health factors. (RX10, p.8-9). However, while addressing cubital tunnel syndrome, Dr. Sudekum testified that gripping and grasping were considered less of a potential cause for cubital tunnel syndrome and more of frequently as a potential cause for carpal tunnel syndrome. *Id.* at 12-13.

Dr. Sudekum testified that nerve conduction studies were performed in his office by his nurse. *Id.* at 25. These studies were not the same type of studies performed by Dr. Phillips; rather, the test is done by a NeuroMetrix machine and administered using stick-on electrode pads. *Id.* at 25, 51. Despite not being a shoulder or cervical specialist, Dr. Sudekum believed that

Petitioner's condition was related to his shoulder and cervical spine. *Id.* at 27. He remained of the belief that Petitioner did not suffer from either carpal or cubital tunnel syndrome. *Id.* at 27-28. When asked to explain why his neurological studies produced different results than those performed by Dr. Phillips, he speculated that perhaps Petitioner's condition resolved, or it was simply the result of "individual variation" as a result of being performed and evaluated by different people. *Id.* at 29. However, he refused to acknowledge that his studies were "at odds" with the study done by Dr. Phillips. *Id.* at 56.

Dr. Sudekum was under the impression that Petitioner still rode his motorcycle; however, rather than indicating this as an absolute factor, he indicated that Petitioner's hobby of riding, hunting and fishing were potentially causative factors dependent upon how the activities were performed. *Id.* at 26-27. Dr. Sudekum also testified that Petitioner's job as a mechanic could serve as an aggravating factor for the development of carpal and cubital tunnel syndromes, with carpal tunnel syndrome being more likely to arise than cubital tunnel syndrome. *Id.* at 31-32. Dr. Sudekum did not know how much time Petitioner spent engaging in his hobbies versus working for Respondent, and he did not ask Petitioner regarding same. *Id.* at 57. However, he felt that Petitioner's problem lied in his neck and shoulder, and felt that those should be addressed first. *Id.* at 33. He testified that he would defer to Dr. Lehman with regard to Petitioner's shoulder condition. *Id.* at 34.

On cross-examination, Dr. Sudekum testified that he has made $915,248.34 performing independent evaluations for the State of Illinois over the last 3 years, beginning on November of 2010. *Id.* at 35-36. He has completed 136 IME's, 83 of which he has examined, and a total of 69 depositions. *Id.* at 38.

Dr. Mall also testified by way of deposition. (PX13). Dr. Mall testified that he specializes in complex shoulder problems and shoulder reconstructions and also treats carpal and cubital tunnel syndromes. (PX13, p.5-6). He testified that he received his upper extremity/hand training at Washington University, one of the best hand programs in the country, and trained with many of the top-rated hand surgeons in the world and past presidents of the American Academy of Orthopedic Surgery, the American Hand Society, and several other large governing boards within orthopedics. *Id.* at 5-6.

Dr. Mall testified that Petitioner was referred to him from Dr. Gornet, the orthopedic spine specialist who performed Petitioner's past cervical spine surgery. *Id.* at 7. Dr. Mall testified that Petitioner initially believed that his problem came from his cervical spine and presented to Dr. Gornet first. *Id.* at 8. Dr. Gornet ruled out Petitioner's cervical spine and referred Petitioner to his office. *Id.* at 8-9. Dr. Mall noted that Petitioner did repetitive overhead lifting of heavy objects and heavy machinery that worsened his symptoms. *Id.* at 9. Dr. Mall also noted that the fact that Petitioner's symptoms were only aggravated with work activities, and not any outside activities, showed that the symptoms experienced by Petitioner were aggravated by his work duties. *Id.* at 9. He testified that even if Petitioner's condition was degenerative, his work

activities aggravated Petitioner's preexisting condition. *Id.* at 9-10, 54-55. Dr. Mall explained that Petitioner's initial shoulder examination was limited by pain. *Id.* at 10-11. However, when the cortisone injection significantly improved Petitioner's level of pain, Dr. Mall was able to perform a better clinical examination and localize the source of Petitioner's symptoms. *Id.* at 10-11. If Petitioner had not significantly improved with the injection, then Petitioner's symptoms would have related more to a cervical spine pathological process. *Id.* at 13-14. Dr. Mall examined Petitioner for carpal and cubital tunnel syndrome because Petitioner presented with classic signs and symptoms for same, and Petitioner had Petitioner had not been examined for these conditions before. *Id.* at 12-13.

Dr. Mall testified that the medical literature shows that patients who perform manual labor-type jobs that involve repetitive lifting and other repetitive motions are at a higher risk of developing carpal and cubital tunnel syndrome. *Id.* at 15. He testified that he had no doubt that this was the case with Petitioner. *Id.* at 15. He also testified that working overhead as a mechanic, doing overhead activities, and performing repetitive heavy work can cause significant injuries to the shoulder. *Id.* at 16. He stated:

> If you were to take an MRI of my shoulder when I'm 47 – or other 47-year-olds that don't do repetitive manual labor – they wouldn't have near the pathology that we found on Mr. Parker's MRI. It's just we don't see it. It's more of a problem of repetitive use and especially with repetitive overhead lifting with heavy objects. *Id.* at 16.

With regard to the nerve conduction studies performed by Dr. Phillips, Dr. Mall testified that Dr. Phillips does an excellent job with EMG/nerve conduction studies and trusts him to perform studies that he would not trust others to do. *Id.* at 17-18. The studies performed by Dr. Phillips demonstrated both carpal and cubital tunnel syndrome, which confirmed his clinical diagnosis. *Id.* at 18. Dr. Mall explained that the NeuroMetrix machine used by Dr. Sudekum was compared to the standard EMG and nerve conduction study, and was demonstrated to be inferior. *Id.* at 32-33. The machine was more effective as a screening tool rather than a diagnostic tool, and in no way served as a substitute for the "gold standard" or traditional EMG nerve conduction study. *Id.* at 33. Dr. Mall also did not believe Petitioner to be "obese" so as to consider him at risk for carpal or cubital tunnel syndrome, nor did he believe him to be old enough for his age to be a factor. *Id.* at 63-64.

Dr. Mall's clinical diagnoses for Petitioner's shoulder were confirmed by MRI. *Id.* at 20-21. Dr. Mall explained that rotator cuff tendinitis progresses to partial-thickness tearing, and then to full-thickness tearing. *Id.* at 20-21. The fluid around Petitioner's biceps also clearly demonstrated evidence of biceps tendinitis. *Id.* at 21. Based on the fatty atrophy of the teres minor, Dr. Mall diagnosed compression of the nerve at that location. *Id.* at 21-22. In order to determine how much of Petitioner's pain was coming from his biceps tendon, he performed an ultrasound guided injection at this location which gave Petitioner 100% relief of his symptoms when aggregated with the relief obtained from his prior injection. *Id.* at 22-23. This confirmed

that Petitioner's problem was not related to his cervical spine. *Id.* at 23, 39. With regard to performing EMG studies on Petitioner's teres minor nerve, Dr. Mall testified that was impractical due to it being covered by several muscles, and further pointed out that it was unnecessary because the compression was caused by a band of tissue at a well-defined nerve compression site that was well-visualized on MRI. *Id.* at 40-41.

When Petitioner's symptoms returned with the subsidence of medication, Dr. Mall recommended surgery. *Id.* at 25. Petitioner's carpal and cubital tunnel symptoms failed to improve with conservative treatment. *Id.* at 26. Therefore, Dr. Mall also recommended carpal and cubital tunnel releases. *Id.* at 26. Respondent never approved these procedures for Petitioner; however, Dr. Mall continued to see Petitioner and his recommendations remained unchanged. *Id.* at 27-29, 35-36.

With regard to Petitioner's additional injury on August 21, 2013, Dr. Mall testified that although this further aggravated Petitioner's symptoms, this injury in no way changed his recommendation with regard to future treatment. *Id.* at 29-30.

CONCLUSION

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

This case involves both repetitive and traumatic, accidents/injuries.

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961. "The word 'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens…Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254. Accidental injury need only be ***a*** causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003) (emphasis added). Even when other non-occupational factors are present, a "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The same theory applies to cases in which the employee's preexisting condition is aggravated by the repetitive nature of the employment. *Cassens Transport Co., Inc. v. Indus. Comm'n*, 262 Ill.App.3d 324, 633 N.E.2d 1344, 199 Ill.Dec. 353 (Ill.App. 2d, 1994). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982).

For this reason, the Court has refused to adopt any standard threshold which a claimant must meet in order for his or her job to classify as repetitive enough to establish causal connection. *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App. 2nd Dist. 2005). The Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. The Court has also repeatedly found that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury. *Darling v. Indus. Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1st Dist., 1988); *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (1st Dist. 2000); *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773 (2d Dist., 2005). In a recent unpublished decision, the Appellate Court cited *Darling* and even stated that "in no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case" (DeKalb); *See e.g. Dorhesca Randell v. St. Alexius Medical Ctr.*, 13 I.W.C.C. 0135 (2013) (citing the Appellate Court in *Edward Hines* and holding that there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made). *See also* the Appellate Court's finding in *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009) (holding that a claimants work duties can be "varied" yet "repetitive and intensive;" repetitive is *not* defined as performing the exact same task over and over).

In *Fierke*, the Appellate Court found that a demand for quantitative proof was improper, reiterating that a claimant must only prove that some act or phase of employment was *a* causative factor. *Fierke*, N.E.2d at 850 citing *Darling*, N.E.2d at 1141-42. In *Darling*, the Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Darling,* N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. Intensive labor as a mechanic with repetitive overhead work does not entail common movements made by the general public. Rather, the risks associated with this type of labor are distinctly related to Petitioner's employment.

Petitioner testified that as a mechanic he spends 6-7 hours using pneumatic, vibratory tools such as air/impact wrenches, air cutters, air chisels, torches and welders to repair State vehicles and equipment such as tractors, mowers, salt trucks and plow trucks. (T.13-15; PX11). Petitioner works on all parts of the vehicle, including the tires, brakes, drive shafts, and mower cutting assemblies. (T.14-15). Petitioner also occasionally drives a ton-and-a-half service truck to sites to perform repairs, holding on to a steering wheel that vibrates. (T.17). Even Respondent's "Demands of the Job" form, which Petitioner testified does not fully depict his job duties, Petitioner uses his hands for gross manipulation (grasping, twisting, handling) for 4-6 hours per day, uses his hands for 6-8 hours per day to lift up to 10lb., 4-6 hours per day to lift up to 20lb., 2-4 hours per day to lift up to 30lb., spends 6-8 hours per day working on or with a moving machine, and spends between 2-4 hours per day working or reaching above shoulder level. (PX12). Thus, the evidence generated by both Petitioner and Respondent show that Petitioner has a hand-and-arm intensive, repetitive job. The Arbitrator believes this to be sufficient activity to cause repetitive injury.

With regard to causation, the Arbitrator relies on the opinion of Dr. Mall and Dr. Gornet. Although Dr. Lehman stated that Petitioner's shoulder problems were related to his cervical spine, Dr. Gornet and Dr. Mall ruled out Petitioner's cervical spine as the cause of Petitioner's symptoms. The Arbitrator notes that Dr. Gornet is the surgeon who performed Petitioner's past cervical procedure and is in a better position to make such a determination. The injection performed by Dr. Mall which relieved Petitioner's symptoms only affected the shoulder and not Petitioner's neck. Therefore, the Arbitrator does not find Dr. Lehman's opinion persuasive. Additionally, Dr. Lehman ultimately conceded that Petitioner's pathology could be of either repetitive or traumatic origin rather than merely the result of degeneration as he initially opined. Dr. Lehman reached his conclusion in reliance upon the information provided to him by Respondent; however, Petitioner testified that Respondent's information was incomplete, and Petitioner's testimony was confirmed by Respondent's witness, Chad Ashmore. When questioning demonstrated that he lacked significant detail regarding Petitioner's job duties, Dr. Lehman agreed that his opinion could change with new information. Additionally, Dr. Lehman agreed that Petitioner's condition required restrictions on overhead work; these clearly would not be necessary unless Petitioner's employment aggravated his condition. (RX12, p. 16-17). Given the very nature of Petitioner's work, including the intensity, use of vibratory tools, and the significant amount of overhead/shoulder work, the Arbitrator agrees with Dr. Mall's assessment that any preexisting pathology in Petitioner's shoulder would have clearly been aggravated by Petitioner's job duties. This point is further proven by the August 21, 2013 sledgehammer incident that provoked sharp pain in Petitioner's shoulder. However, this did not constitute an intervening accident by virtue of the opinion of both Dr. Mall and Dr. Lehman. Neither of these shoulder physicians believed that Petitioner's material condition changed following this incident, and Petitioner's symptoms and recommendations for treatment remained the same. An intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition; as the Court in *Lasley Const. Co.*, aptly put it, "The fact that

other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant." *Id.*; *See also Teska v. Indus. Comm'n,* 610 N.E.2d 1 (1994)

With regard to Petitioner's carpal and cubital tunnel syndromes, these were readily identified by Dr. Mall and confirmed by quality objective electrodiagnostic studies performed by Dr. Phillips. Dr. Sudekum, although being limited to the information provided by Respondent and only gathering limited information from Petitioner, testified that Petitioner's job duties as a mechanic could serve as an aggravating factor for the development of carpal and cubital tunnel syndromes. (RX10, p.31-32). However, he did not feel that Petitioner suffered from these conditions allegedly based on his own examinations and the use of a questionable/controversial screening tool, proven to be inferior to traditional needle EMG/NCS studies. The Arbitrator notes, however, that negative electrodiagnostic studies are not themselves dispositive of whether or not a patient suffers from carpal and/or cubital tunnel syndrome. *See Colleen Gilger v. LCN Closures, Inc.*, 12 I.W.C.C. 0267 (2012); *Polk v. United Airlines*, 03 I.I.C. 0141 (2003); *Abbot v. United Airlines*, 01 I.I.C. 0156 (2001). Following the confirmatory studies of Dr. Phillips, Dr. Mall's follow-up examinations consistently demonstrated evidence consistent with bilateral carpal and cubital tunnel syndromes. Therefore, the Arbitrator finds that evidence supports that Petitioner suffers from bilateral carpal and cubital tunnel syndromes. The Arbitrator likewise finds that Petitioner's bilateral compression neuropathies are related to Petitioner's employment based upon the credible opinion of Dr. Mall. The Commission has also previously found job duties similar to those performed by Petitioner involving the use of pneumatic/air tools to cause and/or contribute to compression neuropathy. *Ernest Everett v. Remare Corp. D/B/A MGM Transportation/National Intermodal Services*, 10 I.W.C.C 0041 (2010).

Based upon the foregoing the Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained accidental repetitive injuries to his shoulder, bilateral hands and bilateral elbows, causally related to his repetitive employment with Respondent.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

Illinois courts have determined that manifestation date for purposes of a repetitive trauma claim can be set as: **(a)** the date the employee actually became aware of the physical condition and its relation to work through medical consultation; **(b)** the date the employee requires medical treatment; **(c)** the date on which the employee can no longer perform work activities; or **(d)** when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3d Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

The Supreme Court in *Durand* noted that it is common practice to set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand* citing *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 487 N.E.2d 356 (1985). The Supreme Court also endorsed the Appellate Court's finding in *Three "D" Discount Store v. Industrial Commission* 556 N.E.2d 261 (1989), wherein the Court found the manifestation date to be the date he was advised by a physician that his condition was related to work, despite having been previously diagnosed and treated for the condition. This provision is equitable, for as the Supreme Court noted, a claimant filing a claim based upon symptoms with a "sketchy and equivocal" understanding of said symptoms would have had difficulty proving the injury. *Durand,* 862 N.E.2d at 930. Although it is commonly argued that claimants are aware of their symptoms and condition long before the employer is notified, the standard from *Durand* that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms until they require treatment. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930.

The Arbitrator finds this guidance particularly instructive in Petitioner's case. Petitioner thought his symptoms came from his cervical spine and a previous work injury. Thus, he was clearly aware of the "fact of injury." However, Petitioner's "discovery" did not occur until he met with Dr. Mall, and was diagnosed with bilateral carpal and cubital tunnel syndromes. Petitioner's understanding of the cause of his problem was indeed "sketchy and equivocal" until that date. The date on which the employee becomes aware of the physical condition and its relation to work through medical consultation is an appropriate manifestation date under the Act. *Durand v. Industrial Commission*, 862 N.E.2d 918 (2007); *Three "D" Discount Store v. Industrial Commission* 556 N.E.2d 261 (1989). Therefore, the Arbitrator finds that Petitioner's injuries manifested on May 9, 2013.

Petitioner promptly notified Respondent of his injury on May 13, 2013, well within the 45-day notice period allotted by the Act. (RX1). Petitioner therefore met his burden of proof regarding manifestation and notice.

Issue (J): **Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?**

Issue (K): **Is Petitioner entitled to any prospective medical care?**

An employee is entitled to medical care that is reasonably required to relieve the injured employee from the effects of the injury. 820 ILCS 305/8(a) (2011). This includes treatment that is obtained to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

As a result of his repetitive job duties, Petitioner developed significant shoulder injuries and bilateral carpal and cubital tunnel syndromes. Dr. Lehman agreed that the treatment rendered

for Petitioner's shoulder, and the restrictions, were reasonable for Petitioner's condition. Dr. Mall unequivocally testified that all of Petitioner's care and treatment was reasonable and required to evaluate and alleviate the effects of Petitioner's injuries. Based upon the foregoing, the Arbitrator awards the following medical expenses outlined in Petitioner's group exhibit. Respondent shall have credit for any amounts previously paid.

Although Petitioner has received the appropriate treatment for his shoulder, Petitioner has not yet been placed at maximum medical improvement regarding same and has not received the recommended treatment for his hands and arms. Therefore, the Arbitrator hereby orders Respondent to authorize and pay for the remainder of the treatment recommended by Dr. Mall.

Issue (L): What temporary benefits are in dispute? (TTD)

Petitioner was unable to work from June 14, 2013 through July 31, 2013 (6 5/7 weeks). After Respondent called him back to work on an IME report, Petitioner was reinjured and had great difficulty performing his job duties. Respondent ultimately sent Petitioner home on December 19, 2013 and instructed him not to return until his shoulder injury was resolved (T.27). Petitioner returned to work on March 18, 2014 (12 5/7 weeks). Based upon the foregoing, the Arbitrator awards temporary total disability benefits for the claimed periods totaling 19 3/7 weeks. Respondent shall have credit for any amounts previously paid.

This award in no instance shall be a bar to a further hearing for determination of a further amount of temporary total compensation, medical benefits and/or compensation for permanent disability, if any.

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Parker,

Petitioner,

vs.

NO: 13WC 21796

Illinois Department of Transportation,

Respondent,

15IWCC0303

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, incurred medical expenses, prospective medical expenses, causal connection, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 19, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

15IWCC0303

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: APR 2 9 2015
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CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

DISSENT

I respectfully dissent from the Decision of the majority. The Arbitrator found Petitioner sustained repetitive traumatic injuries resulting in bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and a left shoulder partial rotator cuff tear. I would have found that Petitioner did not sustain his burden of proving accidents or causal connection to current conditions of ill being, reversed the Decision of the Arbitrator, and denied compensation.

Petitioner testified his job involved the use of tools including some vibratory tools. The description of Petitioner's job prepared by Respondent indicates that he performed a myriad of duties for Respondent. Besides the use of tools, he also plowed snow, mowed grass, directed traffic, maintained the roadway, cleaned drains, dug posts, planted trees, removed trash, performed general housekeeping chores at headquarters, and maintained job records, as well as other assigned duties. Petitioner did not testify as to the exact number of hours a day he performed each task or used vibratory tools. The Arbitrator discounted the job description provided by Respondent simply because it was at odds with Petitioner's testimony concerning his job activities.

Petitioner's orthopedic surgeon, Dr. Mall opined that both his shoulder condition and bilateral carpal tunnel and cubital tunnel syndromes were caused by his repetitive activity. However, he also testified he did not know how many hours Petitioner engaged in various allegedly intense and repetitive work-related activities. On the other hand, Respondent's Section 12 medical examiners, Dr. Sudekum and Dr. Lehman appeared to have a better understanding of Petitioner's precise job duties.

Dr. Sudekum testified that he found no objective evidence of either bilateral carpal tunnel or cubital tunnel syndrome. In addition, the fact that he had peripheral neuropathies throughout his upper extremities suggested that if Petitioner did suffer from these conditions, they would likely be of a physiological rather than traumatic nature. Dr. Lehman found that Petitioner's shoulder condition was degenerative in nature and he found no evidence whatsoever of any traumatic aggravation of his underlying degenerative condition. In short I found the opinion testimony of Dr. Lehman and Sudekum more persuasive than Dr. Mall. It is also noteworthy that Petitioner's history included numerous risk factors for developing neuropathies. He was obese, smoked, had hypertension, hunted with a bow and shotgun, and rode a motorcycle.

In looking at the entire record before the Commission, I would have found that Petitioner did not sustain his burden of proving compensable accidents caused any current condition of ill being and denied compensation. For these reasons, I respectfully dissent.

Ruth W. White

RWW/dw
46

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

PARKER, CHRISTOPHER
Employee/Petitioner

Case# **13WC021796**

14WC007978

ILLINOIS DEPT OF TRANSPRTATION
Employer/Respondent

15IWCC0303

On 8/19/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

AUG 19 2014

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

15IWCC0303

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Christopher Parker
Employee/Petitioner

v.

Illinois Dept. of Transportation
Employer/Respondent

Case # 13 WC 21796

Consolidated cases: 14 WC 07978

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Belleville**, on **June 19, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **5/9/13 and 8/21/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$71,364.00**; the average weekly wage was **$1,372.38**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$6,276.96** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$6,276.96**.

~~Respondent is entitled to a credit of $ under Section 8(j) of the Act.~~

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $914.92/week for 19 3/7 weeks, for Petitioner's period of disability from 6/14/13 through 7/31/13 and 12/19/13 through 3/18/14, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary medical expenses outlined in Petitioner's group exhibit, and shall authorize and pay for any further necessary medical treatment recommended by Dr. Mall, as provided in §8(a) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/13/14
Date

AUG 19 2014

ICArbDec19(b)

FACTS

Petitioner filed two separate applications for adjustment of claim for repetitive injuries to the left shoulder and bilateral wrists and elbows which manifested on May 9, 2013, and traumatic injury to his left shoulder sustained on August 21, 2013. (AX1; AX2). These matters were consolidated before the Arbitrator for hearing.

Petitioner is a 47-year-old serviceman mechanic for Respondent. (T.10, 12-13). Petitioner testified that despite him being classified by payroll as a "highway maintainer," his permanent assignment was that of a service/maintenance mechanic and he served in that capacity for 75% of his 13-year career. (T.12-13).

As a mechanic, Petitioner uses pneumatic, vibratory tools such as air/impact wrenches, air cutters and air chisels. (T.13). Petitioner uses these tools to repair State vehicles and equipment such as tractors, mowers, salt trucks and plow trucks. (T.14-15). Petitioner works on all parts of the vehicle, including the tires, brakes, drive shafts, and mower cutting assemblies. (T.14-15). Petitioner testified that he spends his day performing these duties. (T.17). Petitioner also occasionally drives a ton-and-a-half service truck to sites to perform repairs, holding on to a steering wheel that vibrates. (T.17). Petitioner drives approximately 20 miles on days that he must travel. (T.37). Petitioner submitted a detailed job description as Petitioner's exhibit 11, detailing the other job duties which he performed for the 6.5-7 hours of his work day:

> All these task [sic] that are listed are performed on heavy, medium and light duty trucks, tractors, rotary movers, and heavy to light construction equipment.
>
> Services and repairs such as oil changes, all filter replacement, whing [sic] chassis, brake repair and replacement, hydralic [sic] hose making and replacement, tire changing, track repair or replacement on trackhoes and dozers, electrical and wiring repair, metal fabrication or repair, changing gearboxes, driveshafts, and complete mower cutting assemblies, etc.
>
> The list goes on. I perform these tasks on a 6 ½ to 7hr daily basis five days a week using hand tools, pneumatic tools, torches, welders and others. This requires strength, good hand dexterity and knowledge. These tasks can be very light or all the way up to crain [sic] assisted lifting. (PX11).

Respondent's workers' compensation documentation log subpoenaed by Petitioner includes a "Demands of the Job" form purportedly estimating Petitioner's hand and arm usage. (PX12). In light of the testimony given and evidence presented at Arbitration, it is apparent that this estimate pertains to a different job title than the one performed by Petitioner. The Arbitrator notes, however, that even according the inaccurate form in Respondent's log indicates that a Highway Maintainer uses the hands for gross manipulation (grasping, twisting, handling) for 4-6 hours per day. (PX12). It also indicates that Petitioner uses his hands for 6-8 hours per day to lift up to 10lb., 4-6 hours per day to lift up to 20lb., 2-4 hours per day to lift up to 30lb., spends 6-8

hours per day working on or with a moving machine, and spends between 2-4 hours per day working or reaching above shoulder level. *Id.*

Petitioner testified on direct examination and indicated on the form itself that this form's assessment still does not fully encompass the hand-and-arm activity required by his job duties. (T.15-17; PX12). Petitioner also indicated that his actual assignment is that of a "5 man" or maintenance mechanic, rather than a highway maintainer as indicated on the Demands of the Job form. (PX11). Petitioner testified that from the time he begins work day, he is "wrenching, feeding, doing something in a mechanical line all day long." (T.17). Respondent's witness, Mr. Chad Ashmore, was present on behalf of Respondent but called by Petitioner. (T.43). He testified that he has worked with Petitioner since his start with IDOT in 2004. (T.45-46). He stated that jackhammering was minimal, but did not disagree with any details regarding Petitioner's description of his job duties or any of his sworn testimony. (T.46).

During the course of his job duties, Petitioner began developing symptoms of numbness and cramping in his hand and numbness throughout the claimed affected areas. (T.18). Initially, these symptoms were intermittent and dependent upon the position of his hands and the activity engaged in. (T.18). Later, however, Petitioner's symptoms persisted despite being off work. (T.25). Petitioner does not suffer from gout, hypothyroidism, rheumatoid arthritis, or fluctuations in his weight. (T.18-19). Petitioner further testified that he has no hobbies that involve the repetitive use of his hands or shoulders. (T.19). Petitioner formerly owned a motorcycle, but sold same in 2008 or 2009, years before his injuries manifested or required treatment. (T.19, 20). Nevertheless, Petitioner's symptoms progressed, and he ultimately returned to Dr. Gornet, the physician who previously treated Petitioner for an unrelated neck problem, on May 9, 2013. (T.20-21). Dr. Gornet noted that Petitioner was doing well with respect to his neck, but began developing *increasing* left shoulder and arm pain. (PX3). Dr. Gornet referred Petitioner to Dr. Mall, who Petitioner saw on the same day. (T.21; PX3).

When Dr. Mall saw Petitioner on the same day of May 9, 2013, Dr. Mall noted that Petitioner was doing well for two years, until he began experiencing left shoulder pain a month ago that progressively worsened with work activities. (PX4, 5/9/13). Petitioner also reported bilateral hand numbness that awoke him at night and numbness upon resting his elbow or prolonged bending of the arm or wrist. *Id.* Dr. Mall noted Petitioner's overhead work activities and work with machinery worsened Petitioner's symptoms. *Id.* Petitioner initially thought his pain was coming from his neck and a pulled muscle in his shoulder, informed his supervisor, and decided to wait until his follow-up with Dr. Gornet to seek treatment. (T.30-31; PX4, 5/9/13). However, Dr. Gornet believed Petitioner's problem to be related to his shoulder and not his neck and trapezius. *Id.*

Dr. Mall's physical examination demonstrated left shoulder pain with forward elevation and external and internal rotation, and significantly decreased range of motion. *Id.* Petitioner's neck showed no provocative findings on physical examination, but Petitioner did have pain with

palpation of the trapezius muscles bilaterally. *Id.* Examination of Petitioner's bilateral arms and wrists revealed positive flexion/compression tests bilaterally, positive Tinel's over the right elbow and right wrist, and positive Tinel's over the left wrist. Dr. Mall's assessment was left shoulder rotator cuff tendinitis, left shoulder biceps tendinitis, bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. *Id.* He recommended an EMG/nerve conduction study to evaluate Petitioner's carpal and cubital tunnel symptoms. *Id.* With regard to causation, Dr. Mall noted the following:

> We did have a discussion about the fact that patient's [sic] who do repetitive overhead activities or repetitive heavy work, such as he does for the Illinois Department of Transportation as a mechanic, are actually more likely to suffer from carpal or cubital tunnel symptoms than are people that simply do typing type activities. The fact that he has much more work turned to these activities at work rather than at home indicates that this is likely a work related problem . . . In terms of the left shoulder, I do think that he has multiple pathologies going on here, the first of which is rotator cuff tendinitis/impingement. The second would be biceps tendinitis as well as AC joint arthritis. These have been aggravated by his repetitive overhead activities and his shoulder is quite inflamed at this point. *Id.*

Dr. Mall recommended conservative management of Petitioner's shoulder through injection, physical therapy and anti-inflammatory medication. *Id.* He recommended bracing of the elbows and/or wrists for Petitioner's carpal/cubital tunnel complaints. *Id.* The injection was given the same day and Petitioner reported immediate improvement in pain, although orthopedic tests such as O'Brien's and AC joint testing remained positive. *Id.*

Petitioner testified at Arbitration that the May 9, 2013 visit with Dr. Mall was the first time he received a diagnosis for his condition, and the first time he underwent any electrodiagnostic testing for his bilateral hands and arms. (T.28-29). Although Petitioner believed his symptoms to be related to his employment prior to this visit with Dr. Mall, the record clearly shows that Petitioner mistakenly attributed his condition to his former neck injury, as noted by Dr. Mall in his record, for which he previously filed a claim (10 WC 34619); he thus presented to his spine specialist Dr. Gornet first. (T.32-33; PX4, 5/9/13). This is buttressed by the questionnaire upon which Petitioner indicated that he presented with a "comp case" that "started at work" for which he previously received chiropractic care, massage therapy and other conservative care, treatment rendered in his former neck claim, when he had no prior treatment for his currently claimed symptoms. Upon learning differently from Dr. Mall and Dr. Gornet, he immediately notified his employer on May 13, 2013. (PX12).

Petitioner underwent EMG/nerve conduction studies of his upper extremities and a left shoulder MRI on May 17, 2013. (PX7; PX8). Petitioner's MRI confirmed Dr. Mall's former impressions and demonstrated conclusive evidence of partial tearing of the rotator cuff and suggestive evidence of a labral tear needing confirmation. (PX7). Petitioner's neurological

studies demonstrated evidence of bilateral cubital tunnel syndrome and bilateral carpal tunnel syndrome. (PX8). Petitioner returned to Dr. Mall on the same day and Dr. Mall reviewed the results. (PX4, 5/17/13). Petitioner continued to experience significant left shoulder pain, and Petitioner's bilateral elbow and wrist examination remained unchanged. *Id.* Dr. Mall's assessment now included left shoulder partial-thickness rotator cuff tear and fatty infiltration and atrophy of the left shoulder nerve to the teres minor in addition to Petitioner's left shoulder biceps tendonitis, bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. *Id.* Dr. Mall recommended further conservative care for Petitioner's compressive neuropathy complaints, and administered another left shoulder injection. *Id.* Dr. Mall also noted in a letter directed to Dr. Gornet that Petitioner's MRI also showed muscle atrophy and fatty infiltration of the teres minor, which can be caused by a condition in which the axillary nerve to the teres minor is compressed and produces these findings, pain and weakness. *Id.* Dr. Mall specifically tested Petitioner's teres minor and found greater weakness on Petitioner's left side compared with his right. *Id.* Petitioner was placed on restricted duty with no repetitive use of his upper left extremity, no use of vibratory pneumatic tools, no lifting over 10lb. overhead, and no lifting over 20lb. from floor to waist. *Id.*

Petitioner failed to improve with conservative care. (PX4, 6/7/13). Dr. Mall recommended left shoulder surgery to address Petitioner's partial thickness rotator cuff tear, biceps tendon sheath and tares minor nerve prior to intervention to address Petitioner's bilateral carpal and cubital tunnel syndrome. *Id.* Dr. Mall reiterated his belief that Petitioner's left shoulder and bilateral hand and wrist conditions were causally related to Petitioner's employment. *Id.* Petitioner remained on restricted duty. *Id.*

On June 27, 2013, Respondent had Petitioner examined under §12 by Dr. Anthony Sudekum. (RX9). Dr. Sudekum noted that occupational activities that involve sustained heavy gripping, grasping, hammering, use of vibratory tools, and/or sustained hyperflexion and hyperextension of wrist or elbow could potentially contribute to the development and/or aggravation of carpal/cubital tunnel syndrome, but felt that most individuals who performed these activities did not develop compression or peripheral neuropathies such as carpal and cubital tunnel syndrome. *Id.* Dr. Sudekum performed his own physical examination and electrodiagnostic testing, the results of which were markedly different from electrodiagnostic findings of Dr. Phillips and Dr. Mall's and Dr. Phillips' physical examination, and concluded his report by stating that he did not believe that Petitioner suffered from either carpal or cubital tunnel syndrome. *Id.* He thus did not feel that surgery or work restrictions were necessary. *Id.* With regard to Petitioner's shoulder, Dr. Sudekum, although a hand specialist, felt that Petitioner could potentially benefit from shoulder surgery rather than carpal/cubital tunnel surgery, but should be evaluated by another shoulder specialist for a second opinion regarding left shoulder pathology or need for left shoulder surgery. *Id.*

Dr. Mall noted that Petitioner's physician examination showed signs of carpal and cubital tunnel syndrome, and also noted that Dr. Phillips' EMG and nerve conduction study was of

impeccable quality. (PX4, 7/3/13). He further expressed concern that the nerve in Petitioner's shoulder was sustaining irreversible damage the longer it remained compressed. *Id.* He stated that Petitioner's need for shoulder surgery was urgent. *Id.* Petitioner's pain continued to increase and his range of motion decrease with delay in addressing the left shoulder. (PX4, 7/31/13). With regard to his carpal and cubital tunnel syndromes, Petitioner continued to have symptoms in all fingers. *Id.*

Although Petitioner remained on restricted duty per his treating physician, Respondent called Petitioner to return to work full-duty based on its IME report, which resulted in the traumatic accident bearing number 14 WC 07978. (T.23-24; PX4, 8/28/13). After Petitioner was told to return to work full-duty by Respondent's workers compensation carrier, he went back in and proceeded to do his job. (T.23-24). While working on a bush hog that needed mowing pins knocked out, he picked up a large, heavy sledge hammer with a 4ft. handle, took a full swing of his body to lay into it, and the pain instantly increased in his left shoulder. (T.24-25). Petitioner returned to Dr. Mall following this incident and noted that there was an aggravation of Petitioner's symptoms as a result thereof. (PX4, 8/28/13). Dr. Mall also addressed some questionable aspects of Respondent's IME. *Id.* Specifically, he noted that the tool used by Dr. Sudekum to evaluate Petitioner's bilateral carpal and cubital tunnel syndrome has received questionable reviews in the medical literature regarding its use and ability to accurately assess carpal and cubital tunnel syndrome. *Id.* He pointedly stated that several national committees and academies, as well as physicians who perform EMG studies, have indicated that this tool is not a substitute for formal nerve conduction studies such as those performed by Dr. Phillips. *Id.* He also noted that Dr. Sudekum omitted all of the literature that supports the fact that carpal and cubital tunnel syndrome is seen in a much higher percentage of patients who perform jobs such as Petitioner, which involve repetitive manual labor or repetitive use of vibratory tools. *Id.* He stated that this shows represents an increased risk for the development of carpal and cubital tunnel syndrome in patients that perform job duties such as those performed by Petitioner. *Id.*

On October 3, 2013, Respondent had Petitioner's left shoulder complaints evaluated under §12 by Dr. Richard C. Lehman. (RX11). Dr. Lehman's examination revealed weakness with rotation, a positive O'Brien's test, pain with adduction, which Dr. Lehman believed to be mild, and demonstrated positive impingement signs, including pain with maximum internal rotation and positive Neer and Hawkins tests. *Id.* Dr. Lehman noted Petitioner's history of complaints with repetitive activities, and the incident of August 21, 2013. *Id.* Although Dr. Lehman believed that the treatment Petitioner received was reasonably necessary for the objective findings, he did not believe these to be related to Petitioner's repetitive job duties. *Id.* He believed Petitioner's complaints of numbness to be related to his cervical spine rather than his shoulder. *Id.* Although he gave no specific opinion with regard to Petitioner's subsequent August 21, 2013 injury, he stated his belief that Petitioner's condition was not of an acute nature but the result of degeneration. *Id.*

Petitioner underwent the recommended shoulder surgery on February 4, 2014. (PX10). On that date, Petitioner underwent open nerve to teres minor/axillary nerve decompression, arthroscopic rotator cuff repair of the subscapularis, extensive intraarticular debridement, subacromial bursectomy and acromioplasty, open biceps tenodesis, open AC joint resection/distal clavicle excision. (PX10). During surgery, Dr. Mall also discovered an upper border subscapularis tear and biceps tendon tear, which were included in his postoperative diagnoses along with nerve to teres minor compression, labral fraying, and subacromial bursitis. *Id.* These objective findings were addressed with the appropriate aforementioned procedures. *Id.*

Petitioner testified at Arbitration that his left shoulder surgery helped his condition dramatically. (T.26). However, his carpal and cubital tunnel syndromes have not been addressed and Petitioner continues to experience symptoms and would like to receive treatment to resolve his complaints. (T.29).

Respondent's examiners and Petitioner's treating physicians testified by way of deposition.

Dr. Lehman continued to believe that Petitioner's left shoulder condition was entirely attributable to degenerative changes; however, Dr. Lehman testified to the possibility of Petitioner's AC joint arthritis being traumatic in nature rather than degenerative. (RX12, p.11). He even testified that this type of pathology is often seen in traumatic injuries sustained by hockey players and NFL football players. *Id.* at 11. He further testified, "And then you can see it in people that have certain types of stresses to their shoulders. Some people are born with it, and some people get it from trauma." *Id.* at 11. When asked whether or not the August 21, 2013 sledgehammer incident aggravated or exacerbated Petitioner's condition in any way, he did not believe any material change occurred. *Id.* at 11-12. Rather, he believed that perhaps a "manifestation" of Petitioner's underlying disease process occurred. *Id.* at 12-13. He further hypothesized that this activity is "irritating his underlying degenerative process," but declined to go as far as to say that there was "truly an exacerbation" of the underlying process. *Id.* at 12-13. Despite the aforementioned statements, he stated that Petitioner's job activities in no way contributed to Petitioner's underlying condition. *Id.* at 14. He agreed that Petitioner should be restricted to no overhead work, but did not believe that these restrictions were related to his employment. *Id.* at 16-17. When asked whether or not there was an urgent need for surgery, he stated, "I don't know." *Id.* at 18.

On cross-examination, Dr. Lehman acknowledged that the presence of fluid in the biceps tendon could be indicative of tendinitis, tearing, or overload. *Id.* at 21. He also acknowledged that the diagnosis of "left shoulder bicipital tendinitis" was made by Dr. Mall. *Id.* at 22. He also acknowledged that Dr. Mall performed a biceps tendon sheath injection done using ultrasound. *Id.* at 22-23. Hence, Petitioner's MRI was not the only evidence in support of Petitioner's diagnosis. *Id.* at 23. He also acknowledged that there was no evidence of significant degenerative change in Petitioner's biceps tendon. *Id.* at 29. He also testified that this diagnosis could be

confirmed interoperatively. *Id.* at 30. Dr. Lehman also acknowledged that Petitioner obtained 80% temporary relief with the left shoulder injections performed by Dr. Mall. *Id.* at 27-28. Although he did not have the operative report or know when Petitioner underwent surgery, when informed of the specifications of the procedure and Petitioner's outcome following surgery, he agreed that Petitioner was a surgical candidate and should be able to return to his employment as a laborer following surgery. *Id.* at 31-32, 34-35.

Dr. Lehman was unaware of the tools that Petitioner used as a maintenance mechanic or the amount of time Petitioner spent using these tools, as Respondent primarily provided him with information pertaining to the job title of highway maintainer. *Id.* at 36-37. His information made no mention of the use of impact wrenches, air hammer, or other heavy construction equipment used by Petitioner. *Id.* at 37-38. Although he acknowledged that Petitioner does overhead work, he did not believe that Petitioner spent a significant amount of time performing overhead work using grip and force according the job description with which he was provided. *Id.* at 38-39. He fully acknowledged that Petitioner provided a verbal description of his job duties, but he relied upon the information provided to him by Respondent. *Id.* at 39. He testified that information provided to him was incorrect, however, and Petitioner had a traumatic injury, which he believed to be the usual cause of teres minor nerve entrapment, his opinion could change. *Id.* at 42.

Immediately thereafter, Dr. Lehman gave a contrary opinion and testified that Petitioner's injuries could have been repetitive in nature:

> Q: And it's your belief that unless there is a traumatic injury, this sort of pathology is degenerative in nature?
>
> A: Well, I don't believe that. I think it can be – I think if you have evidence of a repetitive process causing damage, then it's from the repetitive process. So certainly, there can be evidence of somebody who has got a repetitive process that creates overload or pathology. I just don't believe in this case there is anywhere, any suggestive evidence that that's the case. *Id.* at 43.

Dr. Sudekum also testified by way of deposition with regard to Petitioner's bilateral carpal and cubital tunnel syndrome. (RX10). In explaining carpal tunnel syndrome and factors considered when making a recommendation for surgery, Dr. Sudekum only testified to anatomical or non-occupational health factors. (RX10, p.8-9). However, while addressing cubital tunnel syndrome, Dr. Sudekum testified that gripping and grasping were considered less of a potential cause for cubital tunnel syndrome and more of frequently as a potential cause for carpal tunnel syndrome. *Id.* at 12-13.

Dr. Sudekum testified that nerve conduction studies were performed in his office by his nurse. *Id.* at 25. These studies were not the same type of studies performed by Dr. Phillips; rather, the test is done by a NeuroMetrix machine and administered using stick-on electrode pads. *Id.* at 25, 51. Despite not being a shoulder or cervical specialist, Dr. Sudekum believed that

Petitioner's condition was related to his shoulder and cervical spine. *Id.* at 27. He remained of the belief that Petitioner did not suffer from either carpal or cubital tunnel syndrome. *Id.* at 27-28. When asked to explain why his neurological studies produced different results than those performed by Dr. Phillips, he speculated that perhaps Petitioner's condition resolved, or it was simply the result of "individual variation" as a result of being performed and evaluated by different people. *Id.* at 29. However, he refused to acknowledge that his studies were "at odds" with the study done by Dr. Phillips. *Id.* at 56.

Dr. Sudekum was under the impression that Petitioner still rode his motorcycle; however, rather than indicating this as an absolute factor, he indicated that Petitioner's hobby of riding, hunting and fishing were potentially causative factors dependent upon how the activities were performed. *Id.* at 26-27. Dr. Sudekum also testified that Petitioner's job as a mechanic could serve as an aggravating factor for the development of carpal and cubital tunnel syndromes, with carpal tunnel syndrome being more likely to arise than cubital tunnel syndrome. *Id.* at 31-32. Dr. Sudekum did not know how much time Petitioner spent engaging in his hobbies versus working for Respondent, and he did not ask Petitioner regarding same. *Id.* at 57. However, he felt that Petitioner's problem lied in his neck and shoulder, and felt that those should be addressed first. *Id.* at 33. He testified that he would defer to Dr. Lehman with regard to Petitioner's shoulder condition. *Id.* at 34.

On cross-examination, Dr. Sudekum testified that he has made $915,248.34 performing independent evaluations for the State of Illinois over the last 3 years, beginning on November of 2010. *Id.* at 35-36. He has completed 136 IME's, 83 of which he has examined, and a total of 69 depositions. *Id.* at 38.

Dr. Mall also testified by way of deposition. (PX13). Dr. Mall testified that he specializes in complex shoulder problems and shoulder reconstructions and also treats carpal and cubital tunnel syndromes. (PX13, p.5-6). He testified that he received his upper extremity/hand training at Washington University, one of the best hand programs in the country, and trained with many of the top-rated hand surgeons in the world and past presidents of the American Academy of Orthopedic Surgery, the American Hand Society, and several other large governing boards within orthopedics. *Id.* at 5-6.

Dr. Mall testified that Petitioner was referred to him from Dr. Gornet, the orthopedic spine specialist who performed Petitioner's past cervical spine surgery. *Id.* at 7. Dr. Mall testified that Petitioner initially believed that his problem came from his cervical spine and presented to Dr. Gornet first. *Id.* at 8. Dr. Gornet ruled out Petitioner's cervical spine and referred Petitioner to his office. *Id.* at 8-9. Dr. Mall noted that Petitioner did repetitive overhead lifting of heavy objects and heavy machinery that worsened his symptoms. *Id.* at 9. Dr. Mall also noted that the fact that Petitioner's symptoms were only aggravated with work activities, and not any outside activities, showed that the symptoms experienced by Petitioner were aggravated by his work duties. *Id.* at 9. He testified that even if Petitioner's condition was degenerative, his work

activities aggravated Petitioner's preexisting condition. *Id.* at 9-10, 54-55. Dr. Mall explained that Petitioner's initial shoulder examination was limited by pain. *Id.* at 10-11. However, when the cortisone injection significantly improved Petitioner's level of pain, Dr. Mall was able to perform a better clinical examination and localize the source of Petitioner's symptoms. *Id.* at 10-11. If Petitioner had not significantly improved with the injection, then Petitioner's symptoms would have related more to a cervical spine pathological process. *Id.* at 13-14. Dr. Mall examined Petitioner for carpal and cubital tunnel syndrome because Petitioner presented with classic signs and symptoms for same, and Petitioner had Petitioner had not been examined for these conditions before. *Id.* at 12-13.

Dr. Mall testified that the medical literature shows that patients who perform manual labor-type jobs that involve repetitive lifting and other repetitive motions are at a higher risk of developing carpal and cubital tunnel syndrome. *Id.* at 15. He testified that he had no doubt that this was the case with Petitioner. *Id.* at 15. He also testified that working overhead as a mechanic, doing overhead activities, and performing repetitive heavy work can cause significant injuries to the shoulder. *Id.* at 16. He stated:

> If you were to take an MRI of my shoulder when I'm 47 – or other 47-year-olds that don't do repetitive manual labor – they wouldn't have near the pathology that we found on Mr. Parker's MRI. It's just we don't see it. It's more of a problem of repetitive use and especially with repetitive overhead lifting with heavy objects. *Id.* at 16.

With regard to the nerve conduction studies performed by Dr. Phillips, Dr. Mall testified that Dr. Phillips does an excellent job with EMG/nerve conduction studies and trusts him to perform studies that he would not trust others to do. *Id.* at 17-18. The studies performed by Dr. Phillips demonstrated both carpal and cubital tunnel syndrome, which confirmed his clinical diagnosis. *Id.* at 18. Dr. Mall explained that the NeuroMetrix machine used by Dr. Sudekum was compared to the standard EMG and nerve conduction study, and was demonstrated to be inferior. *Id.* at 32-33. The machine was more effective as a screening tool rather than a diagnostic tool, and in no way served as a substitute for the "gold standard" or traditional EMG nerve conduction study. *Id.* at 33. Dr. Mall also did not believe Petitioner to be "obese" so as to consider him at risk for carpal or cubital tunnel syndrome, nor did he believe him to be old enough for his age to be a factor. *Id.* at 63-64.

Dr. Mall's clinical diagnoses for Petitioner's shoulder were confirmed by MRI. *Id.* at 20-21. Dr. Mall explained that rotator cuff tendinitis progresses to partial-thickness tearing, and then to full-thickness tearing. *Id.* at 20-21. The fluid around Petitioner's biceps also clearly demonstrated evidence of biceps tendinitis. *Id.* at 21. Based on the fatty atrophy of the teres minor, Dr. Mall diagnosed compression of the nerve at that location. *Id.* at 21-22. In order to determine how much of Petitioner's pain was coming from his biceps tendon, he performed an ultrasound guided injection at this location which gave Petitioner 100% relief of his symptoms when aggregated with the relief obtained from his prior injection. *Id.* at 22-23. This confirmed

that Petitioner's problem was not related to his cervical spine. *Id.* at 23, 39. With regard to performing EMG studies on Petitioner's teres minor nerve, Dr. Mall testified that was impractical due to it being covered by several muscles, and further pointed out that it was unnecessary because the compression was caused by a band of tissue at a well-defined nerve compression site that was well-visualized on MRI. *Id.* at 40-41.

When Petitioner's symptoms returned with the subsidence of medication, Dr. Mall recommended surgery. *Id.* at 25. Petitioner's carpal and cubital tunnel symptoms failed to improve with conservative treatment. *Id.* at 26. Therefore, Dr. Mall also recommended carpal and cubital tunnel releases. *Id.* at 26. Respondent never approved these procedures for Petitioner; however, Dr. Mall continued to see Petitioner and his recommendations remained unchanged. *Id.* at 27-29, 35-36.

With regard to Petitioner's additional injury on August 21, 2013, Dr. Mall testified that although this further aggravated Petitioner's symptoms, this injury in no way changed his recommendation with regard to future treatment. *Id.* at 29-30.

CONCLUSION

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

This case involves both repetitive and traumatic, accidents/injuries.

In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961. "The word 'accident' is not a technical legal term, and has been held to mean anything that happens without design, or an event which is unforeseen by the person to whom it happens…Compensation may be allowed where a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Comm.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254. Accidental injury need only be ***a*** causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (2003) (emphasis added). Even when other non-occupational factors are present, a "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Commission*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

The same theory applies to cases in which the employee's preexisting condition is aggravated by the repetitive nature of the employment. *Cassens Transport Co., Inc. v. Indus. Comm'n*, 262 Ill.App.3d 324, 633 N.E.2d 1344, 199 Ill.Dec. 353 (Ill.App. 2d, 1994). Employers are to take their employees as they find them. *A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999) citing *General Electric Co. v. Industrial Comm'n*, 433 N.E.2d 671, 672 (1982).

For this reason, the Court has refused to adopt any standard threshold which a claimant must meet in order for his or her job to classify as repetitive enough to establish causal connection. *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773, 292 Ill.Dec. 185 (Ill.App. 2nd Dist. 2005). The Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. The Court has also repeatedly found that quantitative evidence of the exact nature of repetitive work duties is not required to establish repetitive trauma injury. *Darling v. Indus. Comm'n*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (1st Dist., 1988); *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (1st Dist. 2000); *Edward Hines*, 365 Ill.App. 3d 186, 825 N.E.2d 773 (2d Dist., 2005). In a recent unpublished decision, the Appellate Court cited *Darling* and even stated that "in no way can quantitative proof be held as the *sine qua non* of a repetitive trauma case" (DeKalb); *See e.g. Dorhesca Randell v. St. Alexius Medical Ctr.*, 13 I.W.C.C. 0135 (2013) (citing the Appellate Court in *Edward Hines* and holding that there is no requirement that a claimant must spend a certain amount of time each day on a specific task before a finding of repetitive trauma can be made). *See also* the Appellate Court's finding in *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill.App.3d 297, 901 N.E.2d 1066, 327 Ill.Dec. 333 (4th Dist., 2009) (holding that a claimants work duties can be "varied" yet "repetitive and intensive;" repetitive is *not* defined as performing the exact same task over and over).

In *Fierke*, the Appellate Court found that a demand for quantitative proof was improper, reiterating that a claimant must only prove that some act or phase of employment was *a* causative factor. *Fierke*, N.E.2d at 850 citing *Darling*, N.E.2d at 1141-42. In *Darling*, the Appellate Court found that requiring specific quantitative evidence of amount, time, duration, exposure or "dosage" (which in Petitioner's case would be force) would expand the requirements for proving causal connection by demanding more specific proof requirements, and the Appellate Court refused to do so. *Darling,* N.E.2d at 1143. The Court further noted, "To demand proof of 'the effort required' or the 'exertion needed' . . . would be meaningless" in a case where such evidence is neither dispositive nor the basis of the claim of repetitive trauma." *Id.* at 1142. Additionally, the Court noted that such information "***may***" carry great weight "only where the work duty complained of is a common movement made by the general public." *Id.* at 1142. Intensive labor as a mechanic with repetitive overhead work does not entail common movements made by the general public. Rather, the risks associated with this type of labor are distinctly related to Petitioner's employment.

Petitioner testified that as a mechanic he spends 6-7 hours using pneumatic, vibratory tools such as air/impact wrenches, air cutters, air chisels, torches and welders to repair State vehicles and equipment such as tractors, mowers, salt trucks and plow trucks. (T.13-15; PX11). Petitioner works on all parts of the vehicle, including the tires, brakes, drive shafts, and mower cutting assemblies. (T.14-15). Petitioner also occasionally drives a ton-and-a-half service truck to sites to perform repairs, holding on to a steering wheel that vibrates. (T.17). Even Respondent's "Demands of the Job" form, which Petitioner testified does not fully depict his job duties, Petitioner uses his hands for gross manipulation (grasping, twisting, handling) for 4-6 hours per day, uses his hands for 6-8 hours per day to lift up to 10lb., 4-6 hours per day to lift up to 20lb., 2-4 hours per day to lift up to 30lb., spends 6-8 hours per day working on or with a moving machine, and spends between 2-4 hours per day working or reaching above shoulder level. (PX12). Thus, the evidence generated by both Petitioner and Respondent show that Petitioner has a hand-and-arm intensive, repetitive job. The Arbitrator believes this to be sufficient activity to cause repetitive injury.

With regard to causation, the Arbitrator relies on the opinion of Dr. Mall and Dr. Gornet. Although Dr. Lehman stated that Petitioner's shoulder problems were related to his cervical spine, Dr. Gornet and Dr. Mall ruled out Petitioner's cervical spine as the cause of Petitioner's symptoms. The Arbitrator notes that Dr. Gornet is the surgeon who performed Petitioner's past cervical procedure and is in a better position to make such a determination. The injection performed by Dr. Mall which relieved Petitioner's symptoms only affected the shoulder and not Petitioner's neck. Therefore, the Arbitrator does not find Dr. Lehman's opinion persuasive. Additionally, Dr. Lehman ultimately conceded that Petitioner's pathology could be of either repetitive or traumatic origin rather than merely the result of degeneration as he initially opined. Dr. Lehman reached his conclusion in reliance upon the information provided to him by Respondent; however, Petitioner testified that Respondent's information was incomplete, and Petitioner's testimony was confirmed by Respondent's witness, Chad Ashmore. When questioning demonstrated that he lacked significant detail regarding Petitioner's job duties, Dr. Lehman agreed that his opinion could change with new information. Additionally, Dr. Lehman agreed that Petitioner's condition required restrictions on overhead work; these clearly would not be necessary unless Petitioner's employment aggravated his condition. (RX12, p. 16-17). Given the very nature of Petitioner's work, including the intensity, use of vibratory tools, and the significant amount of overhead/shoulder work, the Arbitrator agrees with Dr. Mall's assessment that any preexisting pathology in Petitioner's shoulder would have clearly been aggravated by Petitioner's job duties. This point is further proven by the August 21, 2013 sledgehammer incident that provoked sharp pain in Petitioner's shoulder. However, this did not constitute an intervening accident by virtue of the opinion of both Dr. Mall and Dr. Lehman. Neither of these shoulder physicians believed that Petitioner's material condition changed following this incident, and Petitioner's symptoms and recommendations for treatment remained the same. An intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition; as the Court in *Lasley Const. Co.*, aptly put it, "The fact that

other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant." *Id.*; *See also Teska v. Indus. Comm'n,* 610 N.E.2d 1 (1994)

With regard to Petitioner's carpal and cubital tunnel syndromes, these were readily identified by Dr. Mall and confirmed by quality objective electrodiagnostic studies performed by Dr. Phillips. Dr. Sudekum, although being limited to the information provided by Respondent and only gathering limited information from Petitioner, testified that Petitioner's job duties as a mechanic could serve as an aggravating factor for the development of carpal and cubital tunnel syndromes. (RX10, p.31-32). However, he did not feel that Petitioner suffered from these conditions allegedly based on his own examinations and the use of a questionable/controversial screening tool, proven to be inferior to traditional needle EMG/NCS studies. The Arbitrator notes, however, that negative electrodiagnostic studies are not themselves dispositive of whether or not a patient suffers from carpal and/or cubital tunnel syndrome. *See Colleen Gilger v. LCN Closures, Inc.*, 12 I.W.C.C. 0267 (2012); *Polk v. United Airlines*, 03 I.I.C. 0141 (2003); *Abbot v. United Airlines*, 01 I.I.C. 0156 (2001). Following the confirmatory studies of Dr. Phillips, Dr. Mall's follow-up examinations consistently demonstrated evidence consistent with bilateral carpal and cubital tunnel syndromes. Therefore, the Arbitrator finds that evidence supports that Petitioner suffers from bilateral carpal and cubital tunnel syndromes. The Arbitrator likewise finds that Petitioner's bilateral compression neuropathies are related to Petitioner's employment based upon the credible opinion of Dr. Mall. The Commission has also previously found job duties similar to those performed by Petitioner involving the use of pneumatic/air tools to cause and/or contribute to compression neuropathy. *Ernest Everett v. Remare Corp. D/B/A MGM Transportation/National Intermodal Services*, 10 I.W.C.C 0041 (2010).

Based upon the foregoing the Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained accidental repetitive injuries to his shoulder, bilateral hands and bilateral elbows, causally related to his repetitive employment with Respondent.

Issue (D): What was the date of the accident?
Issue (E): Was timely notice of the accident given to Respondent?

Illinois courts have determined that manifestation date for purposes of a repetitive trauma claim can be set as: **(a)** the date the employee actually became aware of the physical condition and its relation to work through medical consultation; **(b)** the date the employee requires medical treatment; **(c)** the date on which the employee can no longer perform work activities; or **(d)** when a reasonable person would have plainly recognized the injury and its relation to work. *Durand v. Industrial Commission*, 224 Ill.2d 53, 862 N.E.2d 918 (Ill. 2007), *see also Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 505 N.E.2d 1026 (Ill. 1987); *Oscar Mayer & Co. v. Industrial Commission*, 176 Ill.App.3d 607, 531 N.E.2d 174 (3d Dist. 1988); *Three "D" Discount Store v. Industrial Commission*, 198 Ill.App.3d 43, 556 N.E.2d 261 (4th Dist. 1989).

The Supreme Court in *Durand* noted that it is common practice to set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand* citing *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 487 N.E.2d 356 (1985). The Supreme Court also endorsed the Appellate Court's finding in *Three "D" Discount Store v. Industrial Commission* 556 N.E.2d 261 (1989), wherein the Court found the manifestation date to be the date he was advised by a physician that his condition was related to work, despite having been previously diagnosed and treated for the condition. This provision is equitable, for as the Supreme Court noted, a claimant filing a claim based upon symptoms with a "sketchy and equivocal" understanding of said symptoms would have had difficulty proving the injury. *Durand,* 862 N.E.2d at 930. Although it is commonly argued that claimants are aware of their symptoms and condition long before the employer is notified, the standard from *Durand* that "the 'fact of injury' is not synonymous with the 'fact of discovery'" has become a safety measure employed by all Courts to ensure that the employers do "penalize an employee who diligently worked through" his or her symptoms until they require treatment. *Durand v. Indus. Comm'n*, 862 N.E.2d at 927, 930.

The Arbitrator finds this guidance particularly instructive in Petitioner's case. Petitioner thought his symptoms came from his cervical spine and a previous work injury. Thus, he was clearly aware of the "fact of injury." However, Petitioner's "discovery" did not occur until he met with Dr. Mall, and was diagnosed with bilateral carpal and cubital tunnel syndromes. Petitioner's understanding of the cause of his problem was indeed "sketchy and equivocal" until that date. The date on which the employee becomes aware of the physical condition and its relation to work through medical consultation is an appropriate manifestation date under the Act. *Durand v. Industrial Commission*, 862 N.E.2d 918 (2007); *Three "D" Discount Store v. Industrial Commission* 556 N.E.2d 261 (1989). Therefore, the Arbitrator finds that Petitioner's injuries manifested on May 9, 2013.

Petitioner promptly notified Respondent of his injury on May 13, 2013, well within the 45-day notice period allotted by the Act. (RX1). Petitioner therefore met his burden of proof regarding manifestation and notice.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Issue (K): Is Petitioner entitled to any prospective medical care?

An employee is entitled to medical care that is reasonably required to relieve the injured employee from the effects of the injury. 820 ILCS 305/8(a) (2011). This includes treatment that is obtained to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001).

As a result of his repetitive job duties, Petitioner developed significant shoulder injuries and bilateral carpal and cubital tunnel syndromes. Dr. Lehman agreed that the treatment rendered

for Petitioner's shoulder, and the restrictions, were reasonable for Petitioner's condition. Dr. Mall unequivocally testified that all of Petitioner's care and treatment was reasonable and required to evaluate and alleviate the effects of Petitioner's injuries. Based upon the foregoing, the Arbitrator awards the following medical expenses outlined in Petitioner's group exhibit. Respondent shall have credit for any amounts previously paid.

Although Petitioner has received the appropriate treatment for his shoulder, Petitioner has not yet been placed at maximum medical improvement regarding same and has not received the recommended treatment for his hands and arms. Therefore, the Arbitrator hereby orders Respondent to authorize and pay for the remainder of the treatment recommended by Dr. Mall.

Issue (L): What temporary benefits are in dispute? (TTD)

Petitioner was unable to work from June 14, 2013 through July 31, 2013 (6 5/7 weeks). After Respondent called him back to work on an IME report, Petitioner was reinjured and had great difficulty performing his job duties. Respondent ultimately sent Petitioner home on December 19, 2013 and instructed him not to return until his shoulder injury was resolved. (T.27). Petitioner returned to work on March 18, 2014 (12 5/7 weeks). Based upon the foregoing, the Arbitrator awards temporary total disability benefits for the claimed periods totaling 19 3/7 weeks. Respondent shall have credit for any amounts previously paid.

This award in no instance shall be a bar to a further hearing for determination of a further amount of temporary total compensation, medical benefits and/or compensation for permanent disability, if any.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerry Stiles,

Petitioner,

vs.

No. 13 WC 09615

CLT Transport,

15IWCC0304

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, temporary disability and evidentiary issues, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

Petitioner, an over the road tanker truck driver, testified that his job duties included loading, unloading, hooking up and unhooking trailers. The job was physically demanding. On July 24, 2012, Petitioner injured his low back while manually cranking the landing gear to lower a trailer. Petitioner stated he felt a pop in his back and excruciating pain.

Petitioner received emergency treatment at Silver Cross Hospital and St. Mary's Hospital, and followed up with Dr. Chintan Sampat at Parkview Orthopaedic Group. The medical records in evidence show that on July 30, 2012, Petitioner complained of severe low back pain radiating into the right buttock and thigh since the work accident. X-rays showed

decreased disc height at L4-L5 and L5-S1 with foraminal stenosis at the exiting L4 and L5 nerve roots. Dr. Sampat diagnosed degenerative disc disease, lumbar sprain and radiculopathy. He ordered an MRI, prescribed Norco and took Petitioner off work. The MRI, performed August 17, 2012, was interpreted by the radiologist as showing mild bilateral osteoarthritic changes of the facet joints at L4-L5 and L5-S1, and "[a]t the L5-S1 level, there is loss of disc height and signal with adjacent fatty endplate changes of the inferior L5 vertebral body. There is a broad-based right paracentral protrusion resulting in mild spinal stenosis and moderate right neuroforaminal stenosis. There is also resultant narrowing of the right lateral recess at this level." On August 31, 2012, Dr. Sampat prescribed physical therapy. On September 14, 2012, Petitioner followed up with Dr. Sampat, reporting some improvement. Dr. Sampat noted the MRI showed degenerative disc disease and a disc herniation at L5-S1. Straight leg raise test was positive on the right and negative on the left. Dr. Sampat refilled Petitioner's medications, instructed him to continue physical therapy, and kept him off work. On October 12, 2012, Petitioner followed up, complaining of severe low back pain radiating to both legs, the right worse than the left. Dr. Sampat recommended epidural steroid injections after Petitioner declined surgery. On November 27, 2012, Petitioner reported some improvement in the back pain, but not the radicular symptoms, after an epidural steroid injection. He wanted to try one more injection before considering surgery. On December 14, 2012, Petitioner reported only temporary relief after the second injection and requested a second opinion. Dr. Sampat referred Petitioner to Dr. Anthony Rinella, a spine surgeon.

On January 25, 2013, Petitioner consulted Dr. Rinella, complaining of significant back pain radiating to both legs. Physical examination was notable for "diminished sensation in the left S1, more so than L5 nerve root distribution." Dr. Rinella interpreted the MRI as follows: "He has a left-sided laminotomy at the L4-5 level. This level is very well decompressed. He has a right-sided disc herniation with lateral recess on the left side at the L5-S1 level." Dr. Rinella recommended a laminectomy at L5-S1, refilled Norco, and kept Petitioner off work.

On March 10, 2013, Dr. Kevin Walsh, an orthopedic surgeon, examined Petitioner at Respondent's request. Petitioner complained of pain in the low back and the legs, rating the pain a 6-9/10. He also complained of mid-back pain and numbness in the legs. On physical examination, Petitioner was able to forward flex 70 degrees and hyperextend 15 degrees. Straight leg raise test was negative for radicular symptoms. Strength was normal. Dr. Walsh opined the work accident could have caused an exacerbation of preexisting degenerative condition resulting in a disc bulge at L5-S1. Dr. Walsh agreed with Dr. Rinella's surgical recommendation.

On April 22, 2013, Dr. Rinella performed a laminectomy with partial facetectomy and foraminotomy at L5-S1. On May 7, 2013, Petitioner reported a greater than 50 percent improvement, rating the low back and right leg pain a 3/10. Dr. Rinella's physician's assistant discontinued Valium, keeping Petitioner on Norco and Flexeril. On June 7, 2013, Petitioner reported being very happy with his improvement, rating the pain a 5/10. Dr. Rinella kept Petitioner off work. On August 1, 2013, Petitioner reported his left leg symptoms had resolved.

He continued to have numbness in the posterior aspect of the right leg, however. He rated the low back pain a 4/10, reporting taking two 10 mg Norco pills, one Valium pill and 800 mg of ibuprofen a day to control the pain. Physical examination findings were as follows: "[The patient] ambulates with a normal gait. He can forward flex to 60 degrees and is limited by pain and apprehension. His incision is healing nicely. Motor strength is 4/5 throughout all myotomes of the lower extremities. Sensory exam reveals decreased sensation to light touch over the right S1 distribution." Dr. Rinella's physician's assistant prescribed physical therapy and noted that, upon its completion, he intended to decrease Petitioner's overall utilization of pain medication. He kept Petitioner off work.

Petitioner testified that at the time of the follow-up visit on August 1, 2013, he felt the symptoms in his low back and legs had improved to the point he "was finally going to be all right and be able to go back to work." On September 9, 2013, while driving home from physical therapy, Petitioner sneezed, and "it really hurt [his] back bad." Several hours later, the pain became unbearable, even though Petitioner was taking two Norco pills at a time, as well as Valium and ibuprofen. When Petitioner returned to physical therapy on September 11, 2013, he mentioned to the physical therapist his back hurt after he sneezed.

Physical therapy records from Accelerated Rehabilitation Centers (Accelerated) show that Petitioner began physical therapy on August 5, 2013, rating the pain a 4/10. For a little over a month, Petitioner's symptoms waxed and waned. On September 3, 2013, Petitioner rated the pain a 2/10 and reported that therapy was helping. On September 4, 2013, Petitioner rated the pain a 5/10, reporting waking up with increased pain. On September 5, 2013, Petitioner reported feeling better, rating the pain a 4/10. On September 9, 2013, Petitioner rated the pain a 2/10. However, he complained of significant pain with prolonged sitting. The note from September 11, 2013, states: "Increased pain for the last couple days. Patient rates their current pain as 8/10. *** Patient stated that he sneezed on Monday and it has [been] bad ever since then with pain radiating down right posterior thigh to foot." On September 12, 2013, Petitioner reported some improvement, rating the pain a 7/10. He complained of poor sleep and difficulty performing activities of daily living.

On September 13, 2013, Petitioner followed up with Dr. Rinella's physician's assistant, who noted: "[The patient] was doing quite well until 4 days ago. He was an active participant in formal physical therapy who left at approximately 12 noon that day with no specific event or injury and by 3 or 4 o'clock that afternoon he experienced significant pain in his right lower extremity and feels he has a new onset of weakness in his right foot. *** Of note, he was taking no pain medication as of 5 days ago and was progressing nicely." Petitioner rated the pain a 7/10. Physical examination findings were as follows: "[The patient] is in obvious discomfort secondary to facial grimacing and frequent positional shifts while sitting in the exam chair. He can forward flex to 35 degrees only and is limited secondary to pain. *** Exam of the lower extremities reveals 4+/5 strength in the right S1 distribution, this is not new. Right EHL strength is 4/5, this is a new finding. He has decreased sensation over the right L5 and S1 distribution when tested using light touch." Dr. Rinella's physician's assistant diagnosed "[n]ew onset right

L5 weakness with right lower extremity pain of a 4 day duration after no specific injury." He prescribed a Medrol Dosepak, ordered an MRI, instructed Petitioner to continue physical therapy, and kept him off work.

On September 16, 2013, Petitioner returned to physical therapy, rating the pain a 5-7/10. On September 18, 2013, Petitioner rated the pain a 6/10. On September 19, 2013, Petitioner rated the pain a 5/10. Thereafter, Petitioner rated the pain a 4-6/10.

On September 17, 2013, Dr. Walsh reexamined Petitioner. Petitioner related his postoperative progress was "slow, but okay." Dr. Walsh understood Petitioner "was working [*sic*] around in an examination room and developed pain and discomfort in the right buttock area." Dr. Rinella's office therefore prescribed a Medrol Dosepak and ordered an MRI. Petitioner complained of burning and aching in the low back and right buttock, with numbness in the right leg and foot. He rated the back pain a 7.5-10/10 and leg pain a 6-8/10. He also complained of some mid-back pain, which he rated a 2/10. He reported taking Norco at night to sleep. Physical examination findings were as follows: "The patient presented to the office wearing flip-flops. Examination of the lumbar spine reveals limitations of motion. The patient would flex forward only 20 degrees, hyperextend 10 degrees, laterally bend to the right and left 40 degrees, and laterally rotate 70 degrees. He reported a little pain with lateral rotation. Straight leg raise reproduced back pain only. He had 5/5 motor strength ***. He reported toe walking would reproduce quivering in his lower back with pain. Heel walking produced pain. The patient would breathe heavily during the examination and requesting periods of rest between portions of the physical examination; however, when he dropped his eyeglasses, he could easily reach over and pick them up. There was no paraspinal muscle spasm. There was no sciatic notch tenderness. There were *** no palpable trigger points. Reflexes were equal and symmetric." Dr. Walsh opined:

> "The patient's current diagnosis is status post L5-S1 laminectomy by Dr. Rinella. The patient has had a laminectomy on both the right and left sides with exposure of the nerve roots, and decompression of the L5 and S1 nerve roots. The operative report does not indicate that a herniated disk was actually encountered. More likely than not, the patient is at maximum medical improvement with regards to the April 2013 surgery. His current subjective complaints appear to be disproportionate to objective abnormalities and he does exhibit pain behaviors during the physical examination. More likely than not, the patient requires no additional physical therapy at this time from his surgery in April 2013. He is 5 months status post surgery. It is not at all likely the patient will require any permanent work restrictions as a result of an L5-S1 laminectomy. It is not at all likely the patient's current subjective complaints are related to the injury described in July 2012. The patient is taking no pain medicine during the day. He may return to work at this time without formal restrictions as a result of the alleged injury in July 2012. Additional care and treatment does not appear to be

reasonable or necessary as a result of the alleged injury. ¶ Of note, the operative findings do not support the findings of an acute herniated disk."

Petitioner testified that during the examination by Dr. Walsh, he was wearing slip-on shoes because he could not bend over to tie shoelaces. When his sunglasses fell on the floor, he squatted to pick them up.

Petitioner continued physical therapy. In a progress report dated November 6, 2013, the physical therapist stated that Petitioner localized the pain to the right buttock and occasionally the right leg, with numbness in the leg. The assessment was as follows: "Pt has been seen for total of 13 visits since last visit to [doctor's] office. Pt feels progress is unchanged during this time however, objective re-assessment reflects measurements are worse/decreased. Flare up in pain and LE symptoms limits pt progress."

On November 8, 2013, Petitioner followed up with Dr. Rinella, complaining of tenderness radiating down the right leg and rating the pain a 6/10. He continued to take Norco and ibuprofen. Physical examination findings were improved compared to August 1, 2013. Dr. Rinella continued to recommend a repeat MRI "so we can assess whether there is new neural impingement versus surgical scarring," and instructed Petitioner to continue physical therapy, followed by work conditioning. Dr. Rinella kept Petitioner off work. Dr. Rinella was under the impression Petitioner's "right-sided symptoms developed on 09/09/13 while participating in physical therapy." On December 11, 2013, Petitioner rated his pain a 5-6/10 and reported taking Norco, Valium and ibuprofen. Petitioner expressed difficulty performing activities of daily living and stated he was no longer improving with physical therapy. Physical examination findings were unchanged. Dr. Rinella interpreted the repeat MRI as follows: "He has right-sided and central stenosis at L4-5. At the L5-S1 level he has contrast enhanced surgical scar as well as a broad disc herniation extending into the foraminal level." Dr. Rinella also noted decreased foraminal heights at L4-L5 and L5-S1. Dr. Rinella stated: "We discussed various options including a Functional Capacity Evaluation to set permanent restrictions versus further surgical intervention. From a surgery perspective, I recommend a laminectomy at L4-5 followed by a transforaminal lumbar interbody fusion on the right side at L5-S1. This procedure is necessary because the foraminal disc herniation will require removal of the facet which would by definition cause instability." Dr. Rinella recommended a home exercise program instead of physical therapy and kept Petitioner off work. On January 24, 2014, Petitioner continued to complain of back pain radiating down the right leg, reporting no change in his symptoms or medication usage. He wished to proceed with the surgery. Dr. Rinella stated: "I continue to recommend an L4-5 laminectomy with L5-S1 transforaminal lumbar interbody fusion. He has foraminal disc herniation as well as vertical narrowing that requires an interbody fusion and stabilization. The decompression will require removal of the facet, which would cause instability." Dr. Rinella kept Petitioner off work.

In an addendum report dated January 26, 2014, Dr. Walsh stated that he reviewed additional medical records and opined:

"The patient is not an ideal candidate for any surgical intervention. He is morbidly obese, weighing over 300 pounds. He is a smoker. Smokers have an increased risk of nonunion and failed back surgery, and he had disproportionate pain at the time of his previous examination with pain behaviors in my office. His MRI does show post laminectomy changes at L5-S1 with granulation tissue (scar tissue) abutting the posterior and right aspects of the dural sac and abutting the right S1 nerve root. At the time of the previous surgery, the patient had an adequate decompression. Although additional surgical intervention has been proposed by Dr. Rinella, it is not at all clear that the scar tissue at L5-S1 would be diminished by additional surgical intervention in that area. Dr. Rinella has also recommended L4-L5 surgery. This is a new recommendation following the previous surgical intervention and probably is not causally related to the injury described. There is no evidence the patient injured L4-L5 as well as L5-S1 at the time of initial trauma."

Dr. Walsh maintained Petitioner was at maximum medical improvement and did not require additional surgery with respect to the work injury.

Petitioner testified that he last saw Dr. Rinella on January 24, 2014. At the time of the arbitration hearing, Petitioner had discomfort in his back and pain with numbness in the right leg. He continued to take Norco, Valium and ibuprofen. Petitioner wished to proceed with the surgery recommended by Dr. Rinella. Petitioner admitted undergoing surgery at L4-L5 in 1998. He returned to work full duty after recovering from the surgery. Petitioner denied any residual disability from the surgery.

The Arbitrator found:

"Petitioner had a compensable accident on July 24, 2012 that required an L5-S1 laminectomy. Petitioner was still treating, participating in physical therapy and under a no-work order when the sneezing incident occurred on September 9, 2013. With respect to L4-L5, the Arbitrator notes the proximity that L4-L5 has to L5-S1 as well as Petitioner's 1998 L4-L5 microdiscectomy for which the Petitioner has been asymptomatic for approximately sixteen years. Although the sneezing episode was most likely the immediate cause of Petitioner's injuries at L5-S1 and L4-L5, it was not necessarily the sole cause. The Arbitrator finds that Petitioner's current back condition would not have developed but for the April 22, 2013 failed laminectomy, which was necessitated by the undisputed work accident. The Arbitrator finds that L4-L5 and L5-S1 must be considered as parts of a whole, they are inextricably entwined and cannot be separated for purposes of determining causation to the work accident due to their proximity and reliance on one another. Based on the totality of the evidence, including the treating medical records, the Petitioner's credible testimony and the case law, the Arbitrator finds that the Petitioner's current condition of ill-being is causally connected to his work injury."

Respondent contends the Arbitrator's finding of causal connection is unsupported by the weight of the evidence because Petitioner did not provide an expert opinion that the L4-L5 and L5-S1 discs are so inextricably intertwined that they must be considered as a whole in determining causation. Nor did Petitioner provide an expert opinion that his low back was in such a weakened condition due to the work accident that any new findings must be related to the accident. Respondent also argues the sneezing incident was an intervening event breaking the chain of causation.

It is well established that "[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 Comm'n, 93 Ill. 2d 59, 63-64 (1982). Furthermore, "when the claimant's condition is weakened by a work-related accident, a subsequent accident that aggravates the condition does not break the causal chain." Vogel v. Workers' Compensation Comm'n, 354 Ill. App. 3d 780, 787 (2005). However, in certain cases the claimant must introduce into evidence an expert opinion to carry his burden of proof. The appellate court has explained: "Although medical testimony as to causation is not necessarily required (Westinghouse Electric Co. v. Industrial Com. (1976), 64 Ill. 2d 244, 250), where the question is one within the knowledge of experts only and not within the common knowledge or comprehension of laymen, expert testimony is necessary to show that a claimant's work activities caused the condition complained of. (See Johnson v. Industrial Com. (1982), 89 Ill. 2d 438, 442-43.)" Interlake Steel Co. v. Industrial Comm'n, 136 Ill. App. 3d 740, 744 (1985); accord Nunn v. Industrial Comm'n, 157 Ill. App. 3d 470, 478 (1987); see also Cognato v. Industrial Comm'n, 242 Ill. App. 3d 50, 56 (1993) ("The subject of myocardial infarctions and ruptures is not of common knowledge and requires expert opinion with respect to causal connection in cases such as the one before us").

In the instant case, although the chain of events and Dr. Walsh's original opinion support the Arbitrator's decision with respect to Petitioner's condition at L5-S1, the same cannot be said about Petitioner's condition at L4-L5. The evidence shows the accident aggravated Petitioner's preexisting condition at L5-S1. Dr. Rinella recommended a laminectomy, and Dr. Walsh agreed with that recommendation. Post-laminectomy, Petitioner developed scar tissue at L5-S1. In particular, Dr. Rinella noted the MRI showed "contrast enhanced surgical scar" at L5-S1 and Dr. Walsh noted the MRI showed scar tissue at L5-S1 abutting the posterior and right aspects of the dural sac and the right S1 nerve root. Petitioner's symptoms correlate with the MRI findings. With respect to L4-L5, on the other hand, the evidence shows Petitioner had previously undergone a laminotomy more than a decade before the work accident. When Dr. Rinella first evaluated Petitioner on January 25, 2013, he noted the L4-L5 level was "very well decompressed." A year later, Dr. Rinella noted right-sided and central stenosis at L4-L5, for which he recommended a laminectomy. Dr. Rinella did not connect the need for the laminectomy at L4-L5 to the work accident. Dr. Walsh stated, "This is a new recommendation

following the previous surgical intervention and probably is not causally related to the injury described. There is no evidence the patient injured L4-L5."

The Commission affirms the finding of causal connection with respect to L5-S1, but reverses with respect to L4-L5. Correspondingly, the Commission modifies the award of prospective medical care to surgery at L5-S1 only. The Commission affirms the awards of temporary total disability benefits and medical expenses.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 22, 2014, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $719.26 per week for a period of 80 6/7 weeks, from July 25, 2012, through February 11, 2014, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills in evidence from Dr. Rinella and Accelerated pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for prospective medical care in the form of the fusion surgery at L5-S1 recommended by Dr. Rinella, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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.

APR 2 9 2015

DATED:
o-04/09/2015
SM/sk
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

STILES, JERRY
Employee/Petitioner

Case# **13WC009615**

15IWCC0304

CLT TRANSPORT
Employer/Respondent

On 4/22/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.05% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1544 NILSON STOOKAL GLEASON CAPUTO LTD
MARC B STOOKAL
205 W RANDOLPH ST SUITE 440
CHICAGO, IL 60606

3150 JAMES M KELLY LAW FIRM
4801 N PROSPECT RD
SUITE 832
PEORIA HEIGHTS, IL 61616

15IWCC0304

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jerry Stiles
Employee/Petitioner

v.

CLT Transport
Employer/Respondent

Case # **13** WC **09615**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **February 11, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **July 24, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$56,102.28**; the average weekly wage was **$1078.89**.

On the date of accident, Petitioner was **39** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$47,265.65** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$47,265.65**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $719.26/week for 80 6/7 weeks, commencing July 25, 2012 through February 11, 2914, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $47,265.65 for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $46,613.53, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $46,613.53 as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $18,496.53 to Dr. Rinella, $28,119.00 to Accelerated Rehabilitation, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay prospective medical in the form of an L4-L5 LAMINECTOMY and LUMBAR INTERBODY FUSION ON THE RIGHT recommended by Dr. Rinella on December 4, 2013.

Respondent shall be given a credit of $40,688.48 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/18/14
Date

ICArbDec19(b)

APR 22 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JERRY STILES, **Petitioner,**	)	
vs.	)	**No. 13 WC 31607**
CLT TRANSPPORT. **Respondent.**	)	

ADDENDUM TO ARBITRATION DECISION

STATEMENT OF FACTS

Petitioner was employed by Respondent's trucking company as a tanker truck driver transporting hazardous materials. Petitioner's duties included loading and unloading tankers, hooking up tankers to cab units and utilizing hose lines as long as 40 feet in length filled with liquids, acids and flammable materials. Typically, Petitioner worked 70 hours per week, driving between 2,500 to 3,500 miles. Petitioner acknowledged a prior back surgery at the L4-L5 level in 1998. It is uncontested that Petitioner had a compensable accident on July 24, 2012 that required a L5-S1 laminectomy on April 22, 2013. The Respondent disputes causal connection between the July 24, 2012 accident and Petitioner's current condition.

On July 24, 2012, Petitioner was lowering a loaded tanker onto a cab using a dolly cranking system when he felt and heard a "pop" in his low back accompanied by immediate pain in his back and legs. Petitioner was seen at the Silver Cross Hospital emergency room on the accident date where he complained of right lower back pain which radiated up the right side of his back. Petitioner reported a lower back surgery in 1997 and that he has not had pain in 15 years. Petitioner was discharged with pain medications and referred to an orthopedic surgeon, Dr. Chintan Sampat.

On July 30, 2012, Petitioner consulted with Dr. Sampat who noted that Petitioner's chief complaint was axial low back pain radiating down into the right buttock and posterolateral thigh down to mid-thigh level. Dr. Sampat diagnosed the Petitioner with lumbar degenerative disc disease, a lumbar sprain and lumbar radiculopathy. Dr. Sampat recommended an MRI. Dr. Sampat also recommended smoking cessation. A no-work order was issued as well as a prescription for Norco. (PX 2)

On August 17, 2012 an MRI revealed an L5-S1 herniated disk. Specifically, the MRI found degenerative disc disease at L5-S1 with narrowing of the right neural foraminal and lateral recess and a broad based paracentral protrusion resulting in mild spinal stenosis and moderate right neuroforaminal stenosis. No acute injuries were found at L4-L5. (PX 2)

On August 31, 2012 Dr. Sampat noted Petitioner's complaints of low back pain radiating along his right lower extremity. Dr. Sampat diagnosed a recurrent L5-S1 herniated disk. Physical therapy and pain medications were prescribed as well as a no-work order.

On September 14, 2012, Dr. Sampat noted Petitioner's chief complaint of low back pain radiating along the right lower extremity. The doctor noted that physical therapy was helping Petitioner's symptoms. Physical therapy orders were continued as well as prescriptions for Norco and Naproxen

On October 12, 2012, Dr. Sampat noted Petitioner's complaints of low back pain radiating along both lower extremities with numbness and tingling along the left dorsal foot and pain radiating along the right buttock, thigh and leg. Dr. Sampat noted that these complaints "correspond well with his MRI findings." (PX 2) An epidural steroid injection was prescribed and the no-work order was continued.

On November 15, 2012 the Petitioner underwent his first epidural steroid injection. The Petitioner testified that he received temporary relief but that the pain returned. Petitioner received a second epidural steroid injection which did not yield any significant relief.

December 14, 2012 Dr. Sampat noted Petitioner's complaints of low back pain radiating along both lower extremities, complaints of continued complaints of left lower extremity weakness and low back pain radiating down both buttocks. Petitioner indicated interest in surgical intervention. Dr. Sampat recommended smoking cessation and an updated MRI scan. Petitioner indicated the desire for a "second opinion" and was to a spinal surgeon, Dr. Anthony Rinella, M.D. Dr. Sampat continued the Petitioner's no-work order.

On January 25, 2013, Dr. Rinella diagnosed a prior L4-L5 microdiscectomy, L5-S1 disc herniation, bilateral lower extremity and S1 radiculopathy. Dr. Rinella recommended a L5-S1 laminectomy, noting more impingement on the right side "which is his less symptomatic side." The doctor also noted "there is sufficient lateral recess stenosis, especially in light of the significant right-sided pressure, to cause hi left sided symptoms. Norco was prescribed and Petitioner's no-work order was continued.

Petitioner was seen by Dr. Walsh for a Section 12 exam for Respondent on March 18, 2013. Dr. Walsh agreed with Dr. Rinella's surgical recommendation. (RX1)

On April 22, 2013 Petitioner underwent a L5-S1 laminectomy with partial facetectomy and foramanotomy. On May 7, 2013 Dr. Rinella continued his no-work order and prescribed the medications Valium, Flexiril and Norco. (PX1)

On August 1, 2013 Dr. Rinella noted that Petitioner was improving and that his left leg symptoms had resolved. The Petitioner testified that his right leg still was numb as well as lumbar pain on a 4 out of 10 scale. The doctor continued the medications, ordered physical therapy to begin and continued the Petitioner's no-work order. (PX 1)

The Petitioner began physical therapy on August 2, 2013. He testified that the physical therapy exercises did help in his pain management as he was going 2 to 3 times week. (PX 4)

On September 9, 2013, the Petitioner attended physical therapy. Petitioner testified that he was feeling better. Records indicate Petitioner reported his pain was a 2/10. (PX 4) The Petitioner testified that while driving home from therapy that day he sneezed and felt an immediate twinge of pain in his low back with increased pain in his right thigh to his foot.

On September 11, 2013, the first therapy note after the sneezing incident, Petitioner's pain was noted at an 8/10 with "increased pain for the last couple of days…[p]atient stated that he sneezed on Monday and it has been bad ever since then with pain radiating down the right posterior thigh to foot." Records indicate Petitioner had antalgic gait and decreased stance in the right lower extremity. The therapist noted "patient had increased symptoms since Monday when he apparently sneezed. He is having difficulty sleeping, transferring, as well as performing ADL." (PX 4)

Petitioner testified that after the sneezing incident he began combining his medications, taking two Norco's and a Valium, as well as 800 mg of ibuprofen in order to reduce his pain. .

On September 13, 2013, Dr. Rinella noted that Petitioner was:

> *[D]oing quite well until 4 days ago. He was an active participant in formal physical therapy who left at approximately 12 noon that day with no specific event or injury and by 3 or 4 o'clock that afternoon he experienced significant pain in his right lower extremity and he feels a new onset of weakness in his right foot. Current pain score is a 7/10....Of note, he was taking no medication as of 5 days ago and was progressing nicely.*

Dr. Rinella indicated that the Petitioner was in obvious pain and was complaining of pain in his right side. Dr. Rinella prescribed a trial of Medrol dose pack as well as Norco. A new MRI and continued as well as the no-work order. (PX 3)

On September 17, 2013, Petitioner was seen by Dr. Walsh for a second Section 12 exam. (RX 2) Dr. Walsh noted that the Petitioner was not taking medication at the time the examination. Dr. Walsh also indicated that the Petitioner was wearing flip flops at the exam and that Petitioner bent down to pick up a pair of sunglasses that he had dropped. The Petitioner testified that he told Dr. Walsh that he was taking a Medrol dose pack for pain at the time of the evaluation. The

Petitioner testified that he was not wearing flip flops, rather, he was wearing slip-on shoes because of his inability to bend over and tie shoelaces. The Petitioner further testified that because of his inability to bend over at that time, he squatted in order to retrieve his sunglasses from the floor. According to Petitioner, Dr. Walsh never told him that he could return to any type of work.

The Petitioner testified that on October 7, 2013, Mary Kay Carpenter, one of the owners of CLT Transportation Services, offered Petitioner a full duty return to work as a tanker truck driver. The Petitioner testified that he told Ms. Carpenter that he had not been released to work by his doctor and that he was still taking pain medication. Petitioner testified that no other job offer was extended.

On October 11, 2013, Dr. Rinella noted that Petitioner's left lower extremity complaints had resolved but that he had significant right lower extremity symptoms which occurred after his therapy session on September 9, 2013. On November 8, 2013, Dr. Rinella noted that Petitioner's left side pain had resolved but that the right leg pain was still present. The Petitioner complained of pain on a 6 out of 10 scale. Dr. Rinella ordered a lumbar MRI. He continued the Petitioner's physical therapy order as well as his no-work order.

On December 4, 2013, the Petitioner's MRI revealed:

> *Postlaminectomy changes at the L5-S1 level. Granulation tissue in the spinal canal abutting the posterior and right aspect of the dural sac. Granulation tissue abuts the right S1 nerve root in the lateral recess.*
> *Degenerative changes as described with broad-based right paracentral protrusion and disc osteophyte complex at the L5-S1 level and broad-based right perirectal protrusion at the L4-L5 level. Mild generalized bulges at the L2-L3 levels.* (PX 3)

On December 11, 2013, Dr. Rinella noted that Petitioner's left leg pain was gone but the right leg was tender past his thigh down to his calf. Petitioner complained of pain on a 6 out of 10 scale. The doctor's notes indicate that lumbar pain made it difficult for the Petitioner to bend and to perform his activities of daily living. The doctor noted that Petitioner was no longer improving in physical therapy.

Dr. Rinella's records indicate that he reviewed the December 4, 2013 MRI and recommended an L4-L5 laminectomy and a lumbar interbody fusion on the right at L5-S1:

> *From a surgery perspective, I recommend a laminectomy at L4-L5 followed by a transforaminal lumbar interbody fusion on the right side at L5-S1. This procedure is necessary because the foraminal disc herniation will require removal of the facet which would by definition cause instability. I recommend he converts to a home exercise program as physical therapy is no longer helping him. A work conditioning program would only make his symptoms worse. He will remain off work at this time. He is now over 7 months out from his injury and clearly failed conservative management with regards to physical therapy and epidural steroid injections. He has also failed the simple laminectomy procedure. We discussed the likelihood of returning to work as a tanker truck driver. His best chance at returning to work in this capacity would be with the surgical intervention outlined. (PX 3)*

The Petitioner testified that if the surgery were authorized, he would proceed with the procedure recommended by Dr. Rinella.

The Petitioner testified that as of the time of arbitration he was taking 800 mg of Ibuprofen every 6 hours, Norco 10/325 at night and 5 mg of Valium every night. The Petitioner testified that if he had to drive during the day he would take Ibuprofen and not the narcotic medications. The Petitioner testified that when he was not taking his narcotic pain medications, his pain would significantly increase. The Petitioner testified that he has never been released to any type of work by Dr. Rinella. He further testified that he gets approximately 3 hours of sleep per night but then awakens due to pain. Petitioner stated that after the 1998 surgery he returned to work, and wasn't taking any medication until the July 24, 2012 accident. The Petitioner testified that if the surgery was authorized, he would proceed with the surgical intervention outlined by Dr. Rinella.

On cross examination the Petitioner testified that he sneezed in his car on his way home from physical therapy on September 9, 2013. He acknowledged that the records from Dr. Rinella do not contain a mention of sneezing in his September 13, 2013 or October 11, 2013 records. The Petitioner testified he was taking no medication between 1998 and the accident of July 24, 2012. The Petitioner testified that he had cut his smoking down from 2 packs per day to less than ½

packs per day currently. When asked whether he could return to light duty work, Petitioner testified that he would try it if it were offered to him but that he was unable to perform his work as a tanker truck driver due to his pain and the medications that he was taking.

On redirect examination, the Petitioner testified that Mary Kay Carpenter never offered him light duty work, office work or any type of restricted work.

OPINION AND ORDER

Causal Relationship to the Injury

The Workers' Compensation Act is a remedial statute intended to provide financial protection for injured workers, and is to be liberally construed to accomplish that objective. *Flynn v. Industrial Commission*, 211 Ill.2d 546, 556 (Ill. 2004). The aim of the worker' compensation system is to make the worker whole for the losses that were occasioned by an injury. *Flynn*, 211 Ill.2d 546 at 548. To obtain compensation under the Workers' Compensation Act (820 ILCS 305/2), a claimant must show by a preponderance of the evidence that he or she has suffered a disabling injury arising out of and in the course of his or her employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2d 193, 203, 278 Ill.Dec. 70, 797 N.E.2d 665 (2003). The "arising out of" component addresses the causal connection between a work-related injury and the claimant's condition of ill-being. *Sisbro,* 207 Ill.2d at 203, 278 Ill.Dec. 70, 797 N.E.2d 665. 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. *Sisbro,* 207 Ill.2d at 205, 278 Ill.Dec. 70, 797 N.E.2d 665. Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury. *Teska v. Industrial Comm'n,* 266 Ill.App.3d 740, 742, 203 Ill.Dec. 574, 640 N.E.2d 1 (1994). That other incidents, whether work-related or not, may have aggravated the claimant's condition is irrelevant. *Lasley Construction Co. v. Industrial Comm'n,* 274 Ill.App.3d 890, 893, 211 Ill.Dec. 345, 655 N.E.2d 5 (1995); see also *International Harvester Co. v. Industrial Comm'n,* 46 Ill.2d

238, 245, 263 N.E.2d 49 (1970) (where the work injury itself causes a subsequent injury, the chain of causation is not broken).

In *Mendota Township High School v. Industrial Comm'n*, 243 Ill.App.3d 834 (1993) the Petitioner suffered a lower back injury while playing basketball in connection with his coaching duties. Less than a month after the work injury, Petitioner aggravated the injury while playing basketball. The condition worsened after participating in conservative treatment. Several months later, Petitioner sneezed and immediately suffered acute lower back pain that radiated down his leg. Medical evidence was introduced that the work injury most likely resulted in a tear of the posterior longitudinal ligament which weakened and ruptured during the sneezing episode.

The court found that while the sneezing episode was the immediate cause of the rupture, it was not necessarily the sole cause. *Mendota,* 243 Ill.App.3d at 837. The court noted that "[h]ad it not been for the original basketball injury, in all probability claimant's back problems would not have reached the stage they did in such a short period of time." *Mendota,* 243 Ill.App.3d at 837.

In *Teska v. Industrial Comm'n,* the Petitioner sustained a compensable cervical injury that required surgery. Petitioner was released to work two months after the surgery but remained symptomatic. A few months after the surgery an MRI found a recurrent herniated disk at the same level upon which the surgery was performed. Petitioner suffered sharp neck pain while bowling about a month after surgery. The court found that the increase in neck pain while bowling did not break the causal connection. *Teska*, 266 Ill. App. 3d at 742-43. The court reasoned that the Petitioner's condition of ill-being would not have escalated to the point it did were it not for the work related injury. *Teska*, 266 Ill. App. 3d at 743

Petitioner had a compensable accident on July 24, 2012 that required an L5-S1 laminectomy. Petitioner was still treating, participating in physical therapy and under a no-work order when the sneezing incident occurred on September 9, 2013. With respect to L4-L5, the Arbitrator notes the proximity that L4-L5 has to L5-S1 as well as Petitioner's 1998 L4-L5 microdiscectomy for which the Petitioner has been asymptomatic for approximately sixteen years. Although the sneezing episode was most likely the immediate cause of Petitioner's injuries at L5-S1 and L4-

L5, it was not necessarily the sole cause. The Arbitrator finds that Petitioner's current back condition would not have developed but for the April 22, 2013 failed laminectomy, which was necessitated by the undisputed work accident. The Arbitrator finds that L4-L5 and L5-S1 must be considered as parts of a whole, they are inextricably entwined and cannot be separated for purposes of determining causation to the work accident due to their proximity and reliance on one another. Based on the totality of the evidence, including the treating medical records, the Petitioner's credible testimony and the case law, the Arbitrator finds that the Petitioner's current condition of ill-being is causally connected to his work injury.

The Arbitrator notes that Petitioner's surgeon has taken his history into account in developing a treatment plan and the fact that Petitioner smokes cigarettes and is overweight is not a reasonable basis to deny his need for surgery.

Medical Care

Petitioner's Exhibits 5 and 6 being consist of itemized medical bills from Dr. Rinella and Accelerated Rehabilitation in the amounts of $18,496.53 and $28,119.00, respectively, totaling $46,613.53. The Arbitrator finds that the treatment rendered was reasonable and necessary as defined by Section 8(a) of the Act and supported by the treating medical records as well as the Petitioner's testimony. Therefore, the Arbitrator awards the Petitioner the sum of the medical expenses pursuant to the fee schedule.

Prospective Medical Care

After reviewing the second MRI of December 4, 2013, Dr. Rinella recommended an L4-L5 laminectomy and a lumbar interbody fusion on the right at L5-S1:

> *From a surgery perspective, I recommend a laminectomy at L4-L5 followed by a transforaminal lumbar interbody fusion on the right side at L5-S1. This procedure is necessary because the foraminal disc herniation will require*

removal of the facet which would by definition cause instability. I recommend he converts to a home exercise program as physical therapy is no longer helping him. A work conditioning program would only make his symptoms worse. He will remain off work at this time. He is now over 7 months out from his injury and clearly failed conservative management with regards to physical therapy and epidural steroid injections. He has also failed the simple laminectomy procedure. We discussed the likelihood of returning to work as a tanker truck driver. His best chance at returning to work in this capacity would be with the surgical intervention outlined. (PX 3)

The Arbitrator concludes that Petitioner is entitled to prospective medical care with respect to the entire surgery recommended by Dr. Rinella.

Temporary Benefits

The Respondent began paying TTD immediately after the July 24, 2012 accident continuing until September 29, 2013 when the benefits were terminated pursuant to Dr. Walsh's second IME on September 22, 2013.

The Petitioner testified that he told Dr. Walsh at the September 22, 2013 Section 12 exam that he was still taking pain medications, specifically that he was on a Medrol dose pack. Dr. Rinella's records indicate that he prescribed a trial of Medrol dose pack as well as Norco on September 13, 2013. Dr. Walsh failed to record this fact on his written report. Petitioner testified that Dr. Walsh's written report was also incorrect with respect to the fact that Petitioner was wearing slip-on shoes, not flip-flops, because of his inability to bend over to tie shoes. Petitioner further testified that Dr. Walsh's report was inaccurate regarding the fact that Petitioner squatted rather than bent down to pick up glasses that had fallen off his head since bending caused pain. The Petitioner testified that Dr. Walsh doctor never told him that he could return to any type of work. The Arbitrator finds Petitioner to be a credible witness whose testimony is corroborated by the treating medical records. The Arbitrator finds that the September 22, 2013 Section 12 report has been contradicted by the treating medical records and Petitioner's credible testimony.

The Arbitrator concludes that the full duty offer extended to Petitioner by Respondent on October 7, 2013 was not in good faith. This conclusion is based on the fact that Petitioner was still treating, on medication and had not been released to work.

The Arbitrator concludes that the Petitioner remains temporarily totally disabled and is entitled to temporary total disability benefits from July 25, 2012 through February 11, 2014, a period of 80 6/7 weeks. In support of this conclusion the Arbitrator notes that Petitioner has been continuously under a no-work order from July 24, 2012 to February 11, 2014.

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesse Stone,

Petitioner,

vs.

NO. 10 WC 28104

Global Brass,

Respondent.

ORDER

This case was consolidated at arbitration with claim 10 WC 28101. Arbitrator Lindsey issued one Decision on March 25, 2014 covering both claims. Petitioner reviewed the Arbitrator's Decision on the issue of nature and extent of Petitioner's permanent disability. In its Decision and Opinion on Review dated December 3, 2014, 14IWCC1032, the Commission affirmed and adopted the Decision of the Arbitrator. However, the number of this case, 10 WC 28104, was inadvertently left off the Decision and Opinion on Review. The Commission therefore issues a Decision and Opinion on Review for this case 10 WC 28104 affirming and adopting the Decision of the Arbitrator dated March 25, 2014. This has no effect on the Decision and Opinion on Review dated December 3, 2014.

DATED: APR 2 9 2015
MB/maw
r10/22/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with clarification	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jesse Stone,
Petitioner,
vs.

NO: 10 WC 28104
15IWCC0305

Global Brass,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 25, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

There is no bond due for the removal of this cause to the Circuit Court by Respondent as this was assessed on the companion case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 2 9 2015
MB/maw
o10/22/14
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

STONE, JESSE
Employee/Petitioner

Case# **10WC028101**

10WC028104

GLOBAL BRASS
Employer/Respondent

15IWCC0305

On 3/25/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4620 ARMBRUSTER DRIPPS WINTERSCHEIDT
JOHN WINTERSCHEIDT
219 PIASA ST
ALTON, IL 62002

0299 KEEFE & DePAULI PC
MICHAEL KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

15IWCC0305

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jesse Stone
Employee/Petitioner

v.

Global Brass
Employer/Respondent

Case # **10** WC **028101**

Consolidated cases: **10 WC 028104**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Collinsville**, on **January 24, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **06/08/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$84,084.00**; the average weekly wage was **$1,617.00**.

On the date of accident, Petitioner was **64** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a general credit under Section 8(j) of the Act for any medical bills paid by it through its group medical plan.

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $21.03 to Dr. Douglas Pogue, and $156.07 to Petitioner for out-of-pocket medical expenses, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 25 weeks, because the injuries sustained caused the 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

March 18, 2014
Date

MAR 25 2014

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has two claims pending against Respondent. Claim 10 WC 28101 alleges permanent injury as the result of welding fumes and particulate exposure with a date of accident of June 8, 2010. (AX 1) Petitioner contemporaneously filed an identical Application for Adjustment of Claim pursuant to the Occupational Diseases Act. (AX 3) These matters were consolidated for hearing by Order dated April 19, 2012 (AX 2) and proceeded to hearing on January 24, 2014. The parties requested one decision for both claims. The disputed issues are causal connection, medical bills, and nature and extent (AX 1).

The Arbitrator finds:

Petitioner is a sixty-eight-year-old retired welder. Petitioner testified that he quit smoking forty years ago and has never lived with a smoker. Petitioner began working for Respondent (Respondent was known as "Olin" initially and subsequently became "Global Brass") as a welder in 1990. In 1991, Petitioner resigned from Respondent's employment to begin a welding job with McDonnell Douglas. In 1995, Petitioner left McDonnell Douglas and returned to Respondent, again as a welder.

Petitioner testified that when he returned to work for Respondent in approximately 1995, he worked an average of forty hours a week. Petitioner welded different types of metal in the discharge of his duties, but approximately 90% of his welding involved copper. While welding for Respondent, he was not required to wear any breathing protection, nor did he do so. Petitioner testified that he was exposed to 90% more welding fumes in the course of his employment with Respondent than he was while working for McDonnell Douglas.

In approximately 2005, Petitioner was promoted to a foreman position for Respondent, after which time he supervised welders, again without wearing any breathing protection. Petitioner continued working forty hours a week in this position and testified

he was exposed to welding fumes every day. Petitioner retired from Respondent's employment on July 31, 2010.

During the course of his employment with Respondent, Petitioner underwent periodic pulmonary function tests through Respondent's medical department. While some of the results of the pulmonary function tests undertaken by Respondent are unclear, the first recorded test took place on April 3, 1995 and indicated mild respiratory obstruction. The next recorded test took place on February 24, 2002 and revealed moderate restriction and mild obstruction. A medical entry dated February 28, 2002 records worsening of the condition from the original testing. Thereafter, pulmonary function tests were taken on May 11, 2002, October 29, 2002, December 18, 2006 and February 27, 2007. The October 29, 2002 test was interpreted as "normal" and the December 18, 2006 test was read as revealing "moderate obstruction." The April 13, 2007 test was also read as revealing "moderate" airway obstruction. (PX 2)

In 2000, Petitioner was thrown from a horse and fractured a number of ribs resulting in a collapsed lung. Petitioner testified that following his medical release from treatment of those injuries, Petitioner did not experience any breathing problems.

In response to Petitioner's Subpoena Duces Tecum requesting "[a]ny and all OSHA records and reports of air quality testing for the work area(s) of [Petitioner] (SS#[redacted]) from 06/08/05 through the present date; and all Material Safety Data Sheets for welding rods, machines and equipment used by [Petitioner] (SS# [redacted]) from 06/08/05 to the present date", Respondent produced a number of reports establishing that Petitioner was exposed to substances that could cause or aggravate pulmonary conditions. (PX 1)

Petitioner testified that in April of 2010, he noticed a shortness of breath with exertion. Petitioner went to his personal physician, Dr. Barry Mossman, on April 23, 2010 with complaints of dyspnea on exertion when walking up inclines. Petitioner's physical examination revealed clear lungs and the doctor ordered a nuclear cardiac stress test to further assess the dyspnea. (PX 3)

Petitioner returned to Dr. Mossman on April 26, 2010 regarding right foot pain he had developed while walking in the woods mushroom hunting. Any breathing complaints were not discussed. A few days later (April 30, 2010) , Petitioner returned to see the doctor reporting the stress test had been cancelled due to elevated blood pressure. Petitioner underwent a chemical stress test instead. Petitioner reported his dyspnea and chest tightness had worsened in the previous couple of months. Petitioner was taken off all stressful and physical activity for one week until "everything was straightened out."(PX 3)

Petitioner testified that Dr. Mossman referred Petitioner to a cardiologist, who began treating Petitioner for a heart condition. (See also PX 4, p. 1/4)

Still experiencing shortness of breath, Dr. Mossman then referred Petitioner to board certified internist, Dr. Douglas Pogue whom Petitioner initially saw on June 8, 2010 with complaints of moderate shortness of breath. Petitioner was also noted to have heart issues, including fifty percent blockage. Dr. Pogue ordered pulmonary function studies. (PX 4)

As requested, Petitioner underwent a pulmonary function test at Missouri Baptist Hospital on June 8, 2010. As a result, Dr. Pogue diagnosed emphysema, or chronic airway obstruction. (PX 4, 6)

Petitioner returned to see Dr. Pogue July 9, 2010. His breathing had improved with use of Spiriva. Petitioner's high blood pressure and insomnia were also addressed at this visit. (PX 4) A similar visit is described on September 13, 2010. Petitioner reported the weather made his breathing better and he was having no problems in that regard. Physical examination of his lungs was normal. (PX 4)

Petitioner continued to treat with Dr. Pogue. Dr. Pogue's records reflect a stable COPD condition and describe Petitioner as "doing well overall" on both December 14, 2010 and February 15, 2011. On March 24, 2011 Petitioner reported more difficulties with shortness of breath, having been symptomatic for three weeks, with regard to worsening shortness of breath with exertion. Dr. Pogue diagnosed Petitioner with an acute exacerbation and recommended

symbicort and prednisone. (PX 4) On Petitioner's next three visits his symptoms were noted to be stabilized. (PX 4)

On February 16, 2012 Dr. Pogue noted Petitioner's COPD was stable although the cold air was hard on him. (PX 4)

Beginning on March 30, 2012 Petitioner switched his primary care physician to Dr. Benjamin Voss. Dr. Voss and Dr. Pogue are in the same medical group. At that visit, no shortness of breath was recorded and Petitioner's respiratory exam was normal. In July of 2012 Petitioner's COPD was described as under "fair control." Spirometry testing showed severe obstruction. Albuterol was added for wheezing, coughing, or shortness of breath. (PX 5)

Petitioner returned to see Dr. Voss on January 16, 2013, reporting complaints of fatigue. In his office note the doctor noted that Petitioner's complaints were "unlikely COPD related." They began suddenly and the doctor suspected dehydration was the cause. At Petitioner's final visit with Dr. Voss on February 8, 2013 Petitioner's complaints surrounded left ankle and big toe swelling and a gout attack was suspected. (PX 5)

Pursuant to Section 12 of the Workers' Compensation Act, Respondent had Petitioner examined by board certified pulmonologist, Dr. Gary Goldstein on July 10, 2013. In connection with his examination, Dr. Goldstein reviewed Dr. Pogue's medical records, Dr. Pogue's testimony, the material safety data sheets produced by Respondent, and records reflecting the 2010 pulmonary function test ordered by Dr. Pogue. (RX 1, exhibit)

During the examination Petitioner informed Dr. Goldstein that he was having shortness of breath with heavy exertion when walking up hills or going longer distances. He was not able to keep up with a heavy level of exertional activity or a moderate to severe level of exertional activity, but he denied any symptoms with mild exertion. Petitioner denied any specific problems with activities of daily living and noted exacerbations of his shortness of breath with cold weather and other exposures such as dust and perfumes. Petitioner reported using an inhaler to help with the wheezing and shortness of breath. Regarding his work at the church, Petitioner indicated he was able to do it and could walk six minutes without resting and upwards of a mile on level ground. He denied a particular

exercise program. Petitioner did indicate that he used a mask to help protect himself from irritants, such as when mowing his lawn.

As part of the examination Dr. Goldstein reviewed with Petitioner his employment history and medical history, noting both in his report. As part of the examination Dr. Goldstein had Petitioner undergo a walking test on a treadmill. At Dr. Goldstein's request, Petitioner underwent a pulmonary function test that revealed a "moderate – borderline mild to moderate ventilatory abnormality" (which he also described as chronic obstructive pulmonary disease) with normal lung capacity. The test revealed air trapping with mild hyperinflated volume with no evidence of oxygen desaturation. Dr. Goldstein recommended consideration of a chest x-ray and CT scan as well as some additional testing. He also recommended that Petitioner be restarted on Spriva or Tudorza and consider adding Symbicort or Advair. Exercise was also encouraged. In summary, Dr. Goldstein concurred that Petitioner had chronic obstructive pulmonary disease. He felt the condition had been undertreated to date and might benefit from further treatment; however, he did not think it was progressive in nature as manifested by the stability of the pulmonary function tests and symptoms. (RX 1, dep. exhibit)

In a supplemental report dated August 2, 2013, Dr. Goldstein opined that Petitioner's chronic obstructive pulmonary disease was related to his welding exposures. (RX 1, dep. exhibit)

Both Dr. Pogue and Dr. Goldstein were deposed.

Board certified, internal medicine physician, Dr. Douglas Pogue, testified on behalf of Petitioner on March 11, 2013. In addition to teaching medicine at Washington University School of Medicine, Dr. Pogue treats pulmonary conditions in the course of his practice. On the date of his initial examination of June 8, 2010, Dr. Pogue found that Petitioner had long-term lung changes consistent with early congestive pulmonary disease, or "COPD". He had "air trapping" and had airways in his upper lungs that were not functioning very well. Petitioner experienced wheezing with breathing. Dr. Pogue interpreted the pulmonary function test, performed at Missouri Baptist Hospital that day, as revealing airway obstruction in the moderate range and moderate to severe obstruction

on the flow loops. Dr. Pogue testified that these findings are consistent with COPD. Dr. Pogue also testified that the pulmonary function test revealed that Petitioner has lost fifty to sixty percent of his lung capacity. Based upon his examination and the pulmonary function test, Dr. Pogue diagnosed congestive, or obstructive pulmonary disease. (PX 7)

As a result of his diagnosis, Dr. Pogue prescribed inhaled medications (Spireva) to dilate the airways to enable easier air passage with less resistance. The inhaler improved Petitioner's condition, but he was not "normal" in his breathing. Based upon Dr. Pogue's assumption that Petitioner worked as a welder for Respondent five days a week, eight hours a day from 1995 through 2005, and in the course of that employment was exposed to the chemicals, products, gasses and particulates reflected in the Material Safety Data Sheets produced by Respondent in response to Petitioner's Subpoena Duces Tecum, Dr. Pogue opined, "[t]hat with that level of exposure over that period of time...that it would be reasonable that the chemicals did contribute to some degree of lung damage." "[E]xposure over that time period would certainly cause damage to the lungs." In short, Dr. Pogue testified that Petitioner's work place exposure with Respondent contributed to the pulmonary condition he diagnosed. (PX 7)

Dr. Pogue testified that Petitioner's chronic obstructive airways disease would become worse in the future. As long as he is treated biochemically, he should be fairly stable from a day-to-day standpoint, but over time, Petitioner will eventually require oxygen. Dr. Pogue testified that Petitioner will probably require oxygen in the next seven or eight years. As a result of his pulmonary condition, Petitioner will require medical treatment for the rest of his life, consisting of prescribed inhalers, oral medications and oxygen. Depending on the progression of Petitioner's disease, he may require lung reduction surgery or a lung transplant. (PX 7)

At his deposition taken on November 13, 2013, Dr. Goldstein testified that the test revealed no restrictive elements, meaning that Petitioner's lung capacity is normal, but he cannot exhale the normal amount of air. In summary, Dr. Goldstein testified that the pulmonary function test he ordered revealed that Petitioner has lost 35% of his lung capacity. (RX 1)

Dr. Goldstein testified that the July 10, 2013 pulmonary function test demonstrated stability or improvement over the 2010 test ordered by Dr. Pogue. Therefore, Dr. Goldstein testified that he has no reason to believe that Petitioner's condition is going to deteriorate over time, beyond that of normal progression. (RX 1)

Dr. Goldstein testified that Petitioner had no exposures that would cause his pulmonary condition, other than welding. Based strictly upon the number of years Petitioner worked for McDonnell Douglas versus the number of years Petitioner worked for Respondent as a welder, Dr. Goldstein opined that 55% of Petitioner's chronic obstructive pulmonary disease was caused by his welding for Respondent and 45% was due to his welding for McDonnell Douglas. In arriving at these percentages, Dr. Goldstein assumed that Petitioner was not exposed to welding fumes during the course of his job duties as a foreman for Respondent from 2005 through 2010. (RX 1)

Petitioner testified that his breathing problems have become worse since 2010. Petitioner testified that he experiences shortness of breath, tightness in his chest and increased coughing, often with mucus. He experiences wheezing about three to four times a week and has the same number and frequency of coughing episodes, which cause him to choke. While is able to walk on flat surfaces, if he walks on inclines (such as a hill), he has trouble breathing and must frequently rest. Cold weather causes his chest to become tight and results in shortness of breath. Likewise, exposure to strong odors such as perfume, exposure to dusty environments, and exposure to high humidity causes him to become short of breath. Petitioner uses his Spireva inhaler about three times a week.

Petitioner has retired from Respondent's employment. As of July of 2013 Petitioner was working at a church. (RX 1, deposition exhibit)

Petitioner testified that he has given up some of his activities as a result of his breathing problem. Petitioner testified he has sold his motorcycle because of the exposure to exhaust fumes when behind vehicles. He did apply for a drag racing license; however, no additional evidence was presented regarding the extent of Petitioner's drag racing activities. Petitioner no longer engages in wood working due to the dust associated with that activity, but is still able to mushroom hunt, which he does on flat ground along a creek

bed. When Petitioner knows he will be around dust or dirt, such as while performing lawn work, he wears a mask. He acknowledged that he did not have his inhaler with him at the hearing. The Arbitrator noted some wheezing while Petitioner testified.

As a result of his pulmonary condition, Petitioner has incurred medical bills in the amount of $3,056.03. Of that amount, Petitioner's group medical insurance has paid $1,885.52 (for which Respondent claims a Section 8(j) credit), Respondent paid nothing, Petitioner has paid $156.07 out of his own pocket and $21.03 remains outstanding.

The Arbitrator concludes:

Medical Causation (Issue F).

Petitioner's current condition of ill-being is causally related to his exposure to welding fumes while working for Respondent. Both Drs. Pogue and Goldstein testified that Petitioner's pulmonary condition is caused in whole or in part by his exposure to welding fumes while working for Respondent. Dr. Goldstein testified that Petitioner had no other exposures that would make him at risk for the development of chronic lung disease, other than welding.

Medical Bills (Issue J).

Respondent is hereby ordered to pay Dr. Douglas Pogue's outstanding medical bill in the amount of $21.03 pursuant to the Act's Medical Fee Schedule and to pay Petitioner $156.07 for his out-of-pocket medical expenses (Dr. Mossman - $60.00 and Dr. Pogue - $96.07). Respondent is granted a credit for medical bills paid by its group health medical insurer and is hereby ordered to hold Petitioner harmless for the medical bills paid by the medical insurer pursuant to Section 8(j) of the Act. There is no evidence of unreasonable or unnecessary treatment found in the record. Dr. Pogue testified to the reasonableness and necessity of the medical treatment he provided Petitioner for his chronic obstructive pulmonary disease, and Section 12 examiner, Dr. Goldstein ordered the same pulmonary function test that Dr. Pogue obtained and further recommended the very inhaler (Spireva) that Petitioner is currently using.

Nature and Extent of Injury (Issue L).

The central issue in dispute here is the nature and extent of Petitioner's injury as discussed by Petitioner's treating physician, Dr. Pogue, and that of Respondent's Section 12 examining, board certified pulmonologist, Dr. Goldstein.

Dr. Pogue testified that as long as Petitioner is treated biochemically, he should be fairly stable from a day-to-day standpoint, but over time, Petitioner will eventually require oxygen, probably within in the next seven or eight years. As a result of his pulmonary condition, Petitioner will require medical treatment for the rest of his life, consisting of prescribed inhalers, oral medications and oxygen. Depending on the progression of Petitioner's disease, he may require lung reduction surgery or a lung transplant.

Conversely, Dr. Goldstein testified that the pulmonary function test he ordered demonstrated stability or improvement over the 2010 test ordered by Dr. Pogue. Therefore, Dr. Goldstein opined that he has no reason to believe that Petitioner's condition is going to deteriorate over time, beyond that of normal progression.

For this Arbitrator to rely upon the opinions of either doctor regarding the progression of Petitioner's condition as a basis to award permanent partial disability is to engage in speculation. Rather, Petitioner's award of permanency must be based upon his current condition. His rights under Section 19(h) remain open should his condition change in the future. Petitioner testified credibly that his breathing problems have become worse since 2010; however, his condition, based upon all the medical records, has stabilized. He experiences shortness of breath, tightness in his chest and coughs up mucus. He experiences wheezing about three to four times a week and has the same number and frequency of coughing episodes, which cause him to choke. While he is able to walk on flat surfaces, if he walks on inclines, he has trouble breathing and must frequently rest. Cold weather causes his chest to become tight and results in shortness of breath. Likewise, exposure to strong odors such as perfume, exposure to dusty environments and high humidity cause him to become short of breath. Petitioner uses his Spireva inhaler about three times a week. Petitioner's testimony was corroborated by Respondent's examining physician, Dr. Goldstein. (RX 1, deposition exhibit) The Arbitrator concludes that Petitioner

has incurred 5% loss of use of the body as a whole as a result of his chronic obstructive pulmonary disease caused by his exposure of welding fumes in the course and scope of his employment with Respondent. Respondent is therefore ordered to pay Petitioner the sum of $664.72 a week for a period of 25 weeks, because the injuries sustained caused 5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☐ PTD/Fatal denied
☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN MITCHELL,

Petitioner,

vs.

NO: 02 WC 49143
03 WC 26244
11 WC 09262

DAYTON FREIGHT LINE, INC.;
HARBOR FREIGHT,

15IWCC0306

Respondent.

DECISION AND OPINION ON REMAND

The Commission is in receipt of an Order from the Circuit Court of Cook County, relative to the above captioned matter, under its case number 13 L 50965, by which it remanded the Decision of the Commission under its case number 13 IWCC 0817, instructing the Commission to calculate the temporary total disability benefits/maintenance/wage differential award.

The matter was remanded to Arbitrator Carlson who issued a "Clarification of Temporary Total Disability/Wage Differential/Maintenance Owed." However, Arbitrator Carlson did not have jurisdiction to issue a decision on remand. Therefore, we strike Arbitrator Carlson's Decision.

Upon remand from the Circuit Court of Cook County, the Commission has sole jurisdiction to render a modified opinion pursuant to the instructions of the Circuit Court. The Rules before the Commission state that "[u]pon receipt of a remanding order from a reviewing court, the Commission shall docket same and set for hearing in the same manner as petitions for review." Section 7040.50. When a petition for review is filed, the matter is automatically assigned and pending before the Commission. Therefore, Section 7040.50 means that when a remanding order is issued from a reviewing court, jurisdiction is conferred on the Commission and heard like an appeal to the Commission. The matter should not be remanded to the Arbitrator. The Supreme Court of Illinois, when discussing jurisdiction with respect to workers' compensation matters, has stated "[w]hen the circuit court remanded the cause, the Commission had jurisdiction to the same extent as before its first award; however, it was bound by the rules of law announced and the directions given by the circuit court, and it was bound to follow those directions." Stockton v. Indus. Com., 69 Ill. 2d 120, 125, 12 Ill. Dec. 744, 746, 370 N.E.2d 548, 550 (1977). Judge Cepero ordered the Commission to calculate the appropriate benefits owed. No new evidence needed to be presented or heard. The Commission, and not Arbitrator Carlson, has sole jurisdiction to calculate the award.

We find that Petitioner is entitled to temporary total disability benefits from October 7, 2010 through the date of hearing on August 24, 2012. Respondent Dayton Freight Line reduced Petitioner's disability benefits on October 7, 2010 to $283.20 as a wage differential when Petitioner began working at Respondent Harbor Freight. Petitioner should not be penalized for attempting to return to work and is entitled to his full temporary total disability benefits of $650.55 during that time.

Pursuant to the Circuit Court Order, the Commission was not asked to entertain new evidence but merely to calculate the temporary total disability benefits/maintenance/wage differential award due and owing to Petitioner.

Petitioner is entitled to his full temporary total disability award less the maintenance/temporary partial disability paid by Respondent Dayton Freight Line, less the part time wages paid by Respondent Harbor Freight, less the temporary total disability benefits paid by Respondent Harbor Freight. We calculate the amount due and owing to Petitioner as follows:

15IWCC0306

Total amount owed	($650.55 x 98-2/7 weeks)	$63,939.77
Less maintenance paid by Dayton Freight Line	($283.20 x 98-2/7 weeks)	$27,834.51
Less wages paid by Harbor Freight		$ 1,985.50
Less TTD paid by Harbor Freight		$ 3,864.52
	Total:	**$30,255.24**

IT IS THEREFORE ORDERED BY THE COMMISSION that Arbitrator Carlson's "Clarification of Temporary Total Disability/Wage Differential/Maintenance Owed" is stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's temporary total disability benefits/maintenance/wage differential award has been calculated and Petitioner is owed $30,255.24.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 30 2015
TJT: kgg
R: 4/23/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEJANDRO ALFARO,

Petitioner,

vs.

NO: 09 WC 39385
09 WC 43154 (consolidated)

STERLING STAFFING,

Respondent.

15IWCC0307

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of Petitioner's Motion to Reinstate and being advised of the facts and law, affirms and adopts the Arbitrator's Order denying the Motion to Reinstate, which is attached hereto and made a part hereof.

The Commission finds it has no jurisdiction in this case. On February 13, 2013, Arbitrator Doherty dismissed the claim for want of prosecution. On May 7, 2013, Petitioner's attorney timely filed a Motion to Reinstate. On July 18, 2013, Arbitrator O'Malley held a hearing on the Motion. As Petitioner's attorney was still unable to locate Petitioner, Arbitrator O'Malley denied the Motion to Reinstate.

A Petition for Review was not filed within the 30 days as required by the Act.

On February 28, 2014, Petitioner, acting in a pro se capacity, filed a Motion to Reinstate. This motion was filed well outside of the time period provided by the Act. On April 9, 2014,

15IWCC0307

Arbitrator Hegarty declined to hear Petitioner's Motion and issued an Order dismissing the case. However, these actions were a nullity as the period to file a Petition for Review had already passed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator Hegarty's Order signed April 9, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 30 2015
TJT: kgg
R: 3/23/15
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

15IWCC0207

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF MOTION AND ORDER

FILED
2014 FEB 27 PM 12:15

ATTENTION. You must attach the motion to this notice. If the motion is not attached, this form may not be processed. Upon filing of a motion before a Commissioner on review, the moving party is responsible for payment for preparation of the transcript.

Alejandro Alfaro
Employee/Petitioner

Case # 09 WC 039385

v.

Sterling staffing
Employer/Respondent

TO: thomas & Associates, 300 s Riverside plaza Suite 2330 CHICAGO, IL 60606

On 3-30-14 at 2:00 AM. or as soon thereafter as possible, I shall appear before the HONORABLE Arb. Hogarty or any arbitrator or commissioner appearing in his or her place at ..., Illinois, and present the attached motion for:

- ☐ Change of venue (#3072)
- ☐ Consolidation of cases (#3071) (list cases#)
- ☐ Dismissal of attorney (#3052)
- ☐ Dismissal of review (#3085)
- ☐ Fees under Section 16 (#1600)
- ☐ Fees under Section 16a (#1645)
- ☐ Hearing under Sect.19(b) (#1902)
- ☐ Penalties under Sect. 19(k) (#1911)
- ☐ Penalties under Sect. 19(l) (#1912)
- ☒ Reinstatement of case (#3074)
- ☐ Request for hearing (#R33)
- ☐ Withdrawal of attorney (#3073)
- ☐ Other (explain) ____

Alejandro Alfaro
Signature Petitioner ☒ Respondent ☐

Attorney's name and IC code # (please print)

Name of law firm, if applicable

PO BOX 34092
Street address
CHICAGO IL 60634
City, State, Zip code
(773)396-33-76
Telephone number
aexalfa@yahoo.com
E-mail address

ORDER

The motion is set for hearing on _____

Signature of arbitrator or commissioner

APPROVED BY AUTHORITY OF THE ILLINOIS WORKERS' COMPENSATION COMMISSION pursuant to the provisions of the Illinois Workers' Compensation and Workers' Occupational Diseases Acts

APR 04 2014

The motion is ___ Granted ___ Withdrawn ___ Continued to _____
___ Denied ☒ Dismissed ___ Set for trial (date certain) on _____

Signature of arbitrator or commissioner

By: Jessica A. Hogarty, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Cardella,

Petitioner,

vs. NO: 12 WC 39832

City of Chicago, **15IWCC0308**

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability, penalties, fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 16, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 30 2015
TJT:yl
o 3/24/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

CARDELLA, JOHN
Employee/Petitioner

Case# **12WC039832**

13WC015134

CITY OF CHICAGO
Employer/Respondent

15IWCC0308

On 7/16/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2194 STROM & ASSOC
LINDSAY STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0113 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

15IWCC0308

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John Cardella
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **39832**

Consolidated cases: **13 WC 15134**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **April 17, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☐ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the alleged dates of accident, **September 15, 2012** and **April 3, 2013** Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did* exist between Petitioner and Respondent.

On **September 15, 2012**, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

On **April 3, 2013**, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of the **April 3, 2013** accident *was* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the **April 3, 2013** accident.

In the year preceding the injury, Petitioner earned **$70,408.00**; the average weekly wage was **$1,354.00**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

No benefits are awarded in case number 12 WC 39832, because Petitioner failed to prove by a preponderance of the credible evidence that an accident occurred on September 15, 2012 or on a Tuesday near that date.

No benefits are awarded in case number 13 WC 15134, because Petitioner's current condition of ill being is not causally related to the April 3, 2013 accident.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

July 16, 2014
Date

JUL 16 2014

FACTS

Petitioner is employed by Respondent as a motor truck driver. Petitioner testified that his duties include driving a garbage truck and not picking up garbage. Petitioner testified that on September 15, 2012 he was at work, that he drove a truck over a speed bump, that he shot up, and that his head hit the cab. He testified that he felt pain like his back was on fire. He testified that he finished his work shift and that when he returned his truck he notified Jimmy Szewczyk, the foreman. Petitioner testified that most of the time when a work related accident occurs, the supervisor completes an accident report, the employee signs the report, and the employee is sent to Mercyworks.

Petitioner saw Dr. Michael Fisher for nonrelated suture removal on September 20, 2012. Dr. Fisher's record of that visit does not include a history of a work accident or complaints of back pain (PX2).

Petitioner testified on direct examination that on September 27, 2012 he went to the Advocate Lutheran General Hospital emergency room, with complaints of back and leg pain. The medical records do not show a history of driving over a speed bump (PX1). Petitioner testified on cross examination that he went to the emergency room the week of September 15, 2012 but that he does not have those records (T40).

Petitioner saw Dr. Fisher on October 1, 2012. Dr. Fisher's record of that visit does not include a history of a work injury (PX2).

Petitioner testified that he applied for a leave of absence on October 5, 2012, and he identified the signed written request form. In the portion of the form entitled TYPE OF LEAVE "duty disability" is not marked; "medical leave" and other "FMLA other" are marked. Dr. Fisher's attached medical note states that the approximate date that the condition commenced was October 1, 2012 and does not state that there was a work accident. The leave of absence was approved. It was effective on October 2, 2012, and it expired on December 24, 2012 (RX1).

Petitioner returned to the Advocate Lutheran General Hospital emergency room on October 8, 2012 complaining of low back pain with an onset date of September 27, 2012. The medical records do not show a history of a work injury (PX1).

Petitioner followed up with Dr. Fisher on October 9, 2012. Dr. Fisher's record of that visit does not include a history of a work injury (PX2).

Petitioner underwent a lumbar spine MRI on October 11, 2012. The report stated that there was a moderate size herniated extruded disc to the right at L4-L5 extending inferiorly behind L5 and may be affecting the right L5 nerve. The report further states that there is bilateral spondylolysis at L-5 with mild anterior subluxation and that the foramina are narrowed right more than left (PX1).

Petitioner saw Dr. Fisher on October 15, 2012. Petitioner was referred to an orthopedic surgeon, Dr. Ho Min Lim. Dr. Fisher's record of that visit does not include a history of a work injury (PX2).

Petitioner was examined by Dr. Christopher Bergin on October 18, 2012. Dr. Bergin's records of that visit state that the pain began in mid-September when Petitioner in his usual capacity as a garbage truck driver went over speed bump which basically launched him into the air. The records further state "Patient denies any problems with his back prior to this injury." (PX3).

The records of Mercyworks state that on August 22, 2006 Petitioner complained of back pain occurring on August 18, 2006. The Mercyworks records state that on September 29, 2006, a CT scan showed grade 1 spondylolisthesis with spinal stenosis and degenerative disc disease. Petitioner was diagnosed with lumbosacral spine and coccyx contusion/sprain (RX3).

Dr. Bergin performed a right laminotomy, discectomy at L4-L5 on October 24, 2012. The operative report states, on the first page, that the plan was to do microdiscectomy L4-L5 and the right side through a laminotomy approach; that he [Petitioner] may need a hemilaminectomy because the risk was the disk was extruded inferiorly; that this was discussed with him at length; that he understands and agrees with the treatment plan; that he also understands in doing even a laminotomy, he may progress his slip or remain symptomatic and require fusion which would be L4 to the sacrum (PX1).

Petitioner testified that following the surgery his symptoms persisted. Dr. Bergin recommended the additional surgery. However, on January 11, 2013 Petitioner requested and received a return to work as a motor truck driver. Petitioner had continuing treatment and follow-up visits with Dr. Bergin and Dr. Fisher. (PX3).

Petitioner testified that on April 3, 2013 he again drove a garbage truck over a speed bump, bounced in his seat, and had the same symptoms. Petitioner testified that he was taken to Thorek Hospital. Petitioner testified that his foreman, Jimmy Szewczyk, came to the hospital to see him. The records of Illinois Bone and Joint Institute where introduced. Those records include an April 3, 2013 lumbar spine MRI report. The MRI report states that there is no evidence of epidural abscess or epidural mass effect upon the thecal sac and no evidence of spinal canal stenosis. The MRI report further states that there appear to be postsurgical changes at L4-L5 on the right side and there appears to be localized bulging of disc at L4-L5 (PX4).

Petitioner came under the medical treatment of Dr. Krzysztof Siemionow, an orthopedic surgeon at Illinois Bone and Joint Institute, on April 17, 2014. Dr. Siemionow's record of that visit states that after surgery Petitioner was able to walk, but he was never completely symptomatic, however he was good enough to return back to work. Petitioner underwent continued treatment and the same symptoms persisted (PX4).

On August 5, 2013 Dr. Siemionow performed a right L4-L5 hemilaminectomy and resection of recurrent disc herniation, laminectomy of L5-S1 with nerve root decompression and posterior spinal fusion with screws from L4 to S1 (PX4).

On August 29, 2013 Dr. Siemionow performed an anterior lumbar interbody fusion, L4-L5, L5-S1, and application of an intervertebral biomechanical device, L4-L5, L5-S1 (PX4).

Petitioner has not returned to work and complains of ongoing symptoms.

James Szewczyk testified as Respondent's witness. He testified that Petitioner never reported an accident September 15, 2012 and that if an accident were reported then standard written reporting procedures would have been implemented. Mr. Szewczyk testified that Petitioner did not work on the alleged accident date, September 15, 2012. Mr. Szewczyk referred to a Respondent attendance form which showed that September 15, 2012 fell on a weekend, when Petitioner did not work (RX2).

Petitioner testified as a rebuttal witness. He testified that the first accident occurred on a Tuesday.

Dr. Siemionow testified at an evidence deposition. Dr. Siemionow opined that there is a causal relationship between the work activity on April 3, 2013 and Petitioner's condition of ill being (PX5).

Petitioner was examined by Dr. Daniel Troy at respondent's request on September 6, 2013, and he testified at an evidence deposition. Dr. Troy opined that there is no causal relationship between the work activity on April 3, 2013 and Petitioner's subsequent medical treatment or current condition of ill being (RX7).

CONCLUSIONS OF LAW

CASE # 12 WC 39832

ACCIDENT

The Arbitrator finds that Petitioner did not sustain an accident on September 15, 2012 or on a Tuesday near that date. The Arbitrator notes that Petitioner's proposed decision proposes September 18, 2012 as an accident date. However, the Arbitrator finds that Petitioner has not proved by the preponderance of the credible evidence that an accident actually occurred.

Petitioner was not a credible witness, and his testimony did not survive cross examination.

James Szewczyk contradicted Petitioner's testimony. He was a credible witness, and his credibility withstood cross examination.

The documents closest in time to an alleged accident date do not corroborate that an accident occurred. The documents of Dr. Fisher, Advocate Lutheran General Hospital, and Respondent's leave of absence form were prepared between September 20, 2012 and October 15, 2012. None of those documents corroborate a traumatic injury to the spine on or about September 15, 2012.

The first history of accident is Dr. Bergin's record dated October 18, 2012. However, it then incorrectly stated that the patient denied any prior back problems. The nonfactual history given by Petitioner raises a question as to the sincerity of the entire history.

Based upon the foregoing, the Arbitrator finds that Petitioner did not sustain an accident on September 15, 2012 or on a Tuesday near that date.

The remaining issues are moot.

CASE # 13 WC 15134

ACCIDENT AND NOTICE

The Arbitrator finds that Petitioner sustained an accident on April 4, 2013. He testified that he went over speed bump, that he was taken to Thorek Hospital, and that James Szewczyk came to the hospital to see him.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained an accident on April 4, 2013.

Based upon the foregoing, the Arbitrator further finds that timely notice of the April 3, 2013 accident was given to Respondent.

CAUSATION

The Arbitrator finds that Petitioner's current condition of ill being is not causally related to the April 3, 2013 accident.

Petitioner's testimony regarding causation, like his testimony regarding accident, was not credible. Petitioner was not forthcoming regarding his prior back problems. Petitioner has been consistently inaccurate in his medical histories. Accordingly, whatever testimony he has given requires persuasive medical corroboration and factual consistency, which are lacking.

Dr. Siemionow and Dr. Troy testified to differing medical opinions. In this case, the Arbitrator is persuaded by Dr. Troy's opinions that Petitioner's symptoms, findings, and treatment recommendations have been essentially the same before and after the alleged April 3, 2013 occurrence.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being is not causally related to the April 3, 2013 accident.

The remaining issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Cardella,

Petitioner,

vs.

NO: 13 WC 15134

15IWCC0309

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability, penalties, fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 16, 2014, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

15IWCC0309

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 30 2015
TJT:yl
o 3/24/15
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

CARDELLA, JOHN
Employee/Petitioner

Case# **12WC039832**

13WC015134

CITY OF CHICAGO
Employer/Respondent

15IWCC0309

On 7/16/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2194 STROM & ASSOC
LINDSAY STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0113 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

15IWCC0309

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

John Cardella
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **39832**

Consolidated cases: **13 WC 15134**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **April 17, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☐ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

15IWCC0309

On the alleged dates of accident, **September 15, 2012** and **April 3, 2013** Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On **September 15, 2012**, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

On **April 3, 2013**, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of the **April 3, 2013** accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the **April 3, 2013** accident.

In the year preceding the injury, Petitioner earned **$70,408.00**; the average weekly wage was **$1,354.00**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

No benefits are awarded in case number 12 WC 39832, because Petitioner failed to prove by a preponderance of the credible evidence that an accident occurred on September 15, 2012 or on a Tuesday near that date.

No benefits are awarded in case number 13 WC 15134, because Petitioner's current condition of ill being is not causally related to the April 3, 2013 accident.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Fulton Black
Signature of Arbitrator

July 16, 2014
Date

JUL 16 2014

FACTS

Petitioner is employed by Respondent as a motor truck driver. Petitioner testified that his duties include driving a garbage truck and not picking up garbage. Petitioner testified that on September 15, 2012 he was at work, that he drove a truck over a speed bump, that he shot up, and that his head hit the cab. He testified that he felt pain like his back was on fire. He testified that he finished his work shift and that when he returned his truck he notified Jimmy Szewczyk, the foreman. Petitioner testified that most of the time when a work related accident occurs, the supervisor completes an accident report, the employee signs the report, and the employee is sent to Mercyworks.

Petitioner saw Dr. Michael Fisher for nonrelated suture removal on September 20, 2012. Dr. Fisher's record of that visit does not include a history of a work accident or complaints of back pain (PX2).

Petitioner testified on direct examination that on September 27, 2012 he went to the Advocate Lutheran General Hospital emergency room, with complaints of back and leg pain. The medical records do not show a history of driving over a speed bump (PX1). Petitioner testified on cross examination that he went to the emergency room the week of September 15, 2012 but that he does not have those records (T40).

Petitioner saw Dr. Fisher on October 1, 2012. Dr. Fisher's record of that visit does not include a history of a work injury (PX2).

Petitioner testified that he applied for a leave of absence on October 5, 2012, and he identified the signed written request form. In the portion of the form entitled TYPE OF LEAVE "duty disability" is not marked; "medical leave" and other "FMLA other" are marked. Dr. Fisher's attached medical note states that the approximate date that the condition commenced was October 1, 2012 and does not state that there was a work accident. The leave of absence was approved. It was effective on October 2, 2012, and it expired on December 24, 2012 (RX1).

Petitioner returned to the Advocate Lutheran General Hospital emergency room on October 8, 2012 complaining of low back pain with an onset date of September 27, 2012. The medical records do not show a history of a work injury (PX1).

Petitioner followed up with Dr. Fisher on October 9, 2012. Dr. Fisher's record of that visit does not include a history of a work injury (PX2).

Petitioner underwent a lumbar spine MRI on October 11, 2012. The report stated that there was a moderate size herniated extruded disc to the right at L4-L5 extending inferiorly behind L5 and may be affecting the right L5 nerve. The report further states that there is bilateral spondylolysis at L-5 with mild anterior subluxation and that the foramina are narrowed right more than left (PX1).

Petitioner saw Dr. Fisher on October 15, 2012. Petitioner was referred to an orthopedic surgeon, Dr. Ho Min Lim. Dr. Fisher's record of that visit does not include a history of a work injury (PX2).

Petitioner was examined by Dr. Christopher Bergin on October 18, 2012. Dr. Bergin's records of that visit state that the pain began in mid-September when Petitioner in his usual capacity as a garbage truck driver went over speed bump which basically launched him into the air. The records further state "Patient denies any problems with his back prior to this injury." (PX3).

The records of Mercyworks state that on August 22, 2006 Petitioner complained of back pain occurring on August 18, 2006. The Mercyworks records state that on September 29, 2006, a CT scan showed grade 1 spondylolisthesis with spinal stenosis and degenerative disc disease. Petitioner was diagnosed with lumbosacral spine and coccyx contusion/sprain (RX3).

Dr. Bergin performed a right laminotomy, discectomy at L4-L5 on October 24, 2012. The operative report states, on the first page, that the plan was to do microdiscectomy L4-L5 and the right side through a laminotomy approach; that he [Petitioner] may need a hemilaminectomy because the risk was the disk was extruded inferiorly; that this was discussed with him at length; that he understands and agrees with the treatment plan; that he also understands in doing even a laminotomy, he may progress his slip or remain symptomatic and require fusion which would be L4 to the sacrum (PX1).

Petitioner testified that following the surgery his symptoms persisted. Dr. Bergin recommended the additional surgery. However, on January 11, 2013 Petitioner requested and received a return to work as a motor truck driver. Petitioner had continuing treatment and follow-up visits with Dr. Bergin and Dr. Fisher. (PX3).

Petitioner testified that on April 3, 2013 he again drove a garbage truck over a speed bump, bounced in his seat, and had the same symptoms. Petitioner testified that he was taken to Thorek Hospital. Petitioner testified that his foreman, Jimmy Szewczyk, came to the hospital to see him. The records of Illinois Bone and Joint Institute where introduced. Those records include an April 3, 2013 lumbar spine MRI report. The MRI report states that there is no evidence of epidural abscess or epidural mass effect upon the thecal sac and no evidence of spinal canal stenosis. The MRI report further states that there appear to be postsurgical changes at L4-L5 on the right side and there appears to be localized bulging of disc at L4-L5 (PX4).

Petitioner came under the medical treatment of Dr. Krzysztof Siemionow, an orthopedic surgeon at Illinois Bone and Joint Institute, on April 17, 2014. Dr. Siemionow's record of that visit states that after surgery Petitioner was able to walk, but he was never completely symptomatic, however he was good enough to return back to work. Petitioner underwent continued treatment and the same symptoms persisted (PX4).

On August 5, 2013 Dr. Siemionow performed a right L4-L5 hemilaminectomy and resection of recurrent disc herniation, laminectomy of L5-S1 with nerve root decompression and posterior spinal fusion with screws from L4 to S1 (PX4).

On August 29, 2013 Dr. Siemionow performed an anterior lumbar interbody fusion, L4-L5, L5-S1, and application of an intervertebral biomechanical device, L4-L5, L5-S1 (PX4).

Petitioner has not returned to work and complains of ongoing symptoms.

James Szewczyk testified as Respondent's witness. He testified that Petitioner never reported an accident September 15, 2012 and that if an accident were reported then standard written reporting procedures would have been implemented. Mr. Szewczyk testified that Petitioner did not work on the alleged accident date, September 15, 2012. Mr. Szewczyk referred to a Respondent attendance form which showed that September 15, 2012 fell on a weekend, when Petitioner did not work (RX2).

Petitioner testified as a rebuttal witness. He testified that the first accident occurred on a Tuesday.

Dr. Siemionow testified at an evidence deposition. Dr. Siemionow opined that there is a causal relationship between the work activity on April 3, 2013 and Petitioner's condition of ill being (PX5).

Petitioner was examined by Dr. Daniel Troy at respondent's request on September 6, 2013, and he testified at an evidence deposition. Dr. Troy opined that there is no causal relationship between the work activity on April 3, 2013 and Petitioner's subsequent medical treatment or current condition of ill being (RX7).

CONCLUSIONS OF LAW

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ACCIDENT

The Arbitrator finds that Petitioner did not sustain an accident on September 15, 2012 or on a Tuesday near that date. The Arbitrator notes that Petitioner's proposed decision proposes September 18, 2012 as an accident date. However, the Arbitrator finds that Petitioner has not proved by the preponderance of the credible evidence that an accident actually occurred.

Petitioner was not a credible witness, and his testimony did not survive cross examination.

James Szewczyk contradicted Petitioner's testimony. He was a credible witness, and his credibility withstood cross examination.

The documents closest in time to an alleged accident date do not corroborate that an accident occurred. The documents of Dr. Fisher, Advocate Lutheran General Hospital, and Respondent's leave of absence form were prepared between September 20, 2012 and October 15, 2012. None of those documents corroborate a traumatic injury to the spine on or about September 15, 2012.

The first history of accident is Dr. Bergin's record dated October 18, 2012. However, it then incorrectly stated that the patient denied any prior back problems. The nonfactual history given by Petitioner raises a question as to the sincerity of the entire history.

Based upon the foregoing, the Arbitrator finds that Petitioner did not sustain an accident on September 15, 2012 or on a Tuesday near that date.

The remaining issues are moot.

CASE # 13 WC 15134

ACCIDENT AND NOTICE

The Arbitrator finds that Petitioner sustained an accident on April 4, 2013. He testified that he went over speed bump, that he was taken to Thorek Hospital, and that James Szewczyk came to the hospital to see him.

Based upon the foregoing, the Arbitrator finds that Petitioner sustained an accident on April 4, 2013.

Based upon the foregoing, the Arbitrator further finds that timely notice of the April 3, 2013 accident was given to Respondent.

CAUSATION

The Arbitrator finds that Petitioner's current condition of ill being is not causally related to the April 3, 2013 accident.

Petitioner's testimony regarding causation, like his testimony regarding accident, was not credible. Petitioner was not forthcoming regarding his prior back problems. Petitioner has been consistently inaccurate in his medical histories. Accordingly, whatever testimony he has given requires persuasive medical corroboration and factual consistency, which are lacking.

Dr. Siemionow and Dr. Troy testified to differing medical opinions. In this case, the Arbitrator is persuaded by Dr. Troy's opinions that Petitioner's symptoms, findings, and treatment recommendations have been essentially the same before and after the alleged April 3, 2013 occurrence.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill being is not causally related to the April 3, 2013 accident.

The remaining issues are moot.