STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey Guzman,
Petitioner,

vs.

NO: 09 WC 30323

Martin Cement Company,
Respondent.

16IWCC0240

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 accident, notice, causation, average weekly wage, medical expenses, temporary total disability, permanent disability and additional compensation/attorneys' fees and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds per Petitioner's PX19 and Respondent's RX6, Petitioner's average weekly wage is $1,903.33. Petitioner is entitled to $2,847.03 in medical expenses which consist of the unpaid medical bill for Hanger Orthopedics, Parkview Medical Center and Parkview Orthopedics. Pursuant to the bankruptcy Order, Petitioner's medical expenses that were incurred prior to December 6, 2012 are vacated. The Commission finds that Petitioner did not perform a valid job search and as a result Petitioner's maintenance award is vacated.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,231.41 per week for a period of 79-5/7 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 commencing on 12/8/10 Respondent pay to Petitioner the sum of $720.00 per week for the duration of his disability, a provided in §8(d)1 of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing his usual and customary line of employment.

16IWCC0240

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,847.03 for medical expenses under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $153,085.71 paid to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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 1 - 2016

MB/jm

O: 3/17/16

43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

GUZMAN, JEFFREY
Employee/Petitioner

Case# **09WC030323**

09WC031821
12WC021638
12WC021639

MARTIN CEMENT COMPANY
Employer/Respondent

16IWCC0240

On 1/16/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

0274 HORWITZ HORWITZ & ASSOC
MITCHELL HORWITZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2986 PAUL A COGHLAN & ASSOC PC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

16IWCC0240

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
PMO CORRECTED ARBITRATION DECISION
1/12/15

Jeffrey Guzman,
Employee/Petitioner

v.

Martin Cement Company,
Employer/Respondent

Case # **09** WC **30323**

Consolidated cases: **09 WC 31821, 12 WC 21638 & 12 WC 21639**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **8/8/14 & 8/12/14**. 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. [x] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0240

FINDINGS

On **4/27/09**, 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*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,006.85**; the average weekly wage was **$1,909.71**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$153,085.71** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$153,083.71**.

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

ORDER

PMO 1/12/15

Respondent shall pay Petitioner maintenance benefits of $1,231.41 per week for ~~77-2/7~~ 59-6/7 weeks, commencing ~~8/8/10~~ 12/8/10 through 1/30/12, as provided in Section 8(a) of the Act.

PMO 1/12/15

Respondent shall pay Petitioner temporary total disability benefits of $1,231.41 per week for 79-5/7 weeks, commencing 5/29/09 through 12/7/10, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 5/30/08 through 8/12/14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of $4,543.54, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent shall pay Petitioner permanent partial disability benefits, commencing 1/31/12, of $720.00 per week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay to Petitioner penalties of **$0.00**, as provided in Section 16 of the Act; **$0.00**, as provided in Section 19(k) of the Act; and **$0.00**, as provided in Section 19(l) of the Act.

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.

Patrick Kelly

Signature of Arbitrator

PMO 1/12/15

~~12/3/14~~ **1/12/15**

Date

JAN 16 2015

STATEMENT OF FACTS:

The following four (4) consolidated claims proceeded to trial on August 8, 2014 and proofs were closed on August 12, 2014: 09 WC 31821 (D/A = 5/30/08), 09 WC 30323 (D/A = 4/27/09), 12 WC 21638 (D/A = 6/26/09) and 12 WC 21639 (D/A = 7/30/09). At trial, Petitioner was allowed to amend, without objection, the Application for Adjustment of Claim for 09 WC 31821 to allege a date of accident of May 30, 2008 and the alleged date of accident for claim 12 WC 21638 to June 26, 2009. The parties stipulated that questions asked using the previously alleged dates of accident would result in the same answers using the amended dates of accident.

At arbitration, Petitioner's attorney agreed that Mr. Guzman would currently be earning $39.25 per hour in his previous union position, given that his prior local (803) has since merged into Local 502b. Petitioner's attorney thereupon amended the cement finisher wage scale information submitted as part of PX13, PX14 and PX15 to reflect the change in local designation.

At the time of the first alleged date of accident, May 30, 2008 (09 WC 31821), Petitioner was employed by the respondent as a cement finisher. Petitioner testified that he graduated from high school in 1978 and had worked as a cement mason since that time. He has no other formal training or education. During his finishing career, he worked out of a union hall, Local 803. Petitioner testified that as a cement finisher he would work in boots that would weigh anywhere from 5 to 8 pounds, and would become even heavier when they had concrete on them. Petitioner would walk in wet concrete on a daily basis, which could be from 4 to 12 inches deep. He also worked a lot on his knees, finishing boarders and edges of concrete. To perform this work, Petitioner wore knee pads and kneeled on a metal "cookie sheet" or "slider". Petitioner testified that photo admitted at PX29 accurately depicted the work he would do when on his knees. He noted that during a normal work day he would spend 2 to 4 hours in the kneeling position depicted in PX29. In addition, Petitioner was required to lift heavy objects on a regular basis. He explained that lifting a float machine would take four men, lifting a 150 pound machine on a daily basis. Petitioner would also push 200 pound barrels of concrete, lift buckets of concrete weighing 50 pounds and use a 12 pound hammer to pound stakes.

In 1984 he underwent a right knee arthroscopic surgery, after which he returned to work at full duty as a cement mason. This was work related and settled for 22.5% loss of use of the right leg in 1985 against the same Respondent as this case. (RX15). In 2001, he underwent left knee surgery, also returning to full duty thereafter. This was also work related and settled for 27% loss of use of the left leg in 2002 also against the same Respondent. (RX16). From 2001 through May of 2008, Petitioner underwent no medical treatment for either of his knees and worked full duty as a cement finisher.

Petitioner had worked for respondent since the year 1980, and had complied over 34,000 work hours in the employ of Martin Cement. (PX27; PX28; PX32).

In the spring of 2008 Petitioner had worked for Respondent for approximately 6 weeks. He testified that during that time he had to be available to work five days per week, eight hours per day. Petitioner explained that he was available to work at all times during the 5 day work week. Each morning he called Respondent at 5:00 a.m. and spoke with Randy Starck, Respondent's superintendent, who would tell Petitioner whether work was available for him that day. Petitioner testified that if the weather was bad, the work would get called off, but he was always available.

Petitioner testified that on May 30, 2008 (09 WC 31821) he was walking in approximately 18 inches of stiff concrete while pouring paving for Respondent. While performing his job duties, Petitioner attempted to crouch

over and pick up his right foot out of the concrete when he felt pain in his right knee. Petitioner testified that after the incident he approached his foreman, Craig Gaska, at about 8:15 am and told him that he thought his knee had just given out. Petitioner indicated that Mr. Gaska then told him to get out of the concrete and go cut wood. Mr. Gaska later testified that he could not recall such a conversation on that date, and that he did not advise Petitioner to cut wood in 2008. He further denied, on cross examination, the possibility of such a conversation taking place, noting that he would have filled out an accident form if that had been the case.

Petitioner testified that the next day, May 31, 2008, he noticed swelling in his right knee. On that day he sought medical treatment at the emergency room at Adventist Bolingbrook Hospital reporting pain in the right knee. The treatment notes from Adventist state that Petitioner works as a cement layer and that he does "a lot of kneeling" and always notes swelling after work. Petitioner was diagnosed with pre-patellar swelling of the right knee. (PX8).

Petitioner testified on direct examination that prior to May 30, 2008 he was "fine." On cross examination, he likewise initially testified that he had no symptoms in the knees during the two to three months leading up to the May 30, 2008 incident. However, the May 31, 2008 note from Adventist Bolingbrook Hospital notes that Petitioner had experienced right knee pain for four weeks. (PX8). When asked about this, Petitioner claimed to be confused, but conceded that if it was written down "the nurse would not make it up." Later, on re-direct, Petitioner agreed with the initial treating records if they reflect that he had had fluid or edema in the knee for month, and that he had swelling as well as aches and pain. However, he noted that it did not stop him from working, and that he continued to work through the pain throughout this time. In addition, Petitioner agreed that in 2001, following his prior work-related knee injury, that the doctor had told him he might need a total knee replacement. However, Petitioner noted that he continued to work the ensuing seven (7) years as a cement finisher.

Petitioner continued to work following the May 30, 2008 incident and did not lose time from work. On cross examination, Petitioner testified that he worked light duty during this time, running a saw and cutting plywood. Upon further questioning, Petitioner agreed that he also worked for other concrete "outfits" in July of 2008 and that there was "another finisher on the job." However, when asked whether that meant that he did not finish any concrete during this time, Petitioner responded that he "didn't say [he] didn't finish concrete." Petitioner testified that he favored his right knee and led with his left leg while working after this accident. He also tried working with an unloader brace, but it did not allow him enough movement to work. He started noticing pain on the left knee thereafter.

Due to continued pain in the right knee, Petitioner visited Dr. Gridhar Burra of Hinsdale Orthopaedics on August 14, 2008. (PX2).

Petitioner testified that from August 2008 through April of 2009 he kept in touch with Randy Starck, Respondent's superintendent. He called Mr. Starck daily asking to see if work was available. Petitioner would also come into Respondent's building and sit in the break room to have coffee and talk with the employees.

Petitioner testified that in April of 2009, after speaking with Mr. Starck and being offered work, he returned to work for Respondent for approximately 12 days. During that time, Petitioner's work tasks required kneeling for over 6 hours per day. While performing this work, the petitioner noticed increasing pain in his knees. According to the petitioner, this was the toughest job he had worked on with regard to the pain and swelling in the knees.

Superintendent Randy Starck testified that he spoke to Petitioner in the first week of April 2009. Mr. Starck indicated that Petitioner had called him and said that he was looking for work, that his knees were shot and that he was looking for a few more hours through the union. He indicated that he ended up putting Petitioner back on a few jobs. Mr. Starck also testified that he was not aware any report of injury to Petitioner's knees in 2008 or 2009. Furthermore, Mr. Starck testified that he makes the work schedules for Respondent and that in reviewing his schedules he noticed that Dave Buss was Petitioner's foremen on May 30, 2008. However, he noted that the schedule also shows that Craig Gaska was Petitioner's foreman both before and after that date, and that Mr. Gaska was indeed present on the job site on May 30, 2008, or the date of the initial alleged injury.

Petitioner testified that on April 27, 2009 (09 WC 30323) he experienced tightness, pain and swelling in both knees which led him to stop working because he could no longer perform his duties. Petitioner testified that around 3:00 p.m. on that day he had a conversation with his foreman, Paul Hendry, at which time he informed Mr. Hendry that he blew out his knee and that he was in a lot of pain. Petitioner indicated that Mr. Hendry then instructed him to "go sit on a bucket" and wait until quitting time at 3:30 p.m. Mr. Hendry later denied that this conversation ever took place. Mr. Hendry testified that Petitioner did not report an incident on that date and that he did not tell him to sit on a bucket. However, on cross-examination, Mr. Hendry conceded that he would not report a headache or finger ache, or body soreness after a hard day of work.

Petitioner last worked as a cement finisher, for Respondent or any other employer, on April 27, 2009. He has not worked anywhere else since.

Petitioner testified that after he visited Dr. Burra on May 29, 2009 he saw Mr. Starck in his office and gave him an off work slip. Petitioner indicated that when he informed Mr. Starck at that time that he had hurt his knee, Mr. Starck replied: "I knew you would sue me you son of a bitch."

Mr. Starck, for his part, testified that he spoke to Petitioner in his office on June 1, 2009, and that Mr. Guzman informed him at that time that his knees were shot and that he didn't know if it was workers' compensation, but that he was trying to get on disability. Mr. Starck denied telling Petitioner that he knew Mr. Guzman was going to sue him.

Petitioner eventually underwent a right total knee arthroplasty on October 12, 2009 at the hands of Dr. Daniel Newman. A left total knee arthroplasty was subsequently performed by Dr. Newman on December 7, 2009. (PX9). Petitioner testified that he noticed that his feet and ankles were swollen following surgery and during rehab. He indicated that he was sent to a foot specialist in November of 2009.

In an office note dated October 12, 2010, Dr. Newman indicated that he was of the opinion "...that the problem with his foot and ankle is directly related to his work activities and to his knee problem. I think the years of knee deformity and then the correction of the deformity with the total knee prostheses has thrown his bilateral feet and ankles off and has aggravated the situation, causing his current symptoms." (PX1). Dr. Newman indicated that Petitioner was unable to return to even his light duty at that time. (PX1).

In an office note dated December 7, 2010, Dr. Newman noted that Petitioner had recently seen foot and ankle surgeon Dr. Vora regarding his feet and that no surgery was advised. (PX1). Dr. Newman also noted that Petitioner was told that he probably will have some discomfort but that there were no significant degenerative changes. (PX1). As a result, Dr. Newman opined that Petitioner's condition had now stabilized and that he had reached maximum medical improvement. (PX1). Dr. Newman recommended that Petitioner wear Orthotics at all times and shoes capable of accommodating them. (PX1). Petitioner was discharged from care by Dr.

Newman at that time and released to work with permanent restrictions of no prolonged standing or walking, no lifting greater than 10 pounds and no crawling or kneeling. (PX1).

Petitioner subsequently conducted a job search, as evidenced by job search logs from August 9, 2011 through January 30, 2012. (PX20). Petitioner testified that he looked for work at any job openings his sister-in-law could find on the computer. He also indicated that his sister-in-law filled out the logs for him. He noted that he did not receive any job offers as a result of this search. This job search was initiated after vocational counselor Susan Entenberg suggested that Petitioner look for work. Petitioner testified that he had never operated a computer, worked at a desk, or answered phones professionally before engaging in this job search.

Petitioner testified that he started getting workers' compensation benefits in the fall of 2009, and that he received benefits along these lines until they were cut off following his visit with Respondent's §12 physician on May 4, 2012.

Petitioner testified that if he did not have knee surgeries or restrictions, he had no plans to leave the cement mason trade. Petitioner also testified to the current condition of his legs. He stated that he still has pain and swelling in both knees and that he suffers from restless leg syndrome at night. In addition, he indicated that he feels that he wobbles when he walks and that he can no longer be outside for more than two hours. Petitioner testified that he also experiences swelling in his feet and ankles. He also noted that he continues to wear orthotics and that he wears out the outside portion of boots due to his ankle collapse.

After he was injured, his union, Local 803, merged with Local 502 and is recorded on the union pay scale as Local 502(b). Petitioner has not worked since the merger of these unions, and he has not worked since April 27, 2009.

Board certified orthopedic surgeon Dr. Daniel Newman testified by way of evidence deposition on July 19, 2012. Dr. Newman noted that osteoarthritis in the knee is a degenerative condition where the articular cartilage, cushioning in the knee, wears away. He stated that it has been documented that people who do heavy work, who work in squatting position or on their knees, will have greater incidence of osteoarthritis in their knees. (PX16, p.7). Furthermore, Dr. Newman opined that for an individual who had a meniscus surgery 10 or 15 years earlier, doing heavy manual labor will cause degeneration, and since the individual had one less cushioning mechanism in their joint, they are more likely to develop osteoarthritis in the compartment that was operated on than the other compartment or other knee. (PX16, pp.7-8). Dr. Newman noted that when he first saw Petitioner on July 30, 2009 he felt Mr. Guzman needed bilateral knee replacements, which were related to the incidents at work and the nature of his occupation. (PX16, p.8). He explained that Petitioner lifted and carried heavy weights, was on his knees for long periods of time finishing cement and slogging through wet cement on a regular basis. He also noted that Petitioner's medial compartments were probably predisposed to degenerative arthritis due to the prior surgery. (PX16, p. 9). Dr. Newman stated that when performing his job duties, Petitioner was putting pressure on the posterior cartilage when he squatted down. Dr. Newman explained that squatting is one of the most common reasons for people to tear their posterior menisci. (PX16, pp.10-11). Dr. Newman felt that Petitioner's injuries were a repetitive condition given that he repetitively got up and down from a kneeling position, carried things on a regular basis, and slogged through wet concrete, all of which affected his knees. (PX16, p.11).

In addition, Dr. Newman reviewed the photograph of an individual in a squat smoothing out concrete on a cookie sheet and stated that such an activity can compromise the knees as all of the individual's weight in being carried on just his knees. (PX16, pp.11-12). Given the history of the case and a hypothetical question, Dr. Newman testified that the date on which Petitioner had severe pain and swelling in his knee and went to the

emergency room would be the date that he realized that the work was causing his pain and that there was a connection between the two. (PX16, pp.15-19). Dr. Newman also opined that there was a connection between Petitioner's condition in August of 2008 and the onset of pain in May of 2008. Dr. Newman also stated that Petitioner was trying to compensate for one injured knee, put weight on the other side, causing both knees to become painful. (PX16, p.20). Thus, Dr. Newman was of the opinion that the bilateral osteoarthritis in Petitioner's knees is causally related to his work activities as a cement mason. (PX16, p.20). Dr. Newman explained that Petitioner's osteoarthritis was considerably more advanced than the general population at his age, as the petitioner was only 50 years old. He said it is quite unusual to see that level of degeneration in a man of that age. (PX16, p.22). When asked "And this destruction deterioration at least in part is related to his job duties?" Dr. Newman answered, "Absolutely." (PX16, p.22).

In addition, Dr. Newman testified that following bilateral knee replacement surgeries Petitioner developed pain in both his feet due to a correction of the varus deformity in his knees from the knee replacement procedure. (PX16, p.23). He noted that this put his feet into a more pronated state and stressed the posterior tibial tendon of the feet. Dr. Newman stated that Petitioner was now more comfortable with orthotics, but that it was probably a permanent condition. (PX16, pp.23-24). Dr. Newman opined that the condition of Petitioner's feet was a sequela of the knee surgeries. (PX16, p.24). On December 7, 2010, Dr. Newman prescribed restrictions of no prolonged walking, no bending or lifting more than 10 pounds, no crawling or kneeling and he must wear orthotics. (PX16, p.24). Dr. Newman explained that the severe restrictions were due to the pain in Petitioner's knees and feet, and the fact that the petitioner is a young man and Dr. Newman wants his prostheses to last as long as possible. (PX16, p.25). Dr. Newman explained that Petitioner will need conservative foot treatment and orthotics in the future and that his knees have a finite life expectancy and will likely need to be revised in 10 to 15 years. (PX16, p.26).

Dr. Newman reviewed a physical therapy record from October 16, 2008 which noted that Petitioner's leg had fallen into a hole at work that he complained of right knee and right ankle pain. Dr. Newman testified that the incident may have caused an aggravation of Petitioner's knee pain but that it was insignificant compared to what Mr. Guzman did at work on a daily basis. (PX16, pp.31,33). Dr. Newman also agreed that if Petitioner worked for different employers between 2006 and 2009, the cement work he did for those employers also aggravated his condition. (PX16, p.34). In addition, Dr. Newman testified that even though Petitioner had intermittent pain since the time of his meniscectomies, the date he appeared in the emergency room after working 136 hours with swelling and severe pain in his knee would have been the day that a reasonable person would become aware of the connection between their work and their injuries. (PX16, p.36). Furthermore, based on x-rays dated August 14, 2008, which showed that Petitioner's right knee had bone-on-bone degenerative joint disease, Dr. Newman believed that Petitioner would have radiologically been a knee replacement candidate at that time. (PX16, pp.37-38). On re-cross examination, Dr. Newman testified that his opinions would not change if Petitioner had told someone that he needed a knee replacement in 2006 or 2007. (PX16, pp.39-40).

Board certified orthopedic surgeon Dr. Kevin Walsh performed a §12 examination at the request of Respondent on April 12, 2012. (RX7, pp.6-7). Following his examination and review of the medical records, Dr. Walsh diagnosed Petitioner as status post right and left knee replacements. Dr. Walsh noted that Petitioner had reached maximum medical improvement, could return to full duty work and needed no permanent restrictions other than avoiding jarring activities such as running or jumping. (RX7, pp.14-15). Dr. Walsh further opined that the osteoarthritis in Petitioner's knees was "not caused by one specific date of injury." (RX7, p.16). Instead, Dr. Walsh noted that the condition would have been present for years and would not have been caused by an event on any one of Petitioner's claimed accident dates. (RX7, pp.16-17). Dr. Walsh also saw no

evidence that Petitioner's work with Respondent aggravated or accelerated his knee conditions. (RX7, p.17). In addition, Dr. Walsh felt that Petitioner likely had a knee replacement due to his being overweight. (RX7, p.21).

When asked about the October 16, 2008 episode recorded in physical therapy notes where Petitioner allegedly fell into a hole, Dr. Walsh testified that it had no significance. He explained that Petitioner was going to have knee pain with different activities. (RX7, p.24). Dr. Walsh acknowledged that Petitioner did relate to him that the condition of his knees was related to his 30 years of concrete work. (RX7, p.28). However, Dr. Walsh was of the opinion that there were no studies that show that walking through wet concrete, kneeling or squatting can cause osteoarthritis, although heavy lifting over a prolonged period of time can contribute to osteoarthritis. (RX7, p.34). In addition, Dr. Walsh testified that there were no studies that indicate that patients who undergo knee replacements throw their feet and ankles off. (RX7, p.47). As a result, Dr. Walsh did not feel that Petitioner's foot and ankle issues had anything to do with his knees. (RX7, pp.47-48).

In a letter dated January 2, 2013, Dr. Newman noted that contrary to the opinion of Dr. Walsh, there is literature that supports the causal relationship between work activities and the development of osteoarthritis in the knees. (PX17, p.7). Dr. Newman also reiterated that Petitioner is permanently disabled from the construction industry, with permanent sedentary restrictions due to the conditions of his knees and ankles. (PX17, pp.7-8). Dr. Newman further opined that Petitioner's foot problems were related to his knee surgeries, but even if the feet were ignored, the knees themselves would disable Petitioner from his previous line of work. (PX17, p.8).

Vocational rehabilitation counselor Susan Entenberg testified that she met with Petitioner and produced two vocational reports, dated July 29, 2011 and June 8, 2013. (PX21, p.7). Ms. Entenberg reviewed Petitioner's work history as a cement mason as well as some of the medical records, including the permanent restrictions imposed by Dr. Newman in December of 2010 – namely, no prolonged standing or walking, no lifting over ten pounds, no crawling or kneeling, and wearing of orthotics at all times. (PX21, p.9). Based on these permanent restrictions, Ms. Entenberg opined that Petitioner was unable to return to his previous occupation as a cement mason and that his restrictions placed him in a sedentary work capacity level. (PX21, pp.9-10). Ms. Entenberg Ms. Entenberg opined that within a sedentary position Petitioner could perform jobs such as telemarketer, bench assembler, or hand packer, earning approximately $8.50 to $10.00 in the Chicago Metropolitan Area. She noted that Petitioner has no computer or clerical skills and would only be capable of entry level, unskilled jobs based upon the fact that his skills as a cement mason are very specific to that industry. (PX21, pp.12,13). She also indicated that Petitioner has no other work experience, having been a cement mason since 1980. (PX21, p.13). Ms. Entenberg also reviewed a vocational report from Steven Blumenthal, which she testified contained very similar opinions to hers. Mr. Blumenthal had opined that Petitioner was capable of earning $9.28 to $12.25 per hour in an entry level position. (PX21, pp.14-15). On cross-examination, Ms. Entenberg testified that she relied upon the physician's restrictions for her opinions. (PX21, p.19).

Respondent's vocational counselor, Steven Blumenthal, reviewed the report of Susan Entenberg as well as the depositions of Drs. Newman and Walsh. Mr. Blumenthal never met with or spoke with Petitioner. Based upon his review of the records, Mr. Blumenthal agreed with Ms. Entenberg that Petitioner could perform the job duties of a telemarketer. He was also of the opinion that after computer literacy training, Petitioner could earn from $9.28 to $12.25 per hour. Mr. Blumenthal noted that if the opinions of Dr. Walsh were adopted, Petitioner would have a much wider range of employment opportunities. However, within the restrictions outlined by Dr. Newman, Mr. Blumenthal felt that Petitioner would be capable of gainful employment as a telemarketer.

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 injured his right knee on May 30, 2008 while walking in 18" of wet cement. (See decision with respect to claim 09 WC 31821). Petitioner sought treatment the following day at Adventist Bolingbrook Hospital. However, he continued to work and lost no time from work following this incident. Union records show that Petitioner worked for a total of 809.37 hours for various employers from June of 2008 through April of 2009, including 280 hours for the Respondent. (PX28).

Due to ongoing right knee pain, Petitioner visited Dr. Burra at Hinsdale Orthopaedics on August 14, 2008. Petitioner testified that from August 2008 through April of 2009 he kept in touch with Randy Starck, Respondent's superintendent. He called Mr. Starck daily asking to see if work was available. Petitioner would also come into Respondent's building and sit in the break room to have coffee and talk with the employees.

Petitioner testified that in April of 2009, after speaking with Mr. Starck, he returned to work for Respondent for approximately 12 days. During that time, Petitioner's work tasks required kneeling for over 6 hours per day. While performing this work, Petitioner noticed increasing pain in his knees. According to Petitioner, this was the toughest job he had worked on with regard to the pain and swelling in the knees.

Petitioner testified that on April 27, 2009 (09 WC 30323) he experienced tightness, pain and swelling in both knees which led him to stop working because he could no longer perform his duties. Petitioner testified that around 3:00 p.m. that day he had a conversation with his foreman, Paul Hendry, at which time he informed Mr. Hendry that he blew out his knee and that he was in a lot of pain. Petitioner indicated that Mr. Hendry then instructed him to "go sit on a bucket" and wait until quitting time at 3:30 p.m. Mr. Hendry later denied that this conversation ever took place. Mr. Hendry testified that Petitioner did not report an incident on that date and that he did not tell him to sit on a bucket. However, on cross-examination, Mr. Hendry conceded that he would not report a headache or finger ache, or body soreness after a hard day of work.

Petitioner last worked as a cement mason for Respondent on April 27, 2009. He has not worked anywhere else since

Petitioner testified that after he visited Dr. Burra on May 29, 2009 he saw Mr. Starck in his office and gave him an off work slip. Petitioner indicated that when he informed Mr. Starck at that time that he had hurt his knee, Mr. Starck replied: "I knew you would sue me you son of a bitch."

Mr. Starck, for his part, testified that the conversation took place in his office on June 1, 2009, and that Petitioner informed him at that time that his knees were shot and that he didn't know if it was workers' compensation, but that he was trying to get on disability. Mr. Starck denied telling Petitioner at that time that he knew Mr. Guzman was going to sue him.

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *Three"D" Discount Store v. Industrial Commission*, 144 Ill.Dec. 794, 797, 556 N.E.2d 261, 264 (Ill.App. 4 Dist. 1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 109 Ill.Dec. 634, 510 N.E.2d 502 (1987). The petitioner must prove a precise, identifiable date when the accidental injury manifested itself. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Three "D" Discount Store*, 556 N.E.2d at 264; citing *Peoria County Belwood*

Nursing Home v. Industrial Commission, 115 Ill.2d 524, 106 Ill.Dec. 235, 505 N.E.2d 1026 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Id.*, at 264; citing *Luttrell v. Industrial Commission*, 154 Ill.App.3d 943, 107 Ill.Dec. 620, 507 N.E.2d 533 (1987).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment and that said injury manifested itself on April 27, 2009. As in the previous accident (09 WC 31821), there would appear to be a definite repetitive trauma component to Petitioner's bilateral knee injuries, given the amount of kneeling he was required to do as a cement mason for almost 30 years. Furthermore, there is equally no doubt that Petitioner had a pre-existing condition relative to his knees prior to the accident in question, having undergone surgery on the right knee in 1984 and surgery on the left knee in 2001. However, Petitioner was able to return to regular duty work as a cement mason after these surgeries and worked in this capacity for the next seven (7) years leading up to the date of the accident in May of 2008. Likewise, Petitioner continued to work for various employers, including Respondent, following the initial accident on May 30, 2008, albeit with pain, until the incident on April 27, 2009 when he felt increased pain, tightness and swelling after spending hours on his knees while working for Respondent on a heavy-duty industrial floor. Petitioner testified that he stopped working on that date because he could no longer perform his duties as he had been able to up to that point. As such, the event on April 27, 2009 would appear to have been the proverbial straw that broke the camel's back. More to the point, April 27, 2009 is the date that he finally accepted the fact that his knees had reached the point where he could no longer work in his chosen occupation and that his almost 30 year career as a cement mason was coming to an end.

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

Petitioner testified that about 3:00 p.m. on the date of the accident in question, April 27, 2009 (09 WC 30323), he had a conversation with his foreman, Paul Hendry. Petitioner noted that he informed Mr. Hendry at that time that he blew out his knee and that he was in a lot of pain. Petitioner indicated that Mr. Hendry then instructed him to "go sit on a bucket" and wait until quitting time at 3:30 p.m. Mr. Hendry later denied that this conversation ever took place. Mr. Hendry also testified that Petitioner did not report an incident on that date and that he did not tell Mr. Guzman to sit on a bucket. Mr. Hendry did acknowledge, however, that he also would not report a headache or finger ache, or body soreness after a hard day of work.

In addition, Petitioner testified that he met with Respondent's superintendent, Randy Starck, after he visited Dr. Burra on May 29, 2009 at which time he provided Mr. Starck with an off work slip. Petitioner indicated that when he informed Mr. Starck at that time that he had hurt his knee, Mr. Starck replied: "I knew you would sue me you son of a bitch."

Mr. Starck, for his part, testified that he met with Petitioner in his office on June 1, 2009 at which time Mr. Guzman informed him that his knees were shot, that he didn't know if it was workers' compensation and that he was trying to get on disability. Mr. Starck denied telling Petitioner at that time that he knew Mr. Guzman was going to sue him. The Arbitrator notes that this acknowledged meeting took place within 45 days of the alleged date of accident.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner proved by a preponderance of the credible evidence that he provided adequate notice of the April 27, 2009 accident to Respondent in the form of the conversation with superintendent Randy Starck on or about June 1, 2009, or within 45 days of the accident in question, pursuant to §6(c) of the Act. The Arbitrator notes that while both

Mr. Hendry and Mr. Starck disputed Petitioner's claim that he reported the April 27, 2009 incident to them, Mr. Starck clearly knew about the problems with Mr. Guzman's knees as of the date that Petitioner presented Dr. Burra's off work slip. Furthermore, Respondent failed to show that it suffered any prejudice due to any defect in said notice. Accordingly, the Arbitrator finds that adequate notice was provided in this matter.

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

The evidence shows that Petitioner's job duties as a cement mason involved the lifting of cement-filled wheelbarrows and buckets as well as assisting in the lifting of a 150 pound machine onto concrete. More importantly, Petitioner testified that the task depicted in the photo admitted at PX29, showing a worker on his knees, is the job he did 2 to 4 hours a day. Petitioner also noted that he entered the cement trade out of high school and began working for Respondent in 1980. He indicated that for the next 29 years he worked on and off for Respondent as a cement mason, and that he did not have any other occupation during that period. He noted that he would wear boots that weighed from 5 to 8 pounds, and that wet concrete on his boots would add to the weight. He noted that they would pour 4 to 9 inches of concrete, and sometimes 12 inches. He stated that he would walk through wet concrete everyday at work, and that it was part of his job description. He indicated that once the concrete sets up and is a little soft he would do the borders and lay down the edges while kneeling and using knee pads.

Prior to the accidents in question, Petitioner had undergone surgeries on both his knees. Specifically, Petitioner indicated that he underwent right knee surgery following a work-related injury in 1984, for which he settled a workers' compensation claim and after which he returned to full duty work. He noted that he also injured his left knee in April of 2001 and underwent surgery for same. Petitioner likewise received a workers' compensation settlement for this injury and subsequently returned to full duty work. Respondent was the employer in both cases. Petitioner testified that he received no treatment for either knee thereafter, or for the next seven (7) years, until he visited the emergency room on May 31, 2008 following the date of accident in companion claim 09 WC 31821.

While Petitioner initially noted that he felt "fine" prior to the first accident on May 30, 2008, he later agreed with hospital records if they indicate that he had been experiencing pain in his right knee for four weeks. Petitioner also acknowledged that he had had aches and pain in his knee prior to that date, but that it did not stop him from working through the pain. Petitioner also conceded that in 2001, following his previous left knee procedure, his doctor had told him that he might need a total knee placement. However, there is no evidence that such a procedure was scheduled or even ordered at that time.

Petitioner testified that he continued to work after the May 30, 2008 incident, and that he started favoring his right knee as a result. Petitioner indicated that as a consequence his let knee started to hurt as well, although he could not recall when that began. In response to these complaints, Petitioner was prescribed an unloader brace. Petitioner testified that he was unable to work with this brace because it was too cumbersome and did not allow adequate movement.

Due to continued right knee pain, Petitioner eventually visited Dr. Burra at Hinsdale Orthopaedics on August 14, 2008. (PX2).

Union records show that he continued to work for various employers through April of 2009. Twelve (12) days prior to the date of the accident in this case, April 27, 2009, Petitioner began working again for Respondent. Petitioner testified that during that time he worked on existing edge as well as the laying down of borders on a

heavy-duty industrial floor project. He indicated that as part of his duties on this project he would have to kneel and crawl around for six (6) hours a day. Petitioner testified that on April 27, 2009, after performing these tasks, he felt pain in both knees as well as tightness and swelling. Petitioner indicated that he stopped working on that date because he knew he could no longer perform his duties and that it was "time to hang it up." He has not worked as a cement mason since, either for Respondent or any other employer.

Petitioner eventually underwent a right total knee replacement on October 12, 2009 followed by a left total knee replacement on December 7, 2009. Both surgeries were performed by Dr. Newman.

Dr. Newman opined that there was a causal connection between the condition of Petitioner's knees and the nature of his work as a cement mason. Dr. Newman explained that Petitioner's need for bilateral total knee replacements was related to the incidents at work and the nature of Petitioner's occupation. (PX16, p.8). Dr. Newman explained how heavy lifting, squatting and kneeling can place additional pressure on the articular cartilage of the knees. (PX16, p.11). He also opined that Petitioner's bilateral osteoarthritis in the knees was causally related to his work activities as a cement mason. (PX16, p.20). More to the point, he opined that Petitioner's work aggravated and accelerated the osteoarthritis in his knees. (PX16, p.22). In addition, Dr. Newman explained that Petitioner's overcompensation for his first injured knee led to additional weight on the other side and caused both knees to become painful. (PX16, p.20).

Dr. Newman further opined that the date on which Petitioner had swelling and pain which led him to the emergency room would be the date that he realized that the work was causing his pain and that there was a connection between the two. (PX16, pp.15-19). In addition, Dr. Newman opined that the condition of Petitioner's feet was a sequela of the knee injuries. (PX16, p.24). He explained Petitioner's knee replacement surgeries corrected a varus deformity in his knees, putting his feet in a more pronated position and leading to additional stress on the posterior tibial tendon. (PX16, pp.23-24).

Respondent counters with the opinion of its §12 examining physician, Dr. Walsh, who testified that the osteoarthritis in the petitioner's knee was "not caused by one specific date of injury." (RX7, p.16). He further opined that Petitioner's work with Respondent did not aggravate or accelerate his knee condition. (RX7, p.17). Dr. Walsh also testified that there were no studies that show that walking through wet concrete, kneeling or squatting can cause osteoarthritis. (RX7, p.34). He also felt that Petitioner's knee surgeries had nothing to do with the condition of his feet or ankles. (RX7, pp.47-48).

Following the granting of a dedimus potestatem by a previous Arbitrator on the case, Dr. Newman was again deposed. At that time, Dr. Newman pointed to authoritative medical literature that supports the proposition that working as a cement mason can lead to the development of knee injuries and specifically knee osteoarthritis. (PX17, Exhibits 4-10). In addition, Dr. Newman again reiterated his opinion that Petitioner's knee conditions were causally related to his work activities. (PX17, pp.20-21).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner's current conditions of ill-being relative to his right and left knees, ankles and feet are causally related to his employment and that said accident manifested itself on or about April 27, 2009. Along these lines, the Arbitrator finds the opinion of treating orthopedic surgeon Dr. Newman to be more persuasive than that offered by Respondent's §12 examining physician, Dr. Walsh. While the Arbitrator relies upon the opinion of Dr. Newman on the question of causation, and the aggravating affect of his work as a cement mason on his underlying osteoarthritic condition, the Arbitrator believes that a more reasonable date of manifestation would be the last day worked, or April 27, 2009. The Arbitrator notes that the evidence suggests that Petitioner was not fully aware of the full extent of the injury following the May 30, 2008 incident, and indeed continued to work as a cement mason

thereafter up through the date of the current accident in dispute. As a result, the Arbitrator finds that the April 27, 2009 accident more reasonably represents the date of manifestation in that it contemplates for the first time the relationship between both knees and the repetitive, long-term stress associated with Petitioner's job as a cement mason. The Arbitrator also notes that both Drs. Newman and Walsh appear to agree that the increase in right knee pain after falling in a hole at work, as referenced in a physical therapy note dated October 16, 2008, was insignificant in the progression of his bilateral knee condition. (See PX16, pp.31-33; RX7, p.24).

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

§10 of the Act provides, in pertinent part, the following: "[t]he compensation shall be computed on the basis of the 'Average weekly wage' which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during the at period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed..."

The evidence shows that Petitioner worked on and off for Respondent as a union cement mason out of Local 803 (subsequently merged into Local 502b) since 1980. Petitioner testified that he had no other occupation during this period, and that in the spring of 2008 he worked 8 hours a day, 5 days a week for Respondent. He indicated that he was expected to be available at all times, and that he would get a call from Respondent's superintendent, Mr. Starck, as to when he was to come in for work. He noted that weather affected his ability to work in that the setting of the cement was dependent upon the temperature and that rain will destroy a pour. As a result, he noted that work would get called off if there was going to be a downpour. Petitioner testified that he held himself out to work 5 days a week, and that Respondent was his first call.

Petitioner submitted into evidence average weekly wage analysis statements relative to the accidents on May 30, 2008 and April 27, 2009. (PX18, PX19). Respondent submitted into evidence the same analyses at RX5 and RX6. Petitioner also submitted into evidence a summary of Petitioner's hours worked for Respondent by year as well as union records of hours worked. (PX27, PX28). Based on these analyses, it would appear that Petitioner by all accounts did not work the entire 52 weeks preceding either the May 30, 2008 or April 27, 2009 accidents. Thus, §10 requires that earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted.

Petitioner stipulated that he currently would be earning $39.25 per hour as a journeyman cement mason out of Local 502b following the merger of his previous union (Local 803). (PX15). However, Petitioner did not testify as to his hourly rate of pay at the time of the May 30, 2008 accident, nor were union contracts or the like presented for this period.

With respect to the accident on April 27, 2009 (09 WC 30323), the analysis submitted by the parties at PX19 and RX6 shows gross earnings of $21,006.85. This analysis includes 18 weekly paychecks for pay periods ending 4/27/08 through 4/26/09, and shows that Petitioner worked a total of 440 hours or 55 days during that period. Interestingly enough, the union records admitted at PX28 show that Petitioner actually worked for Martin Cement for parts of seven (7) months from May 2008 through April 2009. However, this information

does not provide the actual number of days or weeks worked, let alone the gross wages earned during that period. Thus, we are left with the analysis provided in PX19 and RX6.

Based on the evidence submitted, Petitioner worked 11 weeks and parts thereof (55 days ÷ 5 days) during the year preceding the April 27, 2009 accident.

Therefore, based on the above, and the record taken as a whole, the Arbitrator finds that in regards to claim 09 WC 31821 Petitioner's average weekly wage was equal to $1,909.71 ($21,006.85 ÷ 11 weeks), and that during the six (6) week period leading up to the date of injury he earned $6,565.85 in salary. (PX19; RX6).

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:

The parties submitted into evidence an agreed stipulation as to the amount of medical expenses that would be due and owing in this matter pursuant to the fee schedule, with Respondent maintaining any and all objections as to liability or any objections made during the course of these proceedings. (Arb.Ex.#5).

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" and "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical expenses totaling $4,565.88 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act. This amount includes $1,120.09 for services provided by Dr. Kota from 2/8/10 through 6/8/11, Hangar Orthotics in the amount of $1,661.82 on 7/30/13, Illinois Bone & Joint on 10/21/10 in the amount of $132.24, Parkview Medical Center on 5/2/13 in the amount of $451.77, Parkview Orthopedics from 10/4/11 through 4/23/13 in the amount of $738.44 and Pathology CH from 10/12/09 through 12/14/09 in the amount of $439.18. (Arb.Ex.#5). The Arbitrator notes that the unpaid fee schedule amount due for services rendered by Hinsdale Orthopedics from 8/14/08 through 7/28/09 in the amount of $4,024.45 was previously awarded in the decision issued for claim 09 WC 31821, given that some of the dates of services pre-dated the date of accident in this case.

Furthermore, the Arbitrator notes that Petitioner previously filed for bankruptcy under Chapter 7 with the United States Bankruptcy Court for the Northern District of Illinois. (RX9). Based upon that filing, certain debts, including some of Petitioner's outstanding medical bills as of December 14, 2012, were discharged. As a result, Respondent contends that it should be free from any obligation to make payment on the reasonable, necessary and related medical bills that were unpaid by Respondent in this case.

Along these lines, it is important to remember that worker's compensation is a statutory remedy and the Workers' Compensation Commission, as an administrative agency, is without general or common law powers. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 145, 923 N.E.2d 266, ___, 337 Ill.Dec. 707, ___ (2010); See *Flynn v. Industrial Commission*, 211 Ill.2d 546, 553, 813 N.E.2d 119, 286 Ill.Dec. 62, (2004); *Cassens Transport Co. v. Industrial Commission*, 218 Ill.2d 519, 525, 844 N.E.2d 414, 300 Ill.Dec. 416 (2006). As a result, the Arbitrator makes no determination as to the effect of the discharge in bankruptcy, given that such a ruling clearly exceeds the statutorily created authority and jurisdiction of this administrative body. Instead, the Arbitrator simply finds that Petitioner is entitled to the aforementioned medical expenses pursuant to §8(a) and §8.2 of the Workers' Compensation Act. Whether or not such an obligation would or should be discharged due to the aforementioned bankruptcy is for a court of more competent jurisdiction to decide.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

The record shows that Petitioner was first placed on off work status by Dr. Burra on May 29, 2009. As the Arbitrator has found that the condition of Petitioner's knees, for which Dr. Burra was treating him, is causally related to his April 27, 2009 work accident, the Arbitrator further finds that Petitioner was due temporary total disability benefits beginning on May 29, 2009. Thereafter, Petitioner was kept off work on light duty restrictions by each of his treating physicians until December 7, 2010, at which time Dr. Newman found that Mr. Guzman had reached maximum medical improvement and was released to work with permanent restrictions of no prolonged standing or walking, no lifting greater than 10 pounds and no crawling or kneeling. (PX1).

Dr. Newman later opined that Petitioner was permanently disabled from the construction industry. (PX17, p.23). In addition, Dr. Newman testified that Petitioner could do limited walking, and that he was primarily restricted to a sedentary position as a result of the accident. (PX17, p.24).

In contrast to Dr. Newman, Respondent's §12 examining physician, Dr. Walsh, was of the opinion that Petitioner could return to work at full duty with instructions to avoid jarring activities such as running and jumping with his knee replacements. (RX7, pp.14-15).

Petitioner's vocational counselor, Susan Entenberg, met with Petitioner on July 29, 2011. Ms. Entenberg testified that based on the restrictions imposed by Dr. Newman, Petitioner was unable to return to his previous occupation as a cement mason, and that his restrictions placed him at a sedentary work capacity level. (PX21, pp.9-10). Ms. Entenberg that based on these restrictions Petitioner could perform jobs such as telemarketer, bench assembler or hand packer paying approximately $8.50 to $10.00 per hour in the Chicago metropolitan area. She noted that Petitioner has no computer or clerical skills and would only be capable of entry level, unskilled jobs based upon the fact that his skills as a cement mason are very specific to that industry. (PX21, pp.12,13). She also indicated that Petitioner has no other work experience, having been a cement mason since 1980. (PX21, p.13).

Respondent's vocational counselor, Steven Blumenthal, issued a reported dated February 12, 2013 wherein he noted that he had reviewed the report of Ms. Entenberg as well as the depositions of Drs. Newman and Walsh. (RX8). Mr. Blumenthal never met with or spoke with Petitioner. Based upon his review of the records, Mr. Blumenthal agreed with Ms. Entenberg that Petitioner could perform the job duties of a telemarketer and would be able to earn $9.28 to $12.25 per hour in such a position. (RX8). Mr. Blumenthal noted that if the opinions of Dr. Walsh were adopted, Petitioner would have a much wider range of employment opportunities. (RX8). However, he indicated even if the restrictions outlined by Dr. Newman were adopted, Petitioner would be capable of gainful employment as a telemarketer. (RX8).

Petitioner testified that pursuant to Ms. Entenberg's suggestion, he conducted a self-directed job search from his current home in Pueblo, Colorado from August 9, 2011 through January 30, 2012. Petitioner indicated that he looked for anything that popped up on his computer. The job search log prepared as a result of his job search was admitted into evidence at PX20. This exhibit consists of 18 pages and 54 job contacts. (PX20). In reviewing this job search log, the Arbitrator notes that it does not appear that any of these contacts involved telemarketing positions. Petitioner testified that he received no job offers as a result of his efforts. At no time did Respondent offer any assistance in Petitioner's job search efforts.

Respondent submitted into evidence printouts purporting to evidence TTD/TPD benefits paid dating back to July 30, 2009 through the period ending February 23, 2012, in the amount of $153,085.71. (RX2). The parties stipulated that Respondent would be entitled to a credit in this amount. (Arb.Ex.#2).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from May 29, 2009 through December 7, 2010, for a period of 79-5/7 weeks. The Arbitrator further finds that Petitioner was entitled to maintenance benefits from ~~August~~ December 8, 2010 through January 30, 2012, or the date he completed his self-directed job search, for a period of ~~77-2/7~~ 59-6/7weeks. PMO 1/12/1

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

To qualify for a wage differential award under §8(d)(1) of the Act, Petitioner must show that the disability has caused (a) a partial incapacity that prevents him from pursuing his "usual and customary line of employment" and (b) an impairment of earnings. *Albrecht v. Industrial Commission*, 271 Ill.App.3d 756, 648 N.E.2d 923, 925 (1995). So long as Petitioner has met the twofold showing under §8(d)(1), he is entitled to receive an award of wage differential benefits, unless he "elects to waive the right to recover a wage-differential award and instead chooses to receive a percentage-of-the-person-as-a-whole award." *Freeman United Coal Mining Co. v. Industrial Commission*, 283 Ill.App.3d 785, 670 N.E.2d 1122, 1124 (1996). Indeed, so long as a wage-differential-eligible claimant has not waived his right to recover §8(d)(1) benefits, the Commission is without discretion to award compensation for whole body impairment under §8(d)(2) rather than wage differential benefits under §8(d)(1). *Gallianetti v. Industrial Commission*, 315 Ill.App.3d 71, 734 N.E.2d 482, 488 (2000).

The evidence shows that on December 10, 2010, Petitioner was released from care by Dr. Newman with permanent restrictions including no prolonged standing or walking, no lifting greater than 10 pounds and no crawling or kneeling. (PX1). Dr. Newman also opined that Petitioner was permanently disabled from the construction industry. (PX17, p.23). In addition, Dr. Newman testified that Petitioner could do limited walking, and that he was primarily restricted to a sedentary position as a result of the accident. (PX17, p.24).

In contrast to Dr. Newman, Respondent's §12 examining physician, Dr. Walsh, was of the opinion that Petitioner could return to work at full duty with instructions to avoid jarring activities such as running and jumping with his knee replacements. (RX7, pp.14-15).

Petitioner's vocational counselor, Susan Entenberg, testified that based on the restrictions imposed by Dr. Newman, Petitioner was unable to return to his previous occupation as a cement mason, and that his restrictions placed him at a sedentary work capacity level. (PX21, pp.9-10).

Respondent's vocational counselor, Steven Blumenthal, did not disagree with Ms. Entenberg's assessment as to Petitioner's ability to return to work as a cement mason. (RX8). In fact, he tacitly agreed with this premise by noting that Petitioner was capable of performing the job duties of a telemarketer, based on the restrictions imposed by Dr. Newman, while noting that a wider range of employment opportunities would be available if Dr. Walsh's restrictions were accepted. (RX8).

Thus, other than Dr. Walsh, it would appear that the treating orthopedic surgeon as well as both vocational counselors would agree that Petitioner is unable to return to his "usual and customary line of employment" as a cement mason if one were to accept the restrictions imposed by Dr. Newman. Since the Arbitrator has already determined that Dr. Newman's opinions along these lines are more persuasive than those offered by Dr. Walsh, the question then becomes whether Petitioner has suffered an impairment in earnings as a result.

Ms. Entenberg opined that based on these restrictions Petitioner could perform jobs such as telemarketer, bench assembler or hand packer paying approximately $8.50 to $10.00 per hour in the Chicago metropolitan area. She noted that Petitioner has no computer or clerical skills and would only be capable of entry level, unskilled jobs based upon the fact that his skills as a cement mason are very specific to that industry. (PX21, pp.12,13). She also indicated that Petitioner has no other work experience, having been a cement mason since 1980. (PX21, p.13).

Mr. Blumenthal agreed with Ms. Entenberg that Petitioner could perform the job duties of a telemarketer. He was also of the opinion that after computer literacy training, Petitioner could earn from $9.28 to $12.25 per hour.

Petitioner conducted a self-directed job search from his current home in Pueblo, Colorado from August 9, 2011 through January 30, 2012. Petitioner indicated that he looked for anything that popped up on his computer. The job search log prepared as a result of his job search was admitted into evidence at PX20. This exhibit consists of 18 pages and 54 job contacts. (PX20). In reviewing this job search log, the Arbitrator notes that it does not appear that any of these contacts involved telemarketing positions. Petitioner testified that he received no job offers as a result of his efforts. At no time did Respondent offer any assistance in Petitioner's job search efforts.

The Arbitrator notes that Petitioner agreed that he currently would be earning $39.25 per hour as a cement mason per Local 502b union rates. Thus, Petitioner would have currently been able to earn $1,570.00 per week ($39.25 x 40 hours) in the full performance of his duties as a cement mason.

Thus, it would appear that the evidence supports a finding that Petitioner has suffered an impairment in earnings as a result of the accident. The Arbitrator notes that while Petitioner's self-directed job search may not have been the most impressive attempt at finding work within his restrictions, in that he did not even apply for any telemarketing jobs, the fact remains that even Respondent's vocational counselor agreed that Mr. Guzman was only capable of finding a job paying, at most, $12.25 per hour.

Therefore, based upon the above, and the record taken as a whole, the Arbitrator finds that Petitioner proved by a preponderance of the credible evidence that he sustained a diminution in earnings as a result of the accident in question, and that as a result Petitioner is entitled to a wage loss award in the amount of $720.00 per week commencing January 31, 2012 and extending for the duration of his disability, pursuant to §8(d)1 of the Act. This award is based 2/3rds of the difference between what Petitioner would have been earning in his prior position as cement mason ($1,570.00) and what he is currently capable of earning given his restrictions (or $490 per week, based on an hourly rate of $12.25 over the course of a 40 hour work week).

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that sufficient issues of law and fact existed between the parties and that Respondent's defense of this claim was neither unreasonable nor vexatious so as to warrant the imposition of penalties. Accordingly, Petitioner's claim for additional compensation pursuant to §19(k) and §19(l) as well as attorneys' fees pursuant to §16 of the Act 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 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 Storie,

Petitioner,

vs. NO: 13 WC 42694

Mike Schulte Truck Services, Inc.,

16IWCC0241

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 accident, 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 19, 2015 is hereby affirmed and adopted.

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

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

16IWCC0241

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 - 2016
TJT:yl
o 3/21/16
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

STORIE, LARRY
Employee/Petitioner

Case# **13WC042694**

MIKE SCHULTE TRUCK SERVICE INC
Employer/Respondent

16IWCC0241

On 5/19/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

3067 KIRKPATRICK LAW OFFICES PC
ERIE KIRKPATRICK
3 EXECUTIVE WOOD CT
BELLEVILLE, IL 62226

3150 LAW OFFICE OF JAMES KELLY
JASON JORDING
4801 N PROSPECT RD
PEORIA HTS, IL 61616

16IWCC0241

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)

LARRY STORIE
Employee/Petitioner

v.

MIKE SCHULTE TRUCK SERVICE, INC.
Employer/Respondent

Case # 13 WC 042694

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 **Collinsvile**, on **March 26, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 16, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***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 $**36,400.00**; the average weekly wage was $**700.00**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**41,367.81** for other benefits, for a total credit of $**41,367.81**.

Respondent is entitled to a credit of $**41,367.81** under Section 8(j) of the Act.

ORDER

Because Petitioner did not sustain a single trauma accident on September 16, 2013 that arose out of and in the course of Petitioner's employment with Respondent, benefits are denied.

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

Respondent is not liable for Petitioner's medical treatment or future medical.

Respondent is not liable for temporary total disability benefits.

Respondent shall be given a credit for any medical benefits that have been paid.

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

5/18/15
Date

ICArbDec19(b)

MAY 19 2015

STATE OF ILLINOIS)
) ss.
COUNTY OF MADISON)

16IWCC0241

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATOR'S DECISION

LARRY STORIE,

Petitioner,

vs.

MIKE SCHULTE TRUCK SERVICE, INC.,

Respondent.

Case No.: 13-WC-042694

STATEMENT OF FACTS

Petitioner is a 44 year old truck driver. Petitioner worked for Respondent, Mike Schulte Trucking, for a little over three years. Petitioner was a flatbed driver for Respondent who, as part of his job, would chain, tarp, and secure loads. Petitioner would haul many different loads on his 48 foot trailer. The chains Petitioner used were about 15-20 feet long and weighed approximately 50-60 pounds. The tarps were 16 x 24 and weighed about 70 to 100 pounds. Petitioner would typically leave on Sunday afternoon and return on Friday evening. On September 16, 2013, Petitioner was in Lexington, Tennessee delivering steel coils and solid bars. Petitioner unloaded by taking the chains and straps off the load. Petitioner testified he was hurt "jumping up and down on the trailer." Petitioner also testified that he felt pain in his hip and back when he was pulling on a tarp. Petitioner continued working until October 7, 2013.

Petitioner did not receive medical treatment until September 24, 2013 at Express Medical Care in Fairview Heights, Illinois. Petitioner was examined by Christine Werner, a physician's assistant. Petitioner completed a patient intake form which he signed and dated stating the reason for his visit as "may have hernia" and "shoulder pain (right) side." In the history, Petitioner reported right side shoulder pain with an onset of one month prior which he noted with heavy lifting and transferring large objects while at work. Petitioner also reported groin pain with an onset of 4 days earlier noted while at work. No swelling, bulging, or radiation of pain was noted. Petitioner denied muscle spasm, joint pain, muscle weakness, and paralysis/paresis. Petitioner's neurological exam was normal. The musculoskeletal examination revealed only shoulder pain of the deltoid on palpation and mild anterior tenderness of the right shoulder. Petitioner was released with diagnoses of shoulder pain due to uncertain cause and abdominal muscle strain. (PX 1, RX 5).

Petitioner next reported to St. Elizabeth's Hospital in Bellville, Illinois on October 9, 2013. Petitioner was seen by Dr. Michelle Sampson. Petitioner complained of a pulled muscle in his "left nut" from September 17, 2013. Petitioner reported he had gone to Express Care and a chiropractor without pain relief. Petitioner arrived at St. Elizabeth's by his personal vehicle and was ambulatory with a steady gait. Petitioner was discharged to home in stable condition with instructions for self-care. Petitioner was given a work slip providing a return to work after two days. (RX 8).

On October 11, 2013, Petitioner presented to Dr. Anthony Troung at HSHS Medical Group in Fairview Heights, Ilinois. On that date, Petitioner complained of having testicular pain for one month and left-sided testicular pain for three weeks. Petitioner complained of sharp left-sided pain after lifting a heavy object. Petitioner denied any other chronic medical conditions. On physical exam, Petitioner exhibited no tenderness to palpation along the lower back and exhibited a normal gait and station. Petitioner was diagnosed with testicular pain and epididymitis. Dr. Troung's differential diagnoses were left-sided testicular epididymitis versus chronic mild testicular torsion versus varicocele versus hernia. Dr. Troung ordered diagnostic studies to rule out any surgical condition. No work restrictions were given by Dr. Troung. (PX 2).

An October 11 testicular and scrotal ultrasound demonstrated bilateral hydroceles, but no evidence of testicular torsion or hyperemia to suggest orchitis or epididymitis. (PX 3).

On October 22, 2013, Petitioner presented to Memorial Hospital in Belleville, Illinois. Petitioner complained of right-sided abdominal pain with recurrent episodes of nausea and vomiting. Petitioner stated that he has regular diarrhea. Petitioner stated that he does not eat the best meals. Petitioner reported no musculoskeletal or neurological symptoms at the time; however, Petitioner did provide a history of tooth pain and back pain since September 13 and blood in his stool for one year previously. On physical exam, Petitioner's back and extremities were normal, nontender, and exhibited normal range of motion. (PX 5, RX 10).

A CT of the abdomen and pelvis was accomplished on October 22. No traumatic changes were noted; however, degenerative changes of the bilateral hips and spine were noted. An upper quadrant ultrasound was also accomplished which did not identify any etiology for the right upper quadrant pain. (PX 5).

On October 24, 2013, Petitioner underwent an endoscopy and colonoscopy. The endoscopy demonstrated severe esophagitis. The colonoscopy was normal other than hemorrhoids. Petitioner was discharged on October 25 with a diagnosis of severe esophagitis, chronic diarrhea, rectal bleeding, tender nodule close to the left testicle, tobacco abuse disorder, and hyperemia and hernoconcentration. (PX 5).

Petitioner also sought a urology consultation for his left scrotal complaints with Dr. James Rybak at Memorial Hospital on October 24. Petitioner complained of left scrotal pain which had improved slightly. Petitioner noted chronic low back pain in his history; however, no abnormalities were noted on exam. Another scrotal ultrasound was accomplished demonstrating a small right epididymal head cyst, small bilateral varicoceles, and normal appearing bilateral

testicles. Dr. Rybak diagnosed left epididymitis and orchialgia and recommended an athletic supporter. (PX 5).

On November 4, 2013, Petitioner gave a recorded statement to Janet Reffet, a claims specialist with CCMSI. Petitioner originally reported that the alleged accident took place on September 19, 2013, despite his Application alleging a single trauma accident on September 16. When asked for the accident date, Petitioner replied, "September 18th, 19th, 19-ish." When asked how the injury occurred, Petitioner responded, "Um, I guess doing my job duty, um, either pulling the tarps off, or chains or something. I don't know. I pulled it doing my job duty." The description continued:

> Q: Okay. So you didn't feel anything pull then?
> A: Um, not excruciating pain, but, you know, we're always pulling a muscle or hitting something and banging something on, you know, doing our job.
> Q: Okay. All right. But, but at the time of this, you didn't actually feel anything then?
> A: Uh, not instant, no, but within, yeah, that day, yeah, when I was finishing up, and that. (RX 4).

Petitioner presented for a follow up with Dr. Troung on November 7, 2013. Dr. Troung noted Petitioner had been admitted to a hospital for abdominal pain and was also seen by the hospital urologist for his testicular complaints. Dr. Troung noted no follow up was required. Petitioner reported 40-50% improvement in his testicular pain, but reported difficulty lifting more than twenty pounds. The pain was still in the left testicular region. Petitioner was not wearing an athletic supporter. Petitioner demonstrated tenderness to palpation of the left testicle, but the physical examination was otherwise normal. Petitioner's diagnosis remained epididymitis and Petitioner was advised to start wearing an athletic supporter. Petitioner was instructed to schedule a urology consult and was given work restrictions of no lifting greater than twenty pounds for two weeks. (PX 2).

On November 15, 2013, Dr. Troung noted in a phone message response that Petitioner did not have a torn testicle, that his diagnosis was epididymitis which is usually caused by bacterial infection, but could be brought about by excessive straining. (PX 2).

On December 2, 2013, Petitioner reported to Dr. Troung for a work release. Petitioner noted his symptoms had improved, or he had "gotten used to it." Petitioner wanted a work note stating he could not lift greater than 10 pounds. Dr. Troung stated he could not make the assessment of whether Petitioner could climb into a truck and Petitioner would need to report to occupational medicine. Petitioner was not wearing an athletic support. Petitioner was again told to seek a urology consult and get an athletic support. Petitioner was given a work restriction for no lifting greater than ten pounds. (PX 2).

On December 9, 2013, Petitioner called Dr. Troung's office complaining of an onset of severe testicular pain that radiated into the abdomen. Petitioner was told to go to the emergency room, but refused. (PX 2).

On December 17, 2013, Petitioner saw Dr. Kostantinos Psihramis at HSHS Medical Group for a urology consult. The urology examination was unremarkable. (PX 12, RX 1).

Petitioner presented for a follow up with Dr. Troung on December 18, 2013. Dr. Troung noted that Petitioner had experienced an exacerbation of his testicular pain since his last visit and it radiated up to his back. Petitioner had a urological consult with Dr. Psirhamis who found no testicular abnormalities and recommended a referral to a neurosurgeon or pain specialist. Petitioner noted he was "still out of work" and wanted a work note. On exam, there was no bony tenderness to palpation, no pain with lumbar rotation, sidebending, or flexion. There was mild pain with flexion of the bilateral hips when his knees were near his chest, but no radiating pain. The straight leg test was negative. Dr. Troung noted that Petitioner's reported pain was out of proportion with his physical examination. Dr. Troung ordered a functional capacity evaluation to quantify what his specific limitations were. A work slip was provided for no lifting greater than ten pounds. (PX 2, RX 9).

Petitioner was referred to physical therapy by Dr. Truong for his complaints and completed a physical therapy history form on December 26, 2013. Petitioner reported his problem began on "September 19thish." Petitioner alleged that his problem began while "doing (his) job, bouncing, lifting heavy things, long hours." Petitioner reported 10/10 pain at times and worsened pain with bending, standing, sitting, walking, lifting, dressing, and housework. Petitioner stated he could not work or "really do anything." (RX 8)

On December 27, 2013, Petitioner filed an Application for Adjustment of Claim alleging a single trauma accident occurring on September 16, 2013. (RX 6).

On January 10, 2014, Petitioner reported to physical therapy complaining of low back pain and left testicle pain. Petitioner's pain had exacerbated as a result of digging his car out of the driveway. Petitioner's pain had increased to 7-8/10 and reported exacerbation of pain after driving to Belleville and Mt. Vernon, Il. (RX 8).

Petitioner followed up with Dr. Troung on January 14, 2014. Petitioner reported no relief with physical therapy. Petitioner admitted to smoking marijuana recently to help him "calm" his pain. Petitioner stated that he had never used flexeril in the past. On physical exam, there was no radiating pain with straight leg raise, but pain was reported on the left side at 30 degrees of flexion. Pain was reproduced with resisted flexion/extension/abduction/adduction of the left hip. There was no pain with lumbar rotation or sidebending. For the first time, Dr. Troung diagnosed lower back pain in addition to the previous testicular diagnoses. Petitioner asked Dr. Troung to provide him a note to exempt him from work indefinitely; however, Dr. Troung refused and continued Petitioner's ten pound lifting restriction specifically noting Petitioner could work doing duties that do not include lifting heavy objects. (PX 2, RX 9).

Dr. Troung ordered a lumbar spine radiograph on January 14, 2014. The January 23, 2014 lumbar spine radiograph demonstrated mild spurring along the anterior superior endplate of L5. There was no fracture or spondylolisthesis. There was no intervertebral disc space narrowing. There was mild marginal spurring along the inferior right lateral aspect of the L2

vertebra. The impression was small vertebral body spurs without fracture or spondylolisthesis. (RX 8).

On January 28, 2014, Petitioner cancelled his 9th physical therapy appointment due to no change in pain or symptoms. (RX 8).

A January 30, 2014 lumbar spine MRI taken at Mid America Imaging was normal, with some degeneration at the L5-S1 disc space level but no evidence of disc herniation or nerve root compression. (RX 1).

Petitioner sought further treatment with Dr. Mariam Chowdhry at the Orthopedic and Neurosciences Center Department of Physical Medicine and Rehabilitation on February 11, 2014. Dr. Chowdry referred Petitioner for an MRI of the pelvis which was accomplished on February 27, 2014. The February 27 MRI demonstrated bilateral hip osteoarthritis and a superior labral tear on the left and a small labral tear on the right. (PX 8, 12 RX 1, 3).

On February 14, 2014 Petitioner reported to Barnes-Jewish Hospital with complaints of nausea, vomiting, and abdominal pain. A CT of the abdomen and pelvis was accomplished by recommendation of Dr. Agnieszka Milczarek demonstrating no radiographic explanation for the abdominal pain; however, there was evidence of a mildly thickwalled distal esophagus representing a sequel of reflux. Dr. Milczarek also ordered a noncontrast head CT for Petitioner's alleged mental changes. The head CT demonstrated no acute intracranial finding. (PX 4).

Petitioner also underwent a third scrotal sonogram for his left testicular complaints on February 15 at the request of Dr. George Kyei. The study was again normal demonstrating no ultrasound cause to explain the left scrotal discomfort. (PX 4).

On March 3, 2014, Petitioner was seen by Dr. Frank Petkovich for a Section 12 examination. Dr. Petkovich is a board certified orthopedic surgeon licensed to practice in Missouri and Illinois. Dr. Petkovich is also board certified by the American Board of Independent Medical Examiners. Dr. Petkovich recorded in the subjective history taken from Petitioner that he was in Lexington, Tennessee on September 16, 2013. Petitioner was delivering a load and as he was untarping, unstrapping, and unchaining he felt a pain in his lower back and left groin area. Petitioner denied a specific history of injury on September 16. Physical examination of Petitioner was largely normal. Dr. Petkovich diagnosed Petitioner with muscular lumbar strain, degenerative lumbar disc at L5-S1, and left groin strain. Dr. Petkovich opined that Petitioner's work did not cause, aggravated, or accelerate the degenerative disc disease on September 16. Based on his review of the records, Dr. Petkovich found no evidence that the lumbar and groin strains occurred at work on September 16. Dr. Petkovich's opinion was the pain was idiopathic. (RX 1).

On April 22, 2014, Petitioner was referred to a chiropractor, Dr. Benjamin Laux, by a personal friend, Courtney Blockyou. Petitioner completed, signed, and dated a registration form in which he alleged low back pain and groin pain as a result of work-related repetitive use. Petitioner also alleged he felt a pull in his shoulder which went down his back while pulling a

tarp off of a trailer. Petitioner treated with Dr. Laux from April 22, 2014 through February 23, 2015. In the history provided to Dr. Laux, Petitioner described feeling slight pain when climbing out of his truck, right shoulder pain and constant pain in his back after removing straps from his trailer, a pulling sensation in his groin when jumping off the trailers, and extreme pain and limping while walking. On April 22, Petitioner's chief complaints were lumbar and pubic discomfort, with secondary complaints of right cervical, upper thoracic, and right cervical dorsal pain. The first diagnosis of hip injury was on June 18, 2014. (PX 7).

Petitioner presented to Dr. Matthew Gornet on September 29, 2014. Petitioner presented with a history of pulling a chain and tarp over his flatbed truck on September 16, 2013 when he developed pain. Dr. Gornet diagnosed an annular tear which he related to Petitioner's "lifting accident." Dr. Gornet released Petitioner for work with a ten pound lifting limit, no repetitive bending or lifting, and alternating between standing and sitting. Dr. Gornet referred Petitioner for steroid injections at L5-S1 transforaminally and epidurally. (PX 11).

On October 20, 2014, Petitioner underwent a left L5-S1 transforaminal epidural steroid injection. A left L5-S1 epidural steroid injection was performed on November 3, 2014. (PX 11).

A December 1, 2014 MRI of the left hip demonstrated cam-type femoroacetabular impingement with elongated superior labral tear and small focus of adjacent posterior superior acetabular grade IV chondrosis and underlying subcortical marrow edema. A MRI of the right hip, also dated December 1, demonstrated the same cam-type femoroacetabular impingement and an elongated superior labral tear. (PX 11).

Petitioner presented to Dr. Nathan Mall on December 10, 2014. Petitioner complained of left hip and groin pain, low back pain, and left testicle pain. Petitioner presented with a history of "on or around" September 16, 2013, low back pain due to pulling chains and tarps. Petitioner's history included climbing up and down trailers, and jumping off trailers. Petitioner drag races and does yard work outside of his work duties with his employer. Dr. Mall reviewed the December 1 MRIs and concluded they demonstrated impingement anatomy and labral tears of both hips. The left hip demonstrated mild edema in the underlying subchondral bone of the acetabulum. Dr. Mall opined that Petitioner's history of "jumping off and on trailers in a repetitive loading fashion" is a contributing factor in the development of Petitioner's hip pain. (PX 9).

On December 18, 2014, Petitioner underwent a left hip fluoroscopically guided cortisone injection for his symptomatic snapping psoas, left hip labral tear, and mild osteoarthritis. (PX 9).

On January 2, 2015, Petitioner followed up with Dr. Mall. Petitioner stated that the left hip injections provided no relief from the lidocaine or cortisone aspect. Dr. Mall opined that the vast majority of Petitioner's pain was due to a snapping psoas. Dr. Mall recommended physical therapy for stretching of the psoas muscle. Dr. Mall believed that the snapping psoas should be treated conservatively and, if that failed, could require left hip arthroscopy to lengthen the psoas tendon. (PX 9).

Dr. Benjamin Laux testified by way of evidence deposition on January 29, 2015. Dr. Laux is a chiropractor licensed to practice in Indiana, Illinois, New York, and Missouri. Dr. Laux began treating Petitioner on April 22, 2014. Dr. Laux testified that Petitioner was referred to Dr. Laux by people in his family. Dr. Laux testified that Petitioner presented with mild to moderate neck pain and significant low back and left hip pain. Dr. Laux testified that Petitioner hurt himself pulling tarps and jumping in and out of the truck while unloading. Dr. Laux current assement was that Petitioner required pain management or surgery for his low back and snapping psoas tendon. Dr. Laux agreed with the diagnoses of Dr. Gornet and Dr. Mall. Dr. Laux testified that Petitioner has two conditions, low back and left hip, both of which Dr. Laux stated were a result of pulling a tarp and jumping down off of the truck.

Petitioner returned to Dr. Gornet on February 2, 2015. Petitioner complained of continued left-sided back pain. Dr. Gornet maintained his diagnosis of annular tear at L5-S1. Petitioner also felt he had a hip problem. (PX 11).

Dr. Frank Petkovich performed a records review on February 13, 2015 of updated records, including the complete records of Dr. Laux, Dr. Gornet, and Dr. Mall. Dr. Petkovich also reviewed the December 1, 2014 MRIs of the left and right hip. Dr. Petkovich's opinions expressed from his March 3, 2014 IME were unchanged. Dr. Petkovich opined that Petitioner had degenerative changes of his lumbar spine and bilateral hips. The degenerative changes were not in any way related to the work activities Petitioner described. Dr. Petkovich opined that Petitioner required no further care for his lumbar spine. Dr. Petkovich stated Petitioner would benefit from 4 weeks of physical therapy for his bilateral hips, but the treatment was not related to his work with Respondent. (RX 2).

Dr. Frank Petkovich testified by way of evidence deposition on February 26, 2015. Dr. Petkovich is an orthopedic surgeon, with a subspecialty in spinal surgery and is certified by the American Board of Independent Medical Examiners. Dr. Petkovich performed an IME and records review in this case. Dr. Petkovich's opinion, after taking a subjective history from Petitioner, performing a physical examination, and reviewing all of the records was that Petitioner suffered from lumbar degenerative disc disease and pain in the lumbar spine and groin. Petitioner denied any specific injury, thus Dr. Petkovich's opinion was Petitioner's diagnoses were not related to Petitioner's job. (RX 3).

CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of material fact in support of the following conclusions of law:

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 reaches the following legal conclusions:

The Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that Petitioner suffered a single trauma accident on September 16, 2013 that arose out of and in the course of Petitioner's employment with Respondent. In doing so, the Arbitrator finds probative Petitioner's treatment records and statements prior to the date Petitioner retained counsel and completed his Application for Adjustment of Claim. When compared to Petitioner's allegations after Petitioner's filing his Application, the stark disparity of the records reveals the significant lack of credibility of Petitioner's allegations. As such, the Arbitrator declines to afford Petitioner's testimony, and the opinions from Petitioner's doctors relying on the same questionable history, any evidentiary weight.

After suffering his alleged injury on September 16, 2013, Petitioner testified that he continued with his route from Tennessee to Mississippi. Petitioner testified that he was hurt and had never experienced pain "to that extreme" before. (AT 19). However, Petitioner failed to present for medical care for eight days after he alleges to have suffered the immediate onset of extreme pain. The Arbitrator finds that Petitioner's failure to seek immediate medical care for his extreme pain, demonstrates a significant question of credibility. The record shows that Petitioner did not report for care until September 24, 2013. In fact, Petitioner testified that he would return home on Friday evenings, which would have been September 20, 2013. (AT 12). To believe Petitioner's version of events is to believe that after suffering the immediate onset of extreme pain on September 16, Petitioner worked the remainder of the week, spent the weekend at home, and still did not report for initial care until Tuesday, September 24. The Arbitrator finds that this timeline contradicts Petitioner's testimony. It is reasonable to presume that had Petitioner suffered the immediate onset of such pain, he would have immediately reported for care—or at the very least, sought care at the first opportunity available. Instead, Petitioner waited eight days, including an intervening weekend, before presenting to Express Medical Care on September 24. Additionally, Petitioner's own recorded statement contradicts Petitioner's arbitration testimony that he suffered an immediate onset of extreme pain.

Moreover, the records in the months after Petitioner's alleged accident consistently demonstrate inconsistency with the mechanism of injury, the accident date, and the injuries and complaints that Petitioner now alleges. Petitioner's current allegation is a September 16, 2013 single trauma accident. Petitioner testified that he first suffered low back and hip injury as a result of pulling backwards on a tarp. Petitioner testified that he then suffered more low back pain and hip pain jumping off the trailer. (AT 15-18). However, the version of events to which Petitioner testified at trial does not appear in any of the records prior to Petitioner's hiring counsel and filing an Application over three months later.

Petitioner testified that when he, belatedly, reported to Express Medical Care on September 24, 2013, he provided a history of pain in his lower back and hip area. (AT 20). However, Petitioner's own signed and dated reason for visit provides complaints of "may have hernia" and "shoulder pain (right) side." Petitioner's testimony is inconsistent with his own written statement from September 24. Additionally, the documented history provides that Petitioner had a one month history of shoulder pain and that his groin pain had started four days prior, on September 20, 2013. Both documented onset dates contradict Petitioner's testimony of a September 16 accident. Despite Petitioner's detailed description of accident provided at arbitration; on September 24, Petitioner failed to give the same history. Instead, Petitioner stated the pain was noted with heavy lifting and transferring large objects at work. No history of pulling tarps or jumping off trailers was noted. Also, no abnormal findings or complaints with regard to the low back or hips were noted. (PX 1, RX 5).

Given the contradiction between the Express Medical Care records and Petitioner's testimony at arbitration, the Arbitrator questions the credibility of Petitioner's current allegations. Certainly, the events which Petitioner alleges caused him immediate and extreme pain would have been fresher in his mind eight days after the alleged accident rather than over two years later at arbitration. It is reasonable to presume that had Petitioner provided the same history, complaints, and accident date that he did at arbitration, on September 24, 2013, it would be reflected in the record. However, even Petitioner's own written statement regarding his complaints contradicts his testimony at arbitration which undermines Petitioner's credibility.

Even more, it is not merely the September 24 Express Medical Care record which follows this pattern. Petitioner next sought care with St. Elizabeth's Hospital on October 9, 2013. Again, the medical record refutes Petitioner's testimony with regard to accident date, history, and complaints. On October 9, Petitioner reported pulling a muscle in his "left nut" on September 17, 2013. Petitioner gave no history of pulling tarps or jumping off trailers, and made no low back or hip complaints. In fact, it was noted Petitioner was ambulatory with a steady gait; explicitly contradicting Petitioner's later subjective history given to doctors that he developed a limp on September 16. (RX 8).

On October 11, 2013, Petitioner first presented to Dr. Troung at HSHS Medical Group. Petitioner did not provide a history of injury after pulling tarps or jumping off trailers on October 11. Petitioner did provide a history of 1 month of testicular pain and left sided testicular pain for three weeks. While Dr. Troung does not provide precise dates, the Arbitrator notes that three weeks prior to October 11, 2013 was September 20—the date which Petitioner provided to Express Medical Care as the onset of the groin pain. Dr. Troung also noted Petitioner had testicular pain predating the September 20 onset of left-sided pain. (PE 2).

Petitioner also failed to provide the history given at arbitration at his follow up appointments with Dr. Troung on November 7, December 2, or December 18, 2013. The histories in the treatment records for these visits are inconsistent with Petitioner's arbitration testimony that he told Dr. Troung that the injury occurred while unloading his trailer in Lexington, Tennessee. (AT 23). Petitioner's attempt to rationalize the discrepancy between the medical records and Petitioner's testimony by suggesting "lifting heavy things" is the same as pulling tarps and jumping off trailers is unpersuasive.

The Arbitrator notes the pattern of failing to give the details of the alleged work accident continued through the record. On October 24, 2013, when Petitioner sought a urology consultation at Memorial Hospital, the record reflects no history of pulling tarps or jumping off trailers. The onset date is given as early September, not mid-September. (PX 5).

In a recorded interview with a claims specialist for Respondent's carrier, Petitioner again failed to give the accident history, the accident date, or the alleged injuries to which Petitioner testified at arbitration. In fact, when asked for the accident date, Petitioner volunteered September 18 or 19, not September 16. When asked about how the injury occurred, Petitioner stated, "Um, I guess doing my job duty, um, either pulling the tarps off, or chains, or something. I don't know. I pulled it doing my job duty." The Arbitrator finds that Petitioner's inability to describe the alleged accident in the detail to which Petitioner testified (in fact, the inability to describe the accident at all) strikes against the credibility of Petitioner's testimony. In addition, Petitioner's description at arbitration of immediate extreme pain is contradicted by his recorded statement in which he described the pain as, "Uh, not instant, no, but within, yeah, that day, yeah when I was finishing up, and that." (RX 4).

On December 27, 2013, Petitioner completed an intake form, this time for St. Elizabeth's hospital. Petitioner provided September 19 as the accident date. Petitioner stated the problem began "doing my job, bouncing, lifting heavy things, long hours." No history of pulling tarps or jumping off trailers was given. (RX 8).

Given the magnitude of the discrepancies between Petitioner's testimony and the evidence admitted in this case, the Arbitrator finds that Petitioner has not met his burden of proving by a preponderance of the credible evidence that he suffered an accident arising out of and in the course of his employment with Respondent.

In so finding, the Arbitrator specifically finds Respondent's Section 12 examiner, Dr. Frank Petkovich, more persuasive than those of Petitioner's expert, Dr. Benjamin Laux. The Arbitrator notes Dr. Petkovich's credentials as a board certified orthopedic surgeon who has treated conditions similar to Petitioner's condition, whereas Dr. Laux is a chiropractor and refers patients to orthopedic surgeons. The Arbitrator finds this distinction in qualifications significant, but more importantly, relies on the accuracy of each doctor's opinions.

Dr. Petkovich performed a Section 12 examination on March 3, 2014 and reviewed updated medical records, issuing a supplemental report on February 13, 2015. Dr. Petkovich testified by evidence deposition on February 26, 2015. Dr. Petkovich demonstrated a thorough knowledge of Petitioner's medical condition and had reviewed all of the relevant medical records regarding Petitioner's alleged injuries. Dr. Petkovich's opinion is that Petitioner did not suffer a work injury on September 16, 2013. Dr. Petkovich came to his conclusion based on the subjective history taken from Petitioner, the review of all of the records, and his physical examination. Dr. Petkovich opined that Petitioner's hip conditions, that of osteoarthritis and cam-type femoroacetabular impingent, was not caused, aggravated, or exacerbated by the activities Petitioner described. Petitioner's labral tears were bilateral and degenerative, likely the result of the chronic impingent. Dr. Petkovich also testified that Petitioner's disc bulge was

chronic and degenerative and was not caused, aggravated, or exacerbated by Petitioner's work. (RX 1)

Dr. Laux treated Petitioner's condition; however, admitted to having specific, essential, gaps in his knowledge regarding Petitioner's condition and his records. Most importantly, Dr. Laux's opinion is based on a faulty history, close to that which Petitioner gave at arbitration and conflicts with the record as outlined in this decision. The history which Dr. Laux relied on provided, in part:

"The morning of September 16, 2013, (Petitioner) was in Lexington, Tennessee at LeRoy Somer. Got out of the truck and felt a slight pain in lower back and proceeded to take bungee straps off the tarp and undo 3 binders and a 4" strap on the driver's side felt a pain in right shoulder and more constant pain in lower back. Climb onto the trailer and under 4" strap; the load was belly wrapped as the reason why I could not throw strap over the load. Jumped off trailer; felt a pulling sensation in my groin area. Grabbed the tarp tugged and pull on tarp and continued to feel the pain in the lower back groin area...At this point I am limping and in extreme pain." (PX 7).

The Arbitrator notes that Petitioner's description of injury to Dr. Laux is different than his prior histories and his arbitration testimony. At arbitration, Petitioner testified that he felt back and hip pain pulling a tarp, then again jumping on and off the trailer. Petitioner told Dr. Laux he felt pain getting out of the truck, undoing binders, jumping off the trailer, and pulling the tarp. Petitioner also told Dr. Laux he developed a limp and was in extreme pain, which is contradicted by the contemporaneous medical records and Petitioner's own recorded statement to Respondent's workers' compensation carrier.

Dr. Laux's reliance on a faulty history undermines his causation opinion. In fact, Dr. Laux admitted in his deposition that the weight of the tarps which Dr. Laux testified to as forming part of his causation opinion was gleaned from an internet search on Petitioner's wife's phone.

Additionally, Dr. Laux's deposition makes it clear that Dr. Laux is unfamiliar with the injuries, and the anatomy, at issue. When asked to define cam-type femoroacetabular impingement, the very condition Petitioner exhibits in both hips, Dr. Laux replied, "I'm not familiar, I'm not familiar enough with that to give you an answer that I would be happy giving it." The deposition continued with regard to Petitioner's grade 4 left hip chondrosis:

Q: I know we've already covered that you don't know what a cam-type femoroacetabular impingment is, but could you tell me what grade 4 chondrosis is?
A: Cartilage degeneration.
Q: And how is cartilage degeneration graded, Doctor?
A: I don't have that off the top of my head where it's numbered. I think it's 1 to 4 with – I wouldn't want to comment on that. I'm not able to to (sic) a professional level.

Dr. Laux's deposition concluded with Dr. Laux admitting that he was not able to testify as an expert witness with regard to Petitioner's hip complaints:

Q: Well, Doctor, you testified that you're unfamiliar with cam-type femoroacetabular impingement. So can you render an opinion whether that would become symptomatic as a result of Mr. Storie's alleged work accident?

A: It's not that I'm unfamiliar. I'm just not comfortable testifying as an expert witness on the psoas snapping and the cam too. So that's why I'm not answering that question because I'm not familiar with it. And since I don't know it to the level I wouldn't want to comment and answer your question whether or not a cam can or cannot be aggravated because I'm not sure.

Because Dr. Laux admitted in his deposition to being "unsure" and "uncomfortable" with testifying to the standard of a medical expert, and relied on a faulty history on which to base his causation opinion, the Arbitrator does not afford Dr. Laux's opinion evidentiary weight.

Also, the Arbitrator declines to consider Dr. Gornet and Dr. Mall's opinions expressed in their records. As noted below, Dr. Gornet and Dr. Mall exceed Petitioner's choice of doctors and both rely on the same faulty history which the Arbitrator rejects.

At arbitration, Petitioner attempted to reconcile the discrepancies in the records by relying on his log notes which provided information as to where Petitioner was on September 16, 2013. However, on cross-examination, Petitioner testified that the log notes did not provide information to refresh his recollection as to the alleged accident facts:

Q: No, I'm meaning the description of the accident that you gave us in great detail today that you were unable to provide at the time. What did you use to refresh your recollection of the accident?
A: The—my log sheets on what load I was doing.
Q: But it doesn't--
A: But all the loads are about the same. Every load you still got to chain, strap, tarp, pick up tarps, sling tarps, jump up and down off the trailer, climb on the trailer, climb on the loads, if you had a lumber load you have to scale it to get to the top of it and whatnot.
Q: So why couldn't you give that history on September 24th and October 9th and November 4th of 2013 if all the loads are approximately the same and you have to do the same duties?
A: Correct.
Q: Couldn't you have given that history then?
A: To?
Q: Your medical providers and to the insurance adjuster.
A: I did give it to my medical providers.
Q: But it's not recorded in the medical records.
A: I can't help what they don't write down.
Q: And it's not in your recorded statement to the insurance adjuster.

The Arbitrator finds Petitioner's testimony incredible that he provided the history given at arbitration to his medical providers at any point prior to filing this claim. Certainly, one of the

over five treating doctors would have recorded circumstances of Petitioner's complaints to guide the treatment plan. Additionally, had Petitioner made low back and hip complaints, one of the over five treating doctors, who performed repeat diagnostic studies of the testicles and scrotum based on Petitioner's very specific complaints, would have ordered diagnostics for the low back and hips.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the credible evidence that Petitioner suffered an accident that arose out of and in the course of Petitioner's employment with Respondent.

In support of the Arbitrator's Decision relating to D: "What was the date of the accident?," the Arbitrator reaches the following legal conclusions:

The Arbitrator's findings with respect to accident are incorporated herein. As the Arbitrator finds that Petitioner did not suffer an accident arising out of and in the course of his employment with Respondent, there is no need to determine the accident date. However, the Arbitrator notes that the preponderance of the credible evidence strikes against Petitioner's allegation of an accident on September 16, 2013.

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 reaches the following legal conclusions:

The Arbitrator's findings with respect to accident are incorporated herein. Petitioner did not sustain accidental injury that arose out of and in the course of his employment with Respondent. Moreover, consistent with Dr. Petkovich's opinions, Petitioner's current condition is related to his congenital and degenerative conditions.

Petitioner's first medical record, from Express Medical Care on September 24, 2013, documents groin pain and right shoulder pain. After September 24, 2013, Petitioner makes no further mention of right shoulder pain to his treating doctors and he receives no further care for his right shoulder. On September 24, Petitioner admits that the right shoulder pain pre-dated his alleged accident and Petitioner confirmed as much at arbitration. Petitioner offered no causation opinion with regard to his shoulder. (PX 1, RX 5)

As to Petitioner's groin pain, Dr. Troung recorded a history on October 11 of one month of testicular pain and three weeks of left sided testicular pain. Dr. Troung's history provides that Petitioner was suffering from testicular pain prior to the onset of left-sided testicular pain, which according to the credible medical evidence, occurred on September 20, 2013. Until December 2013, Petitioner's complaints consisted of, entirely, very specific complaints of testicular pain. Petitioner's attempt to portray that he complained of low back pain and hip pain throughout his treatment is disingenuous. Given the medical evidence, and Petitioner's own recorded statement, the Arbitrator finds Petitioner incredible. Petitioner's current version of events, including the September 16 accident date, the mechanism of injury, and the alleged injury and complaints, was crafted to support Petitioner's workers' compensation claim and has no basis in the evidence. As such, the Arbitrator affords it no evidentiary weight.

The Arbitrator does find persuasive the fact that Dr. Troung diagnosed Petitioner with an atraumatic testicle condition and does not provide a causation opinion relating the condition to Petitioner's work. Additionally, none of the myriad providers who Petitioner engaged to examine the testicular condition discovered a traumatic injury, or opined that Petitioner suffered a work-related testicular injury.

In fact, the Arbitrator notes that on December 2, 2013, Petitioner reported to Dr. Troung that his symptoms had either improved, or he had "gotten used to it." The record then shows that Petitioner suffered a significant exacerbation of his testicular pain on December 9, 2013. According to the record, Petitioner was not working on December 9, 2013. Furthermore, Dr. Troung recorded Petitioner reporting pain out of proportion with his physical examination findings. (PX 2, RX 9). Dr. Troung's suspicion of symptom magnification is further supported by Petitioner's January 10, 2014 physical therapy record which records Petitioner suffering an exacerbation of pain due to "having to dig car out of driveway." (RX 8). The Arbitrator finds Petitioner's allegation that he has been unable to work due to disabling injury on September 16, 2013 inconsistent with Petitioner actively engaging in digging cars out of driveways. This further supports the Arbitrator's finding that Petitioner's testimony is incredible.

Dr. Laux's testimony is also of no evidentiary weight. Dr. Laux hastily opines that Petitioner's current condition is related to a September 16, 2013 work accident. However, in doing so, Dr. Laux relies on a faulty history. Again, Petitioner completed a registration form with Dr. Laux which does not recite the version of events which Petitioner now claims, instead alleging "work related repetitive use." (RX 7). Dr. Laux also demonstrated a lack of knowledge with regard to Petitioner's condition and the medical knowledge of the conditions themselves. Dr. Laux testified in his deposition that he had no knowledge of Petitioner's right hip condition, when his own records show Dr. Laux reviewed a pelvic MRI and noted bilateral hip labral tears on June 18, 2014. (PX 7). Dr. Laux's lack of knowledge regarding his own records, and the illustrated inability to testify to an expert level regarding Petitioner's conditions, undermines Dr. Laux's causation opinion and, accordingly, the Arbitrator does not afford those opinions evidentiary weight.

The Arbitrator does find the opinions of Respondent's Section 12 examiner, Dr. Petkovich, to be persuasive. Dr. Petkovich, in his deposition, identified Petitioner's bilateral osteoarthritic hip condition and cam-type femoroacetabular impingement induced labral tears as degenerative, and provided a credible opinion that they were not caused, aggravated, or exacerbated by any work activities. Likewise, Dr. Petkovich opined Petitioner's lumbar spine condition is degenerative and not related to work activities. (RX 1).

The Arbitrator notes Petitioner did not take evidence depositions of Dr. Gornet or Dr. Mall. However, Dr. Gornet and Dr. Mall's opinions in the records both are premised on the faulty history which the Arbitrator has rejected. Additionally, neither doctor treated Petitioner until over a year after his alleged accident. Given the evidence in the medical records demonstrating Petitioner's lack of credibility and the fact that Petitioner still actively engaged in physical activities, such as digging cars out of driveways, the Arbitrator does not afford Dr.

Gornet and Dr. Mall's causation opinions evidentiary weight. Also, as discussed below, the Arbitrator finds that Dr. Gornet and Dr. Mall were outside of Petitioner's two choices of doctor.

With regard to Petitioner's emergency room visits for abdominal pain, despite Petitioner's allegations that he suffered the onset of abdominal pain due to medicine prescribed by Dr. Troung, the evidence leads to a different conclusion. Petitioner attended the emergency room on two occasions for abdominal pain. After the first visit, in October 2013, Petitioner is discharged with severe esophagitis and "the etiology seems to be excessive consumption of nonsteroidal anti-inflammatory medications together with the underlying history of smoking." However, Petitioner made a subsequent emergency room visit, in February 2014, with the same abdominal complaints due to reflux. Given the repeat visits, and the lack of a causation opinion, the Arbitrator finds Petitioner failed to meet his burden with regard to the abdominal complaints.

Petitioner did not sustain accidental injury that arose out of and in the course of his employment with Respondent. The Arbitrator finds Petitioner's complaints and current condition is related to his congenital and degenerative conditions.

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 reaches the following legal conclusions:

The Arbitrator's findings with respect to accident and causal connection are incorporated herein. Petitioner did not sustain accidental injury that arose out of and in the course of his employment with Respondent. Consistent with the Arbitrator's findings, the credible evidence, and Dr. Petkovich's opinions, Respondent is not liable for Petitioner's medical bills.

The Arbitrator notes that Petitioner also exceeded his entitlement to medical providers under Section 8(a) of the Illinois Workers' Compensation Act. Petitioner first treated with Express Medical Care in Fairview Heights, Illinois. The Arbitrator finds this qualifies as emergency treatment. Petitioner then sought treatment with St. Elizabeth Hospital, which the Arbitrator also finds qualifies as emergency treatment. Petitioner next went to Dr. Troung for regular care and adopted Dr. Troung as his primary care physician. Petitioner next went to Memorial Hospital on an emergency basis, but while there, elected to have a urology consult with Dr. Rybak. The Arbitrator finds that the urology consultation does not qualify as emergency treatment. Petitioner next treated with Dr. Psihramis, upon referral by Dr. Troung. Petitioner was also referred to physical therapy at St. Elizabeth's Hospital by Dr. Troung. Petitioner then presented to Dr. Chowdhry on a non-emergency, non-referral basis. Petitioner then reported to Barnes-Jewish Hospital where he sought another urology consult with Dr. George Kyei which did not qualify for emergency treatment. Subsequently, Petitioner came under the care of Dr. Laux who referred Petitioner to Dr. Gornet, who in turn referred Petitioner to Dr. Mall.

Under the Act, Petitioner is entitled to emergency treatment and his first two choices of doctor. The evidence as presented demonstrates Petitioner's first doctor choice was Dr. Troung, and his second choice was Dr. Ryback. Petitioner then made a third doctor choice in Dr.

Chowdhry, a fourth with Dr. Kyei, and a fifth in Dr. Laux. Especially in light of Dr. Troung's opinion that Petitioner represented symptoms out of proportion with his objective findings, and Dr. Laux's records evidencing Petitioner's attorney facilitating the referral to Dr. Gornet; the numerous doctor choices made by Petitioner weigh against Petitioner's credibility and exceed Petitioner's statutory entitlement under the Act.

The Arbitrator also notes that Petitioner makes a claim for medical mileage. The Illinois Workers' Compensation Act specifically addresses when mileage is the responsibility of the employer. 820 ILCS 305/12 states that an employer requesting an independent medical exam must defray travel expenses to the exam. The Act does not provide for the reimbursement for any travel expenses to ordinary doctor's appointments.

Illinois courts have previously found that "travel expenses to cover the cost of transportation to and from treatment can be awarded under the same standard of reasonableness and necessity as medical expenses." *General Tire & Rubber Co. v. Industrial Com.*, 221 Ill. App. 3d 641, 651 (Ill. App. Ct. 5th Dist. 1991). In *General Tire*, the Commission awarded mileage because the Petitioner had to drive approximately 100 miles each visit to receive care from his primary care physician. However, since the *General Tire* decision, the General Assembly has amended the Act and has subsequently failed to make a provision for mileage to ordinary medical appointments.

The Arbitrator finds Petitioner is not entitled to medical mileage under the Act. As Petitioner is not entitled to medical benefits according to the Arbitrator's decision, neither is Petitioner entitled to medical mileage under the case law of Illinois.

In support of the Arbitrator's Decision relating to K: "Is Petitioner entitled to any prospective medical care?" the Arbitrator reaches the following legal conclusions:

The Arbitrator's findings with regard to accident, causal connection, and medical are incorporated herein. Based on those findings, Petitioner is not entitled to prospective medical care. Petitioner did not sustain accidental injury that arose out of and in the course of his employment with Respondent. Consistent with the Arbitrator's findings, the credible evidence, and Dr. Petkovich's opinions, any further treatment for Petitioner's complaints is personal in nature and Petitioner's responsibility.

In support of the Arbitrator's Decision relating to L: "What temporary benefits are in dispute," the Arbitrator reaches the following legal conclusions:

The Arbitrator's findings with regard to accident and causal connection are incorporated herein. Based on those findings, Petitioner is not entitled to TTD benefits.

Additionally, the Arbitrator notes that Petitioner's testimony regarding his work status is not credible. Petitioner testified that Dr. Troung took him off work, as well as Dr. Laux, Gornet, and Mall. In fact, the evidence shows Dr. Troung refused to take Petitioner off work indefinitely. Dr. Troung specifically stated Petitioner could work within the restrictions Dr. Troung prescribed. (PE 2, RX 9). Neither Dr. Gornet, nor Dr. Mall has taken Petitioner off

work. (PX 9, PX 11). Petitioner offered no testimony that he reported to work within his restrictions. In fact, the credible evidence shows that Petitioner continued to work full duty after September 16, 2013 until October 7, 2013 at which time Petitioner simply stopped reporting to work without excuse. (RX 4).

Accordingly, Respondent is not liable for TTD.

In support of the Arbitrator's Decision relating to N: "Is Respondent due any credit?" the Arbitrator reaches the following legal conclusions:

The Arbitrator finds that the parties have stipulated that Respondent is due credit for any medical which has been paid and a Section 8(j) credit for payments made, if any, by group health. At the time of arbitration, Respondent's 8(j) credit totaled $41,367.81. (PX 12).

In support of the Arbitrator's Decision relating to O: "Other" the Arbitrator reaches the following legal conclusions:

The parties disputed the admissibility of Petitioner's exhibit 11, the records of Dr. Gornet. Respondent disputed the admissibility of Dr. Gornet's record on the basis of not falling within the hearsay exceptions provided by Illinois law.

Illinois Supreme Court Rule 803(4) provides a hearsay exception for statements for purposes of medical diagnosis or treatment. Medical records which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source therof insofar as reasonably pertinent to diagnosis or treatment are admissible under the exceptions, but not statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial.

In Petitioner's exhibit 11, Dr. Gornet, who received his medical records from Petitioner's attorney (PX 7), exceeded the exception for statements for purposes of medical diagnosis or treatment when he inserted his rebuttal to Respondent's Section 12 examiner. At that point, Dr. Gornet stepped out of his role as documenting the cause of Petitioner's complaints for diagnosis or treatment, and began making a statement which sole purpose was litigation. In this case, it is quite clear that Dr. Gornet's statements refuting Dr. Petkovich's opinions were not for the purposes of medical diagnosis or treatment, but "testimony" which Petitioner intended to introduce at trial.

As such, the accepted Petitioner's exhibit 11, as redacted by Petitioner's attorney and agreed to by Respondent's counsel is admitted into evidence. The redacted statements of Dr. Gornet, which were made for the purpose of preparing for litigation, are excluded from the record as is Petitioner's exhibit which contains the unredacted report of Dr. Gornet.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Westerfield,

Petitioner,

vs.

NO: 15 WC 3500

Randstad,

16IWCC0242

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, employment, jurisdiction, temporary total disability, penalties, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 24, 2015, is hereby affirmed and adopted.

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

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

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

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 - 2016
TJT:yl
o 3/8/15
51

Michael J. Brennan

Kevin W. Lamborn

DISSENT

For the reason that I believe the law and the facts of this case support a finding of Illinois jurisdiction, I respectfully dissent.

Pursuant to the Act, Illinois may acquire jurisdiction over a claim (1) if the contract for hire was made in Illinois, (2) if the accident occurred in Illinois, or (3) if the claimant's employment was principally located in Illinois. 820 ILCS 305/1(b)(2) (West 1998); *D.J. Masonry Co. v. Industrial Commission*, 295 Ill.App.3d 924, 929-30, 230 Ill.Dec. 450, 693, N.E.2d 1201 (1998). Since the accident occurred in Indiana and there is no evidence that Petitioner's employment activities were "principally localized" in Illinois, the sole avenue for Illinois jurisdiction would be if the contract for hire was made in Illinois.

In making his ruling, the Arbitrator cited as "instructive and persuasive" the case of *Cowger v. Industrial Commission (D.J. Baker Trucking, Inc.)*, 313 Ill. App. 3d 364 (Ill. App. Ct. 2000), noting that the appellate court in *Cowger* "... found the last act necessary for the formation of the employment contract was the completion of the drug test in Indiana." (Arb.Dec. [Addendum], p.3). *Cowger* involved an over-the-road trucker who was required to pass a drug test before he would be hired. Unfortunately, the "last act necessary" in this case is not so easily discerned, and as such, we need to look closer at the relationship of the parties and the facts of this case in order to decide where and when the contract for hire was effectuated. Indeed, I would argue that

the relationship of the parties, including that between Randstad and Conway, is the key to understanding the nature and formation of the employment contract in question.

The evidence shows that Respondent Randstad is a staffing company. It is not some recruiting or headhunting firm. It hires individuals who are sent out to clients as temporary workers, with the possibility of being hired by those clients full time. Indeed, the company that manages Respondent's workers' compensation injuries, Bunch & Associates, admitted as much in a letter to a provider on June 6, 2014. (PX2). The nature of this relationship was also documented in Physicians Urgent Care records wherein it was noted that "Pt. is a dockworker for Randstad Temp Service in Bolingbrook who was working at Conway in Gary..."(PX2).

Furthermore, in a letter dated August 26, 2014, Trisha Bukovsky, Respondent Randstad's assistant branch manager in Bolingbrook, noted that "[t]his letter is to confirm that Jennifer Westerfield has been working for us at Con-Way Freight, located in Gary, IN. Jennifer started this position on 4/14/14 ..." (PX7).

In addition, Petitioner credibly testified that as of the date she began working at Conway she was paid by Respondent Randstad, not Conway. (T.27-28). She also indicated that when she began working for Conway she was paid by Respondent Randstad as an employee during the initial training period when she had to watch videos. (T.28). Randstad is likewise the name on the wage statements admitted at PX8. Furthermore, the evidence shows that at the time of the injury the 90 day trial period, after which Petitioner could be considered for full-time employment by Conway, had yet to expire (4/14/14 start date and 6/5/14 D/A = 52 days).

Thus, there is absolutely no question that Petitioner was an employee of Respondent Randstad from the time she set foot on Conway Freight property through the date of the injury.

That being the case, one would think that Respondent Randstad being a staffing company is highly relevant in terms of evaluating the practical nature of the hiring process in question. Indeed, the whole purpose of a staffing company, and its main selling point, is to provide clients with workers as needed and to relieve businesses of the burdens normally associated with the hiring process, not to mention to avoid having to pay benefits or be subject to workers' compensation claims. Thus, by its very nature, staffing companies such as Respondent Randstad take on the hiring and even firing responsibilities associated with their workers. Indeed, one would wonder why clients such as Conway would expect anything less.

Furthermore, one has to question the real significance of the forms Petitioner was asked to fill out once she reported to Conway. (RX1). With titles such as "Fire Control Training Certificate", "Orientation Checklist" and "Trainee Performance and Knowledge Objectives" it would appear that these forms had more to do with indoctrinating new workers and instructing them as to the safety and performance demands associated with the job at Conway, and not some final piece in the hiring process puzzle.

16IWCC0242

In addition, I find the testimony and opinion of Ms. Baker, the recruiter who hired Petitioner, to the effect that Ms. Westerfield was only a "candidate" for employment until she completed paperwork in Indiana, to be unpersuasive and biased. Indeed, as a layperson, I seriously doubt that Ms. Baker would have had any idea exactly when Petitioner became an employee of Respondent Randstad from a legal standpoint were it not for the discussion she admittedly had with defense counsel prior to her testimony at trial. As result, her opinion is less than impressive, let alone dispositive.

Thus, in my opinion, Petitioner's appearance and filling out of forms at Conway Freight on April 14, 2014 was not so much the last act necessary in the formation of the contract for hire as it was Ms. Westerfield's first job assignment after being hired by Respondent Ranstad's staffing firm. Since the majority and most important aspects of Petitioner's hiring took place at the time of her meeting with Ms. Baker in Bolingbrook, Illinois, the reasonable interpretation would be that the last act necessary occurred on or shortly after that date, when Petitioner passed her background check, and prior to her showing up at the client's place of business to watch videos and sign a series of inconsequential forms. As such, jurisdiction would reside in Illinois, the state where the contract for hire was made, and for that reason I dissent from the majority opinion.

Thomas J. Tyrrell

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

WESTERFIELD, JENNIFER
Employee/Petitioner

Case# **15WC003500**

RANDSTAD
Employer/Respondent

16IWCC0242

On 6/24/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% 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:

0154 KROL BONGIORNO & GIVEN LTD
MIKE BRANDENBERG
120 N LASALLE ST SUITE 1150
CHICAGO, IL 60602

1505 SLAVIN AND SLAVIN
BRIAN H DRISCOLL
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0242

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jennifer Westerfield
Employee/Petitioner

v.

Randstad
Employer/Respondent

Case # **15** WC **3500**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Kankakee**, on **June 15, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ 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, **June 5, 2014**, Respondent ***was not*** 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 $**26,566.80**; the average weekly wage was $**510.90**.

On the date of accident, Petitioner was **30** 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 $**3,697.89** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,697.89**.

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

ORDER

Petitioner has failed to meet her burden of proof on the issue of jurisdiction. Therefore, Petitioner's 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

6/23/15
Date

JUN 24 2015

16IWCC0242

FINDINGS OF FACT

Petitioner alleges an injury while working for the Respondent on June 5, 2014. Petitioner resides in Indiana. Respondent is a corporation headquartered in Atlanta, Georgia with offices in various states, including Bolingbrook, Illinois. Petitioner was hired by Respondent to work at Con-way Freight in Gary, Indiana. Her injuries occurred while working for Con-way Freight in Indiana. At issue in this case are the following: 1) jurisdiction, 2) accident, 3) causation, 4) medical expenses, 5) TTD, 6) penalties and attorney fees, and 7) prospective medical care.

Petitioner, a 31 year old fork lift driver, was working at Con-way Freight in Gary, Indiana on June 5, 2014. Petitioner testified that she was pulling a piece of plywood off a stand when it fell back and struck her right Achilles tendon. She first sought treatment on June 6, 2014 with Dr. Charles Asher at St. Catherine's Hospital in East Chicago, Indiana on referral by Con-Way Freight. She was diagnosed with an ankle contusion right, initial encounter. (Petitioner's Exhibit #1) X-rays taken at that time were negative for fracture. (Petitioner Exhibit #1) The Petitioner was discharged the same day.

Petitioner next sought treatment on June 8, 2014 with Dr. Nicholas Apostolopoulus at Physician's Urgent Care in Highland, Indiana, where she was diagnosed with a crushing injury of the ankle, crushing injury of the lower leg, and a crushing injury of the foot. (Petitioner's Exhibit #2) She was released to return to work with a sit down work only restriction, and was also prescribed a pneumatic boot and crutches. (Petitioner's Exhibit #2) Petitioner testified that she returned to light duty work at Randstad's facility in Bolingbrook, Illinois as there was no light duty available at Con-Way Freight in Gary, Indiana (R16).

On June 10, 2014, the Petitioner followed up with Dr. Apostolopoulus, who recommended surgical debridement as Petitioner still had considerable swelling of the right lower leg and ankle. Dr. Apostolopoulus debrided a 6 sq. cm area which did not require suturing. (Petitioner's Exhibit #2) Petitioner had continued complaints of pain with the right leg and on June 23, 2014, Dr. Apostolopoulus recommended a CT scan. (Petitioner's Exhibit #2) On July 7, 2014, Petitioner was referred to an orthopedic surgeon specialist, Dr. Charles Tremaine. (Petitioner's Exhibit #2) On July 9, 2014, Petitioner underwent a CT scan at St. Mary's Open MRI, which appeared normal. (Petitioner's Exhibit # 2) Petitioner discontinued using crutches on July 24, 2014 and began a course of physical therapy at Nova Care Rehabilitation. On July 24, 2014, Dr. Apostolopoulus recommended that Petitioner continue treating with Dr. Termaine and to continue with physical therapy.

On February 3, 2015, the Petitioner sought treatment from a neurologist, Dr. Christopher Simon at DuPage Medical Group on February 3, 2015. Dr. Simon diagnosed complex regional pain syndrome and prescribed Gabapentin. He also recommended Petitioner undergo an EMG scan, which appeared normal. (Petitioner's Exhibit # 4)

On March 17, 2015, Petitioner returned to Dr. Simon, who prescribed a neuropathic pain cream compound. Dr. Simon took Petitioner off work due to her pain complaints Dr. Simon last saw Petitioner on April 20, 2015. Dr. Simon also prescribed physical therapy, which was not authorized by Respondent.

The Petitioner testified that she still has a burning sensation and has difficulty sleeping. She received

temporary total disability benefits on February 3, 2015 through April 15, 2015. (R. 26-27)

The Petitioner testified that she first became aware of a fork lift position at Con-Way Freight when she looked up the position. From her home in Hammond, Indiana she telephoned the terminal manager at Con-Way Freight in Gary, Indiana. The terminal manager, John Wadas, directed the Petitioner to contact Respondent Randstad to fill out the preliminary paperwork. She next made an appointment at Respondent to complete job screening paperwork at their office in Bolingbrook, Illinois. Petitioner testified that on April 14, 2014, she showed up to work at Con-Way Freight in Indiana. She admitted she was not paid any wages prior to that date. Petitioner originally testified that she completed the hiring process at the Bolingbrook, Illinois facility; however, upon cross-examination, Petitioner testified that when she showed up at Con-Way Freight she filled out additional paperwork. Petitioner did not recall undergoing one week of training to drive the fork lift but did remember a second week of training with a supervisor.

Ms. Rachel Baker testified on behalf of the Respondent. Ms. Baker is a recruiter for Respondent Randstad. She stated that Respondent's main headquarters are located in Atlanta, Georgia and that she works at the Bolingbrook, Illinois branch. Ms. Baker testified that Respondent is a national company which has offices in the majority of the states. She stated that at her Bolingbrook office she recruits for jobs both in Indiana and in Illinois. Ms. Baker testified that she is personally responsible for hiring and placing employees at Con-Way Freight in Gary, Indiana. Ms. Baker stated that she was personally familiar with the steps that one must go through to progress from an applicant to an employee at that facility.

Ms. Baker explained that an applicant would need to apply online and then complete paperwork and testing at the Bolingbrook, Illinois office. The Bolingbrook office would provide a safety video test, a drug screen, a background check, and an I-9 employment verification form. While the applicant is going through this process, the individual is not considered an employee, but rather, they are considered a candidate for employment. After the candidate had filled out the paperwork in Bolingbrook, Illinois they had to wait 3 to 5 business days for the background check to come back. Once the paperwork comes back, Ms. Baker then alerts the candidate as to what day they should start at Con-Way Freight in Gary, Indiana.

Ms. Baker testified that the Petitioner was required to fill out additional paperwork when she showed up at Con-Way Freight. (See Respondent's Exhibit #1) On April 14, 2014, at the Con-Way Freight facility in Indiana, the Petitioner executed the following forms: 1) the Con-Way Freight Hazard Communication Program Employee Training Verification Form; 2) the Con-Way Freight Lockout /Tag Out Training Certificate for the OSHA Standard 29 CFR 1910 subpart J 1910.147; 3) the Con-Way Freight Fire Control Training Certificate on April 14, 2014; and 4) the Con-Way injury prevention form.

Ms. Baker testified that if the Petitioner did not show up at Con-Way on April 14, 2014, she would not have been considered an employee. Similarly, she testified that if Petitioner had not filled out the paperwork at Con-Way on April 14, 2014, she also would not have been an employee. Ms. Baker testified the Petitioner had to go through additional training at Con-Way to progress to a non-probationary employee.

CONCLUSIONS OF LAW

1. With regard to the issue of jurisdiction, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding, the Arbitrator relies on the witnesses' testimony and the governing case law. Jurisdiction under the Illinois Workers' Compensation Act is determined pursuant to Section 1(b)2 of the Workers' Compensation Act, 820 ILCS 305/1(b)2, which allows for jurisdiction to be proper for any one of three circumstances:

1. Where the contract of hire is made within the State of Illinois; or
2. Where the injury is incurred within the State of Illinois; or
3. Where the injured person's employment is principally localized within Illinois.

In the instant case, the accident occurred in Indiana and there was no evidence that the petitioner's employment was principally located in Illinois. Therefore, the main question in this case is whether the Petitioner's contract for hire was made in the state of Illinois. On this question, the Arbitrator finds instructive and persuasive, the Appellate Court's decision in Cowger v. Industrial Commission, 313 Ill. App. 3d 364 (2000). In Cowger, the Petitioner was hired to work as a driver for a trucking company located in Indiana before he sustained an injury in Texas while working for that Indiana employer. It was the company's standard procedure for every driver to complete an application, a written driving test, and a drug screening test. The Petitioner stated that he was hired over the phone. However, the phone conversation in which the job offer was accepted, took place before these steps were taken. The Appellate Court in Cowger affirmed the Commission's denial of jurisdiction by looking to where the last act necessary occurred for the formation of the contract of employment. In that case, the Commission and the Appellate Court found the last act necessary for the formation of the employment contract was the completion of the drug test in Indiana. The Appellate Court noted that the last act was not based on the alleged offer and acceptance which was done by phone.

In applying this analysis to the instant case, the Arbitrator finds that the last act necessary for the formation of the contract of employment for the Petitioner occurred in Indiana, where Petitioner had to complete paperwork and training for the Respondent. It was only after Petitioner completed the paperwork that she began her training and at which point she began to receive her pay while training. The Arbitrator finds persuasive the unrebutted testimony of Ms. Baker, who explained that the Petitioner was considered a candidate for employment until she completed the paperwork and training in Indiana; and only after completing the paperwork and training Petitioner became an employee of Respondent. Accordingly, the Arbitrator concludes that based on the facts above and consistent with the governing case law, the Petitioner has failed to prove that jurisdiction for this claim lies in Illinois.

2. Based on the Arbitrator's findings with regard to the issue of jurisdiction, all other issues are rendered moot and Petitioner's claim is denied.

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

Nora Crandall,

Petitioner,

vs. NO: 12 WC 39433

IICLE,

16IWCC0243

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical, 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 August, 27, 2015 is hereby affirmed and adopted.

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

DATED: APR 4 - 2016

MB/mam
o:3/10/16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRANDALL, NORA
Employee/Petitioner

Case# **12WC039433**

16IWCC0243

IICLE
Employer/Respondent

On 8/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.20% 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:

4251 KELLY LAW OFFICE PC
DONALD A BEHLE
121 N MAIN 3RD FL
BLOOMINGTON, IL 61701

0265 HEYL ROYSTER
JOHN O LANGFELDER
3731 WABASH AVE
SPRINGFIELD, IL 62705

16IWCC0243

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

NORA CRANDALL
Employee/Petitioner

Case # 12 WC 39433

v.

Consolidated cases: _____

IICLE
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Dearing**, Arbitrator of the Commission, in the city of **Springfield**, on **June 23, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 8, 2012,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

The parties stipulated that petitioner's average weekly wage was $2,555.19 in the year preceding the injury.

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

Because Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on May 8, 2012, all benefits are denied. Petitioner's Petition for Relief under Sections 19(L), 19(K) and 16 of the Workers' Compensation Act 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.

Arbitrator Molly Dearing

August 21, 2015
Date

AUG 27 2015

16IWCC0243

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

NORA CRANDALL
Employee/Petitioner

v. Case # 12 WC 39433

IICLE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On her date of accident, Petitioner was sixty-two years of age (Arb. X 1), and she was employed by Respondent as Executive Director. She was employed in that capacity for six years until she retired on December 31, 2012. Petitioner testified that her duties as Executive Director frequently involved travel away from her office for luncheons, conferences, bar association meetings, visits to Respondent's warehouse, and continuing education programs, as well as travel to Respondent's satellite office in Chicago, Illinois. Petitioner estimated that she was out of her office one third of her time.

On May 8, 2012, Petitioner arrived at her office at her usual time of arrival, approximately 6:15 and 6:30 a.m., and she stated that at that time, she generally had her pick of parking spaces. She parked her vehicle in the parking lot of the building. When she exited her vehicle, she was carrying her purse over her shoulder, a briefcase containing files in one hand and her keys in the other, which contained her car key and keys for entering the building. Petitioner testified that prior to normal business hours of 8:00 a.m., a key card is required to enter the building. Petitioner testified that she walked directly towards the front entrance upon exiting her vehicle and as she was about to step up onto the sidewalk approximately twenty feet from the door, she heard honking of geese that were barreling at her. She attempted to make it into the building, but testified that before she took a few more steps, one goose was in front of her trying to bite her and two were behind her. Petitioner swung her briefcase to scare them away. She testified that she saw something in her peripheral vision and then a goose struck her head, causing her fall to the pavement. Her buttocks struck the pavement and then her side. After she was knocked down, Petitioner testified that she felt pain and she was dazed. Petitioner does not remember picking up her things, but she recalls stumbling back to her car and falling into the passenger seat of her vehicle. She was trembling, and she texted or called her secretary, who then contacted Petitioner's husband.

On May 8, 2012, Petitioner sought emergent care and treatment at Memorial Medical Center. Petitioner reported falling after being chased by multiple geese in a parking lot. She rated her pain as a nine on a ten-point scale. Petitioner was given pain medications, fitted with a brace, and admitted to the hospital overnight for pain control. She was discharged on May 9, 2012 with a diagnosis of acute L1-L3 fracture as a result of mechanical fall with intractable back pain. She was prescribed Tramadol, Zantac, and Norco upon discharge. PX 5.

A CT scan of the thoracic spine on that date revealed no thoracic fracture. A CT scan of the lumbar spine revealed severe superior endplate compression fractures of L3 and L1, which appeared

acute, a mild superior endplate compression deformity of L2 of indeterminate age, osteopenia, and degenerative changes. A CT of the pelvis was normal. PX 3.

On May 11, 2012, Petitioner presented to Dr. Abdur Nawoor at Physicians Group Associates and reported that following "a run in" with some geese at the parking lot at work, she presented to Memorial Medical Center on May 8, 2012, and has been unable to get her back pain under control since. Petitioner complained of discomfort at night. Dr. Nawoor diagnosed her with a closed fracture of the lumbar vertebrae, and he prescribed her Vicodin and Flexeril. PX 2, RX 8.

On May 15, 2012, Petitioner presented to Dr. Joseph Williams at the Orthopedic Center of Illinois for a follow-up regarding her lumbar endplate compression fractures. A physical examination showed good strength in the lower extremities bilaterally, sensation light to touch grossly in tact in all distributions, and a normal gait. Petitioner was fitted with a TLSO brace and instructed to maintain same at all times. She was instructed to return in four weeks. Dr. Williams removed Petitioner from jury duty on May 23, 2012 through December 31, 2012 due to her "medical condition and healing process." PX 4, RX 6.

On May 25, 2012, Petitioner presented to Dr. Neni Prasad at Physicians Group Associates with complaints of intermittent left knee pain for a couple of months, and she requested a steroid shot. Petitioner reported that "she might be aggravating her knee with wearing the back brace she has on as well." Petitioner reported that the pain in her lower back had decreased due to the use of the back brace. Dr. Prasad injected Petitioner's left knee and she also prescribed DepoMedrol. PX 2, RX 8.

On June 18, 2012, Petitioner returned to Dr. Joseph Williams for a follow-up of her compression fractures. She had been immobilized in a TLSO brace, and she reported doing well, denied tremendous pain, and she stated that overall she is continuing to show improvement. A physical examination revealed good strength in the lower extremities and upper extremities bilaterally, and a normal gait. X-rays of the lumbar spine showed compression fractures at the superior endpoint at L1 through L3. Dr. Joseph diagnosed her with L1, L2, and L3 compression fractures as a result of the fall in a parking lot on May 8, 2012. Dr. Williams ordered Petitioner to continue utilizing the TLSO brace for the next four to six weeks, and she was to follow up in one month. PX 4, RX 6.

On July 23, 2012, Dr. Williams prescribed Petitioner physical therapy and ordered her to discontinue the use of the TLSO brace. Petitioner underwent physical therapy at Midwest Rehab from August 7, 2012 through August 29, 2012. PX 4, RX 6.

Petitioner returned to Dr. Williams on September 7, 2012 with complaints of chronic low back pain with pain radiating down into her bilateral hips, greater on the left than on the right, and some symptoms down the anterior thigh on the left. Petitioner reported returning to riding her recumbent bicycle, and that physical therapy provided some relief of the upper lumbar and lower thoracic spine pain. She further reported that "she is walking differently now" and that same had worsened the symptoms in her left knee. Petitioner had presented to Dr. Ronald Romanelli for her left knee and was requesting an injection in her left knee before she departed for Montreal. A physical examination revealed mild tenderness to palpation of the lower lumbar spine at the belt line, good strength in ankle dorsiflexion, ankle plantarflexion, knee extension bilaterally, mild effusion of the left knee, stable to a varus and valgus stress, and a calf that is soft and nontender. Petitioner was

able to stand and walk around the examination room without significant discomfort. X-rays taken revealed compression fractures at L1, L2, and L3 with a slight compression fracture at the superior endplate of T12. Dr. Williams diagnosed her with healed T12, L1, L2, and L3 compression fractures, chronic low back pain, lumbar degenerative disc disease at L5 through S1, chronic left knee pain, and mild to moderate left knee tricompartmental arthritis. Dr. Williams ordered her to continue physical therapy exercises at home and to lessen her use of Norco. Dr. Williams administered a cortisone injection to her left knee. PX 4, RX 6.

An MRI of the lumbar spine dated September 25, 2012 revealed a mild diffuse disc bulge with no significant central spinal canal or neural foraminal stenosis at L1-2, L3-4, L4-5, and L5-S1, and a mild anterior wedge compression deformities of L1 and L3 vertebral bodies with minimal edema seen along the superior end-plate fractures. PX 4, RX 6.

On October 1, 2012, Petitioner returned to Dr. Williams with complaints of significant low back pain. She reported taking sick leave from work and that "the stress of the job, coupled with the fact that she has significant pain in the low back and pain in the left knee is culminating in significant stress." Petitioner noted improvement since leaving her position. She denied weakness, numbness or tingling in her lower extremities. Dr. Williams diagnosed her with L1, L2, L3 and T12 superior end-plate fractures, osteoporosis, lumbar degenerative disc disease, and left knee degenerative joint disease. Dr. Williams did not see "any reason to seek more aggressive treatments in regard to her pain. At this point, she has had an improvement in her symptoms since taking the leave of absence. I would suggest continuing the leave of absence." Dr. Williams ordered Petitioner to perform activity modifications with regard to her lumbar spine, he removed her from work, and he instructed her to return in four weeks to obtain x-rays of her left knee. PX 4, RX 6.

On October 3, 2012, Petitioner returned to Dr. Prasad with complaints of left knee pain for a few weeks for which she was treating with an orthopedic physician and low back pain that radiated to left thigh. She rated her low back pain as a six on a ten-point scale. Dr. Prasad assessed Petitioner with primarily localized osteoarthritis of the lower leg and radicular syndrome of the lower limbs. PX 2, RX 8.

On October 30, 2012, Petitioner returned to Dr. Williams with complaints of chronic low back and left knee pain. She reported improvement in her back pain since ceasing work. Petitioner further reported that the cortisone injection she received in her left knee on September 7, 2012 did not provide relief and she indicated that her left knee pain was presently more of a concern than her back pain. A physical examination of the left knee was stable to varus and valgus stress, and showed mild crepitation with passive range of motion of the patellofemoral joint, a stable patella, full extension, flexion to one hundred twenty degrees, good pulses distally at the ankle, and mild effusion. Dr. Williams diagnosed her with L1, L2, L3 and T12 superior end-plate fractures, chronic left knee pain, left knee degenerative joint disease, and lumbar degenerative disc disease. Dr. Williams noted that neither surgical intervention nor an injection would be beneficial to Petitioner in her low back, and he recommended an MRI of her left knee. He continued to remove her from work. PX 4, RX 6.

On July 8, 2013, Petitioner returned to Dr. Williams with complaints of interrupted sleep due to back pain, though she reported an improvement in her pain since retiring from her employment. Petitioner complained of low back pain two to three nights per week. Dr. Williams diagnosed her with closed compression fractures of lumbar vertebral bodies, joint pain in the left

knee, lower back pain, and osteoarthritis of the left knee. Dr. Williams performed a cortisone injection to Petitioner's left knee. PX 4, RX 6.

On October 22, 2013, Petitioner presented to Dr. Michael Kelly at Washington University Physicians for evaluation of low back pain. She rated her pain as a seven on a ten-point scale. Petitioner reported that her low back condition was worsening and she also complained of left-sided leg pain. After conducting a physical examination and reviewing x-rays, Dr. Kelly diagnosed Petitioner with insufficiency fractures of her lumbar spine after low-energy mechanism fall. He stated that, "[t]his is pathognomonic for osteoporosis." He recommended anabolic or antiresorptive therapy, and he ordered an MRI of her left knee for her left leg pain. PX 6.

An MRI dated November 5, 2013 was compared to that taken on September 25, 2012, and revealed normal lumbar lordosis and alignment, no interval change in the multiple compression fracture deformities, moderate height loss of the L1 vertebral body with slight repulsion of the superoposterior vertebral body into the spinal canal resulting in mild to moderate spinal canal narrowing at the T12-L1 level, mild central concavity in the superior L2 end-plate and mild height loss in L2 and L3, no marrow edema to suggest acute fracture, distal cord and conus medullaris abnormal in caliber and morphology terminating at L1-2, degenerative disc desiccation, and disc height loss throughout the lumbar spine with at most moderate disc height loss. PX 4.

On March 25, 2014, Petitioner returned to Dr. Kelly for repeat evaluation of her low back pain. Petitioner was one year status post total knee arthroplasty on that date. On physical examination, Petitioner stood erect with good coronal and sagittal plane alignment, with negative straight leg raises, and nontender to palpation of the lumbar spine. X-rays ordered on that date revealed healing insufficiency fractures with good overall alignment and no evidence of instability. Dr. Kelly diagnosed her with lumbar compression fractures, and he noted that she required "some sort of osteoporosis medication." He did not recommend surgical intervention and he released her to return on an as-needed basis. PX 6.

Dr. Williams testified by way of evidence deposition on February 3, 2015. Dr. Williams attributed Petitioner's continued complaints of low back pain to degenerative changes aggravated by her work injury. He opined that with regard to Petitioner's fractures, there are no additional modalities of treatment, surgical or otherwise, that would benefit Petitioner. Dr. Williams opined that her left knee could possibly become a candidate for epidural steroid injections or some other type of injection or repetition of therapy. He stated that water therapy, land-based therapy, nonsteroidal medication, and phosphates used to treat osteoporosis may be of benefit to her low back pain. Dr. Williams testified that Petitioner should not expect her low back condition to be completely resolved or be pain free because "the source of her symptoms are both related to the fractures that occurred at those three bones but also because of the degenerative changes that's present throughout her spine and sometimes, you know, that can remain symptomatic." He opined that it would be beneficial for her to avoid strenuous activities, repetitive bending and lifting heavy weights, though he did not recommend strict restrictions in regard to same. Dr. Williams testified that as of May 23, 2012, he restricted her performance of jury duty until December 31, 2012, but he could not recall whether he issued work restrictions at that time. He stated that if he had issued an off work slip on May 23, 2012, it would be contained in his records. Dr. Williams testified that he restricted her from work as of October 1, 2012 relative to her low back. PX 17, RX 7.

Petitioner testified that approximately ten to eleven months prior to her date of accident,

16IWCC0243

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

NORA CRANDALL
Employee/Petitioner

v. Case # 12 WC 39433

IICLE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On her date of accident, Petitioner was sixty-two years of age (Arb. X 1), and she was employed by Respondent as Executive Director. She was employed in that capacity for six years until she retired on December 31, 2012. Petitioner testified that her duties as Executive Director frequently involved travel away from her office for luncheons, conferences, bar association meetings, visits to Respondent's warehouse, and continuing education programs, as well as travel to Respondent's satellite office in Chicago, Illinois. Petitioner estimated that she was out of her office one third of her time.

On May 8, 2012, Petitioner arrived at her office at her usual time of arrival, approximately 6:15 and 6:30 a.m., and she stated that at that time, she generally had her pick of parking spaces. She parked her vehicle in the parking lot of the building. When she exited her vehicle, she was carrying her purse over her shoulder, a briefcase containing files in one hand and her keys in the other, which contained her car key and keys for entering the building. Petitioner testified that prior to normal business hours of 8:00 a.m., a key card is required to enter the building. Petitioner testified that she walked directly towards the front entrance upon exiting her vehicle and as she was about to step up onto the sidewalk approximately twenty feet from the door, she heard honking of geese that were barreling at her. She attempted to make it into the building, but testified that before she took a few more steps, one goose was in front of her trying to bite her and two were behind her. Petitioner swung her briefcase to scare them away. She testified that she saw something in her peripheral vision and then a goose struck her head, causing her fall to the pavement. Her buttocks struck the pavement and then her side. After she was knocked down, Petitioner testified that she felt pain and she was dazed. Petitioner does not remember picking up her things, but she recalls stumbling back to her car and falling into the passenger seat of her vehicle. She was trembling, and she texted or called her secretary, who then contacted Petitioner's husband.

On May 8, 2012, Petitioner sought emergent care and treatment at Memorial Medical Center. Petitioner reported falling after being chased by multiple geese in a parking lot. She rated her pain as a nine on a ten-point scale. Petitioner was given pain medications, fitted with a brace, and admitted to the hospital overnight for pain control. She was discharged on May 9, 2012 with a diagnosis of acute L1-L3 fracture as a result of mechanical fall with intractable back pain. She was prescribed Tramadol, Zantac, and Norco upon discharge. PX 5.

A CT scan of the thoracic spine on that date revealed no thoracic fracture. A CT scan of the lumbar spine revealed severe superior endplate compression fractures of L3 and L1, which appeared

acute, a mild superior endplate compression deformity of L2 of indeterminate age, osteopenia, and degenerative changes. A CT of the pelvis was normal. PX 3.

On May 11, 2012, Petitioner presented to Dr. Abdur Nawoor at Physicians Group Associates and reported that following "a run in" with some geese at the parking lot at work, she presented to Memorial Medical Center on May 8, 2012, and has been unable to get her back pain under control since. Petitioner complained of discomfort at night. Dr. Nawoor diagnosed her with a closed fracture of the lumbar vertebrae, and he prescribed her Vicodin and Flexeril. PX 2, RX 8.

On May 15, 2012, Petitioner presented to Dr. Joseph Williams at the Orthopedic Center of Illinois for a follow-up regarding her lumbar endplate compression fractures. A physical examination showed good strength in the lower extremities bilaterally, sensation light to touch grossly in tact in all distributions, and a normal gait. Petitioner was fitted with a TLSO brace and instructed to maintain same at all times. She was instructed to return in four weeks. Dr. Williams removed Petitioner from jury duty on May 23, 2012 through December 31, 2012 due to her "medical condition and healing process." PX 4, RX 6.

On May 25, 2012, Petitioner presented to Dr. Neni Prasad at Physicians Group Associates with complaints of intermittent left knee pain for a couple of months, and she requested a steroid shot. Petitioner reported that "she might be aggravating her knee with wearing the back brace she has on as well." Petitioner reported that the pain in her lower back had decreased due to the use of the back brace. Dr. Prasad injected Petitioner's left knee and she also prescribed DepoMedrol. PX 2, RX 8.

On June 18, 2012, Petitioner returned to Dr. Joseph Williams for a follow-up of her compression fractures. She had been immobilized in a TLSO brace, and she reported doing well, denied tremendous pain, and she stated that overall she is continuing to show improvement. A physical examination revealed good strength in the lower extremities and upper extremities bilaterally, and a normal gait. X-rays of the lumbar spine showed compression fractures at the superior endpoint at L1 through L3. Dr. Joseph diagnosed her with L1, L2, and L3 compression fractures as a result of the fall in a parking lot on May 8, 2012. Dr. Williams ordered Petitioner to continue utilizing the TLSO brace for the next four to six weeks, and she was to follow up in one month. PX 4, RX 6.

On July 23, 2012, Dr. Williams prescribed Petitioner physical therapy and ordered her to discontinue the use of the TLSO brace. Petitioner underwent physical therapy at Midwest Rehab from August 7, 2012 through August 29, 2012. PX 4, RX 6.

Petitioner returned to Dr. Williams on September 7, 2012 with complaints of chronic low back pain with pain radiating down into her bilateral hips, greater on the left than on the right, and some symptoms down the anterior thigh on the left. Petitioner reported returning to riding her recumbent bicycle, and that physical therapy provided some relief of the upper lumbar and lower thoracic spine pain. She further reported that "she is walking differently now" and that same had worsened the symptoms in her left knee. Petitioner had presented to Dr. Ronald Romanelli for her left knee and was requesting an injection in her left knee before she departed for Montreal. A physical examination revealed mild tenderness to palpation of the lower lumbar spine at the belt line, good strength in ankle dorsiflexion, ankle plantarflexion, knee extension bilaterally, mild effusion of the left knee, stable to a varus and valgus stress, and a calf that is soft and nontender. Petitioner was

able to stand and walk around the examination room without significant discomfort. X-rays taken revealed compression fractures at L1, L2, and L3 with a slight compression fracture at the superior endplate of T12. Dr. Williams diagnosed her with healed T12, L1, L2, and L3 compression fractures, chronic low back pain, lumbar degenerative disc disease at L5 through S1, chronic left knee pain, and mild to moderate left knee tricompartmental arthritis. Dr. Williams ordered her to continue physical therapy exercises at home and to lessen her use of Norco. Dr. Williams administered a cortisone injection to her left knee. PX 4, RX 6.

An MRI of the lumbar spine dated September 25, 2012 revealed a mild diffuse disc bulge with no significant central spinal canal or neural foraminal stenosis at L1-2, L3-4, L4-5, and L5-S1, and a mild anterior wedge compression deformities of L1 and L3 vertebral bodies with minimal edema seen along the superior end-plate fractures. PX 4, RX 6.

On October 1, 2012, Petitioner returned to Dr. Williams with complaints of significant low back pain. She reported taking sick leave from work and that "the stress of the job, coupled with the fact that she has significant pain in the low back and pain in the left knee is culminating in significant stress." Petitioner noted improvement since leaving her position. She denied weakness, numbness or tingling in her lower extremities. Dr. Williams diagnosed her with L1, L2, L3 and T12 superior end-plate fractures, osteoporosis, lumbar degenerative disc disease, and left knee degenerative joint disease. Dr. Williams did not see "any reason to seek more aggressive treatments in regard to her pain. At this point, she has had an improvement in her symptoms since taking the leave of absence. I would suggest continuing the leave of absence." Dr. Williams ordered Petitioner to perform activity modifications with regard to her lumbar spine, he removed her from work, and he instructed her to return in four weeks to obtain x-rays of her left knee. PX 4, RX 6.

On October 3, 2012, Petitioner returned to Dr. Prasad with complaints of left knee pain for a few weeks for which she was treating with an orthopedic physician and low back pain that radiated to left thigh. She rated her low back pain as a six on a ten-point scale. Dr. Prasad assessed Petitioner with primarily localized osteoarthritis of the lower leg and radicular syndrome of the lower limbs. PX 2, RX 8.

On October 30, 2012, Petitioner returned to Dr. Williams with complaints of chronic low back and left knee pain. She reported improvement in her back pain since ceasing work. Petitioner further reported that the cortisone injection she received in her left knee on September 7, 2012 did not provide relief and she indicated that her left knee pain was presently more of a concern than her back pain. A physical examination of the left knee was stable to varus and valgus stress, and showed mild crepitation with passive range of motion of the patellofemoral joint, a stable patella, full extension, flexion to one hundred twenty degrees, good pulses distally at the ankle, and mild effusion. Dr. Williams diagnosed her with L1, L2, L3 and T12 superior end-plate fractures, chronic left knee pain, left knee degenerative joint disease, and lumbar degenerative disc disease. Dr. Williams noted that neither surgical intervention nor an injection would be beneficial to Petitioner in her low back, and he recommended an MRI of her left knee. He continued to remove her from work. PX 4, RX 6.

On July 8, 2013, Petitioner returned to Dr. Williams with complaints of interrupted sleep due to back pain, though she reported an improvement in her pain since retiring from her employment. Petitioner complained of low back pain two to three nights per week. Dr. Williams diagnosed her with closed compression fractures of lumbar vertebral bodies, joint pain in the left

knee, lower back pain, and osteoarthritis of the left knee. Dr. Williams performed a cortisone injection to Petitioner's left knee. PX 4, RX 6.

On October 22, 2013, Petitioner presented to Dr. Michael Kelly at Washington University Physicians for evaluation of low back pain. She rated her pain as a seven on a ten-point scale. Petitioner reported that her low back condition was worsening and she also complained of left-sided leg pain. After conducting a physical examination and reviewing x-rays, Dr. Kelly diagnosed Petitioner with insufficiency fractures of her lumbar spine after low-energy mechanism fall. He stated that, "[t]his is pathognomonic for osteoporosis." He recommended anabolic or antiresorptive therapy, and he ordered an MRI of her left knee for her left leg pain. PX 6.

An MRI dated November 5, 2013 was compared to that taken on September 25, 2012, and revealed normal lumbar lordosis and alignment, no interval change in the multiple compression fracture deformities, moderate height loss of the L1 vertebral body with slight repulsion of the superoposterior vertebral body into the spinal canal resulting in mild to moderate spinal canal narrowing at the T12-L1 level, mild central concavity in the superior L2 end-plate and mild height loss in L2 and L3, no marrow edema to suggest acute fracture, distal cord and conus medullaris abnormal in caliber and morphology terminating at L1-2, degenerative disc desiccation, and disc height loss throughout the lumbar spine with at most moderate disc height loss. PX 4.

On March 25, 2014, Petitioner returned to Dr. Kelly for repeat evaluation of her low back pain. Petitioner was one year status post total knee arthroplasty on that date. On physical examination, Petitioner stood erect with good coronal and sagittal plane alignment, with negative straight leg raises, and nontender to palpation of the lumbar spine. X-rays ordered on that date revealed healing insufficiency fractures with good overall alignment and no evidence of instability. Dr. Kelly diagnosed her with lumbar compression fractures, and he noted that she required "some sort of osteoporosis medication." He did not recommend surgical intervention and he released her to return on an as-needed basis. PX 6.

Dr. Williams testified by way of evidence deposition on February 3, 2015. Dr. Williams attributed Petitioner's continued complaints of low back pain to degenerative changes aggravated by her work injury. He opined that with regard to Petitioner's fractures, there are no additional modalities of treatment, surgical or otherwise, that would benefit Petitioner. Dr. Williams opined that her left knee could possibly become a candidate for epidural steroid injections or some other type of injection or repetition of therapy. He stated that water therapy, land-based therapy, nonsteroidal medication, and phosphates used to treat osteoporosis may be of benefit to her low back pain. Dr. Williams testified that Petitioner should not expect her low back condition to be completely resolved or be pain free because "the source of her symptoms are both related to the fractures that occurred at those three bones but also because of the degenerative changes that's present throughout her spine and sometimes, you know, that can remain symptomatic." He opined that it would be beneficial for her to avoid strenuous activities, repetitive bending and lifting heavy weights, though he did not recommend strict restrictions in regard to same. Dr. Williams testified that as of May 23, 2012, he restricted her performance of jury duty until December 31, 2012, but he could not recall whether he issued work restrictions at that time. He stated that if he had issued an off work slip on May 23, 2012, it would be contained in his records. Dr. Williams testified that he restricted her from work as of October 1, 2012 relative to her low back. PX 17, RX 7.

Petitioner testified that approximately ten to eleven months prior to her date of accident, Respondent relocated its office to its present location at 3161 West White Oaks Drive in Springfield, Illinois in order to accommodate on site seminars and classes sponsored by Respondent by providing more parking for attendees. Petitioner testified that several tenants occupied the same building as did Respondent and that Respondent's office was on the third floor of the building. Petitioner testified that other individuals were not generally present at the time of morning she usually arrived at work, though she stated that her secretary arrived at that time, and individuals attending courses at Respondent's office also arrived early. She stated that there was no assigned parking other than designated visitor and handicapped parking. Petitioner testified that visitors to Respondent's offices could park anywhere in the lot. She testified that neither she nor any other employees of Respondent were assigned spaces, and she stated that anyone could park anywhere. Petitioner testified that she was aware of only one entrance to the building at the time of her accident, but testified that she subsequently learned of a second possible entrance to the building. She stated that Respondent did not direct her to utilize any particular entrance into the building. Petitioner testified that walking to or attempting to use the second entrance would have put her in closer proximity to the geese and their nesting area. Petitioner testified that she has previously observed geese near the periphery of the building, but she had not seen them close to the building. Petitioner testified that the landlord maintained exclusive control of the parking lot and common areas, including the landscaped area where the geese had been nesting, and that Respondent had no control over the parking lot or entrances. Petitioner testified that the landlord was notified of the incident, and she believed this was the only reported incident of the geese attacking any occupant or visitor of the building.

Petitioner's retired on December 31, 2012. Petitioner testified that December 31, 2012 was her last date of employment with Respondent because her health had deteriorated to the point where she did not feel as if she could keep working. She described her state as "miserable" at that time. Petitioner stated that she made the decision to retire in August 2012 and she informed Respondent in October 2012. Electronic messages to Respondent and her colleagues dated August 2, 2012 and October 1, 2012 informing them of her retirement were admitted as Respondent's Exhibit 5. On August 2, 2012, Petitioner wrote, in part, "[a] few moments ago, I submitted my resignation to IICLE's Board effective December 31, 2012. My 13 years here have always been rewarding and certainly very challenging at times, but I am ready for new adventures. So you may think of me laying on a beach somewhere, starting a new small business, or who knows where this is going?" On October 1, 2012, Petitioner wrote, in part, "[m]any of you know that I have been struggling with the back injury that I incurred in the spring. I have been aware from work recently undergoing more tests to determine why my pain is increasing and my nights are getting shorter...this means that I will not be returning to work as I am to follow this regimen indefinitely and certainly past the December 31, 2012 date that I had intended to leave." RX 5.

Petitioner described her state of being prior to the work accident as "excellent." She testified that she wallpapered and painted her home, she and her husband rode trike bicycles long distances, she was active with her grandchildren, she played golf, and she worked in her yard. Following the accident, however, Petitioner testified that she continues to have low back pain. She stated that sitting, standing or laying for prolonged periods of time aggravate her back pain, as does cold weather.

Michael Crandall, Petitioner's husband, testified at Arbitration. He testified that on May 8, 2012, he and his wife had breakfast together before both of them departed separately for work.

Shortly thereafter, he was called to her place of work where he found Petitioner sitting in the passenger side seat of her vehicle. Petitioner reported to him that she had been attacked by geese in the parking lot. She complained of severe back pain and he thereafter drove her to the emergency room. Mr. Crandall described his wife as being very active prior to May 8, 2012 and he testified that he and Petitioner rode trike bicycles oftentimes forty miles per day. Mr. Crandall testified that Petitioner engaged in numerous household activities prior to her work accident. He testified that she has attempted to engage in the activities she enjoys subsequent to the work accident, but she is unable to so due to her back pain. Mr. Crandall stated that he and Petitioner "are doing well" if they can ride five miles. He testified that she presently complains about her low back pain and that her pain frequently interrupts her sleep at night.

James Yokim testified at Arbitration. Mr. Yochim is employed an assistant director with the U.S. Department of Labor, another tenant in the same building as Respondent, and he has been so employed since 2007. He testified that the U.S. Department of Labor is one of three governmental agencies that lease the building. Mr. Yochim testified that he rode his bicycle to work on May 8, 2012, and upon arriving to his office building at his usual time of arrival, approximately 6:15 to 6:30 a.m., he observed two geese flying around Petitioner in front of the main entrance. He then observed Petitioner fall to the ground, but he was unsure as to whether one of the geese struck her. Mr. Yokim testified that he was unaware of her name or who she was at the time. He testified that she thereafter went to her vehicle and he went into his office. Mr. Yokim testified that he had observed geese in that area prior to May 8, 2012 and was aware that they were actively nesting. He had not known them to attack anyone prior to that day, and he denied ever being attacked by geese. Mr. Yokim testified that he did not attempt to assist her because he did not see a need to, as she was able to walk to her car and the geese were no longer around her.

An Illinois Form 45: Employers First Report of Injury was admitted into evidence. The Report indicates that the accident occurred when Petitioner "came into work and three geese took flight in the parking lot and one hit her in the head, she fell over on her back. She was able to get herself back into the passenger side of her veh andsent [sic] an email to her assistant who sat with her until her husband arrived to take her to the [sic]". PX 16, RX 2.

A Lease agreement between Bridge Real Estate, L.L.C and Respondent was admitted into evidence. The Lease states that Respondent leases eight thousand eighty square feet in the Novanis E-Business Center Building located at 3161 West White Oaks Drive, Springfield, Illinois, and the "'Leased Premises' shall be designated as Suite 300 of the 'Building'". The Lease enumerates in part that, "Common Areas and Facilities including automobile parking areas, driveways, entrances and exits thereto, and other areas and facilities furnished by Lessor, including pedestrian sidewalks, ramps, stairs, malls and courts, restrooms, elevators, stairwells, and landscaped areas provided by Lessor for general use...Such common areas and facilities shall at all times be subject to the exclusive control and management of Lessor." The Lease states that Respondent "shall have the right of nonexclusive use, in common with others, of the outdoor automobile parking areas", but provides Respondent no less than four parking places per one thousand square feet of net leasable area, and grants Respondent an additional eighty parking places for its "courses, seminars and conferences". PX 22.

Photographs of the parking lot and landscaped areas adjacent to the building where Respondent's office is located were admitted into evidence. PX 20, RX 3.

CONCLUSIONS OF LAW

In regard to disputed issue (C), to obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. 820 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013 (2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). However, the fact that an injury arose "in the course of" the employment is not sufficient to impose liability, for to be compensable, the injury must also "arise out of" the employment. *Id.* at 58.

The "arising out of" component refers to an origin or cause of the injury that must be in some risk connected with or incident to the employment, so as to create a causal connection between the employment and the accidental injury. *Id.* There are three categories of risk to which an employee may be exposed: (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. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27; *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC. Injuries resulting from a neutral risk are not generally compensable and do not arise out of the employment unless the employee was exposed to the risk to a greater degree than the general public. *Id.*

The "in the course of" component refers to the time, place and circumstances under which the accident occurred. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). If an injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of her duties, and while she is performing those duties or doing something incidental thereto, the injuries are deemed to have been received in the course of the employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 21.

Illinois Courts have repeatedly held that "'when an employee slips and falls, or is otherwise injured, at a point off the employer's premises while traveling to or from work, her injuries are not compensable.'" *Illinois Bell Tel. Co.*, 131 Ill.2d at 483-484, quoting *Reed v. Industrial Comm'n*, 63 Ill.2d 247, 248-249 (1976). Such accidents are deemed to occur outside "the course of" the employment. *Suter v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 19. However, the Courts have recognized two exceptions to the general premises rule. *Id.* at 484. Injuries have been found compensable "for off-premises injuries incurred by an employee when the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons." *Id.* Recovery has also been allowed for injuries sustained by an employee in a parking lot provided by and under the control of the employer. *Id.* This "parking lot exception" applies in circumstances where the employee's injury is caused by some hazardous condition in the parking lot. *Vill v. Industrial Comm'n*, 351 Ill. App. 3d 798, 803 (2004). "[S]lips or falls on an employer-provided lot when hazardous conditions are present are generally compensable...The rationale for awarding compensation is that the employer-provided parking lot is considered part of the employer's premises." *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038 (2004). It is immaterial

whether an employer "owns or does not own the parking lot...so long as the employer has provided the parking lot for its employees." *DeHoyos v. Industrial Comm'n*, 26 Ill. 2d 110, 887 (1962). The relevant inquiry in parking lot cases is "'whether the employer maintains and provides the lot for its employees' use'", *Suter*, at ¶ 30, citing *Mores-Harvey*, 345 Ill. App. 3d at 1040, as "[t]he presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim. *Id.*

"The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable." *Commonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534, 537 (1981). An exception arises, however, when the employee is a traveling employee. *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶ 20 (2015). A traveling employee is deemed to be in the course of his employment from the time he leaves his home until he returns. *Id.* An injury sustained by a traveling employee arises out of his employment if he was injured while engaging in conduct that was reasonable and foreseeable. *Id.* "An injury suffered by a traveling employee is compensable under the Act if the injury occurs while the employee is traveling for work, i.e., during a work-related trip. However, the work-related trip at issue must be more than a regular commute from the employee's home to the employer's premises. Otherwise, every employee who commutes from his home to a fixed workplace owned or controlled by his employer on a daily basis would be deemed a 'traveling employee,' and the exception for traveling employees would swallow the rule barring recovery for injuries incurred while traveling to and from work." *Id.* at ¶ 22.

In the present case, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that her accident arose out of and in the course of her employment with Respondent. In so concluding, the Arbitrator finds that Petitioner's confrontation with geese on her date of accident was not a risk distinctly associated with her employment or a risk to which she was exposed to a degree greater than was the general public. Although Petitioner arrived to her office early in the morning, approximately 6:15-6:30 a.m., Petitioner did not present any evidence that geese are more likely to confront or attack in the morning as opposed to other times of the day. While Petitioner testified that other individuals were not generally present at the time she arrived to work that morning, Petitioner did not present any evidence that geese are more likely to approach an individual rather than a group. Moreover, Petitioner acknowledged that individuals attending Respondent's courses, who are members of the general public, arrived early to Respondent's facility, and James Yokim arrived at the building shortly after Petitioner on the date of accident. Mr. Yokim testified that 6:15 to 6:30 a.m. was his usual time of arrival to his office and he is not an employee of Respondent, but rather, a member of the general public. Because he and Petitioner generally arrive to the same office building at virtually the same time, as they did on the date of accident, the Arbitrator finds that Mr. Yokim was exposed to the same degree of risk of being confronted by geese as was Petitioner. Moreover, Petitioner acknowledged that she was not directed by Respondent to utilize a particular entrance of the building, she was not directed by Respondent where to park within in the parking lot, and she did not have a designated parking place. The Lease reflects that Respondent had the nonexclusive right to use the parking areas in common with other tenants. PX 22. As the area in which Petitioner was injured, that is, the parking lot, is utilized by Respondent's employees, as well by the employees of other tenants and visitors attending Respondent's seminars alike, the Arbitrator finds that Petitioner was exposed to the same degree of risk on May 8, 2012 as was the general public.

Furthermore, the Arbitrator notes that the preponderance of the evidence demonstrates that the parking lot in which Petitioner was injured was not maintained by or under the control of Respondent. Petitioner testified that the landlord, not the Respondent, maintained exclusive control of the common areas, including the landscaped areas where the geese had been nesting, as well as the sidewalks and parking lot where Petitioner was injured. The Lease agreement admitted into the evidence reveals that the parking area in which Petitioner was confronted by the geese, as well as the landscaped areas in which the geese were nesting, are both under the exclusive control and management of the landlord to the building. PX 22. The Arbitrator finds that Petitioner's injury was not resultant from a hazardous condition on premises controlled or maintained by Respondent, and in light of the foregoing and the totality of the record, the Arbitrator accordingly finds the "parking lot exception" to the general premises rule inapposite to the case at hand.

Lastly, Petitioner contends that she was a traveling employee, and as such, is protected by the traveling employee exception. The Arbitrator disagrees and finds that Petitioner was not a traveling employee at the time of her accident. In so concluding, the Arbitrator notes that Petitioner testified that she had traveled from her home on May 8, 2012 to attend breakfast with her husband at a local restaurant before arriving at her office. Petitioner was not attending an off-site meeting or seminar on her date of accident that necessitated she travel that day. Rather, the preponderance of the evidence demonstrates that on her date of accident, Petitioner performed her regular commute from home to work, and while her work duties oftentimes required her to travel from Respondent's office, no such travel was indicated or required on her date of accident. Therefore, the Arbitrator declines to find Petitioner was a traveling employee at the time of her work accident on May 8, 2012.

Based upon the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries that arose out of and in the course of her employment with Respondent on May 8, 2012. All benefits are denied, including Petitioner's Petition for Relief under Sections 19(L), 19(K) and 16 of the Workers' Compensation Act. All 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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Victor Huerta Flores,

Petitioner,

16IWCC0244

vs. NO: 13 WC 22755

Dunree Homes Inc,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 13, 2015, is hereby affirmed and adopted.

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

16IWCC0244

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 4 - 2016
o3/23/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

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

16IWCC0244

HUERTA FLORES, VICTOR
Employee/Petitioner

Case# 13WC022755

DUNREE HOMES INC
Employer/Respondent

On 7/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0815 LUIS A ACEVES & ASSOC
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1931 N MILWAUKEE AVE
CHICAGO, IL 60647

1120 BRADY CONNOLLY & MASUDA PC
NICOLE RUSSO
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

16IWCC0244

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)

Victor Huerta Flores
Employee/Petitioner

v.

Dunree Homes, Inc.
Employer/Respondent

Case # **13** WC **22755**

Consolidated cases: D/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 **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **06/25/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0244

FINDINGS

On the date of accident, **06/28/13**, 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 $**38,814.36**; the average weekly wage was $**746.43.**

On the date of accident, Petitioner was **27** 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 $**50,364.37** for TTD (and $2,687.16 statutory loss payment), $**0** for TPD, $**0** for maintenance, and $**23,928.63** for other benefits. Arb Exh 1. RX 1.

ORDER

Respondent shall pay Petitioner temporary total disability benefits in the amount of $497.62 per week from June 29, 2013 through the hearing of June 25, 2015, a period of 103 6/7 weeks, with Respondent receiving credit for the $47,677.21 ($50,364.37 minus $2,687.16 statutory loss payment for the undisputed compression fracture) in temporary total disability benefits it paid prior to the hearing. Arb Exh 1.

Respondent shall pay reasonable and necessary medical expenses claimed in PX 3(a) (Michigan Avenue Medical Associates) and PX 5(a) (Premier Physical Therapy), subject to the fee schedule and with Respondent receiving credit for any payments it has made toward those expenses. RX 1.

Respondent shall authorize and pay for prospective care in the form of a return visit to Dr. Espinosa along with a microdiscectomy at L5-S1 if the doctor continues to recommend this procedure.

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.

Molly C Mason
Signature of Arbitrator

07/13/15
Date

ICArbDec19(b)

JUL 13 2015

16IWCC0244

Statement of Issues

The parties agree that Petitioner, a 27-year-old laborer, sustained an accident while working for Respondent on June 28, 2013. There is no dispute that the accident resulted in a compression fracture at L1, with Respondent having paid the statutory benefit for this loss (PX 9), along with other benefits, prior to the hearing. The dispute lies in whether Petitioner established causation as to another lumbar disc condition of ill-being that requires surgery.

Arbitrator's Statement of Facts

Petitioner testified through a Spanish-speaking interpreter. He testified he is currently 29 years old. He began working as a laborer for Respondent about 3 or 4 months before his June 28, 2013 accident. His job involved gathering pieces of wood, constructing and lifting wooden walls and nailing the walls into place. RX 6, a job description completed by Respondent's president, shows that Petitioner was regularly required to lift items weighing 50 to 100 pounds, bend and work above ground level.

Petitioner denied having any back problems before the June 28, 2013 accident.

Petitioner testified that, immediately prior to his accident, he and a number of co-workers were lifting and positioning a large wooden wall. The wall was 18 feet long and 12 feet wide. Petitioner did not know the wall's exact weight but indicated "it took seven people to lift it." After he and his co-workers lifted the wall, they put blocks behind the wall so as to support it while they nailed it into place. At some point, the wall "detached" from the nails and started to fall. The wall hit and broke one of the blocks. Petitioner was in front of the wall in a confined space and could not move out of the way. He believed his co-workers would hold the wall but they moved away. The wall fell onto his back and neck, pushing him down into a seated position. He felt a strong pain in his back, ribs and both thighs. His left thigh hurt more than his right. He reported the accident to his bosses and was taken to Palos Community Hospital.

The Emergency Room records reflect that a co-worker of Petitioner was present and acted as an interpreter. PX 1, pp. 1, 7. The history states that a two-story wooden wall slipped and fell onto Petitioner's back. The Emergency Room physician noted complaints of diffuse pain in the neck, thoracic spine and lumbar spine as well as right-sided rib pain and tenderness in the mid-line vertebrae. He also noted that Petitioner complained of back pain with movement of his right leg. PX 1, p. 1. Another note reflects that Petitioner denied radiation of his back pain. PX 1, p. 7. The physician ordered various radiographic studies, including a lumbar spine CT scan. This scan, performed without contrast, showed a fracture of the superior endplate of L1 with retropulsion of the posterior body. The radiologist commented that, while the fracture appeared to be a burst type, there was "also a vertical component through the

inferior aspect of the body on the right." He also noted mild bulging at L2-L3, moderate bulging at L3-L4 and L4-L5, with mild bilateral foraminal narrowing at both levels, and moderate bulging at L5-S1 with moderate lateral foraminal narrowing and mild diffuse concentric canal stenosis. Right rib and thoracic spine X-rays were negative. Cervical spine X-rays showed degenerative changes. Lumbar spine X-rays showed the compression fracture at L1 and posterior placement of L5 with relation to S1 and narrowing of the posterior disc space. The radiologist could not exclude a fracture at the L5 level. PX 1, pp. 17-18. At discharge, Petitioner was given pain medication and a back brace. The Emergency Room physician instructed him to rest and follow up with an orthopedic surgeon.

Petitioner returned to the Emergency Room the following day, June 29, 2013. The Emergency Room physician noted that Petitioner was wearing the brace, denied any new symptoms and had been unable to fill his Tylenol #3 prescription. The physician noted 5/5 motor strength in both legs and lumbar and thoracic vertebral tenderness. He again indicated that Petitioner denied any radiation of his low back pain. PX 1, p. 25. He prescribed Norco and Ibuprofen and instructed Petitioner to see an orthopedic surgeon, Dr. Earmon, on Monday. PX 1, p. 20.

Petitioner saw Dr. Earmon on July 2, 2013. Dr. Earmon is affiliated with the Orthospine Center. He recorded the following history:

> "Patient presents a 26-year-old laborer in construction who was working on Friday when a wall that was being constructed fell, landing onto his back, forcing him into a flexed position. Patient has sudden increasing amounts of pain and was seen in the primary care center where X-rays were taken. Denies any numbness or paresthesias, continuing to have back pain today. Patient has been on some pain medications and rest. Patient denies any other injuries, any sensory or motor loss."

On examination, Dr. Earmon noted paraspinal muscle spasms, no ecchymosis and symmetrical reflexes. He described motor strength as intact and sensory examination as normal. He described straight leg raising as negative bilaterally.

After examining Petitioner and noting the CT scan results, Dr. Earmon diagnosed a lumbar vertebral fracture. He provided Petitioner with a TLSO brace. He instructed Petitioner to remain off work for one month, continue his pain medication and return in two weeks for an X-ray. PX 2, p. 4.

Petitioner did not return to Dr. Earmon thereafter. On July 22, 2013, he saw Dr. Albert at Michigan Avenue Medical Associates. Dr. Albert recorded a consistent history of the work accident. He noted that Petitioner complained of immediate pain in his low back, chest, ribs, neck and right shoulder. He also noted the CT results and TLSO brace provided by Dr. Earmon. He indicated that Petitioner's neck and right shoulder pain had improved but that his back pain

was no better. He indicated that Petitioner denied radicular symptoms, was having difficulty sleeping and had been unable to tolerate the prescribed Norco.

On initial lumbar spine examination, Dr. Albert noted tenderness to palpation at L1, L2, L4 and L5, as well as associated paralumbar hypertonicity. He described lower extremity muscle testing as normal but indicated Petitioner complained of significant low back pain while attempting the test maneuvers. He described his overall orthopedic examination as "somewhat limited" due to Petitioner's pain level.

Dr. Albert recommended a lumbar spine MRI, Tramadol and a neurosurgical consultation, based on Petitioner's reported lack of improvement. PX 3, pp. 1-2.

On July 12, 2013, Petitioner saw Dr. Erickson of Michigan Avenue Medical Associates. Dr. Erickson recorded a consistent history of the work accident and subsequent CT scan results. He noted that Petitioner was wearing a TLSO brace and that his neurologic examination was normal. He saw no long tract signs. He interpreted the CT scan as showing "retropulsion of 4 mm at the superior part of L1 as well as a rather complex burst pattern." He told Petitioner he had a chance of healing under bracing but that "surgery may be necessary to prevent further deformity." He recommended a lumbar spine MRI scan and directed Petitioner to remain off work. PX 3, pp. 5, 7.

Petitioner underwent the recommended lumbar spine MRI scan on July 17, 2013. The scan, performed without contrast, showed a mild to moderate anterior wedging deformity of L1 with loss of less than half the vertebral body height and underlying residual minimal edema. The radiologist also noted "minimal retrolisthesis of L1 and L5 by 1-2 mm." He was unable to detect any pars interarticularis defects. He further noted minimal diffuse bulging at L4-L5 causing minimal bilateral foraminal narrowing and diffuse disk bulging and left lateral recess extrusion measuring 2.5 mm at L5-S1, with the retrolisthesis contributing to foraminal narrowing, moderate on the left and mild on the right. PX 4.

Petitioner returned to Dr. Erickson on July 22, 2013. The doctor noted that Petitioner complained of 3/10 low back pain as well as upper back pain and bilateral sacroiliac pain and tenderness. He interpreted the MRI as showing "anterior compression of 50% and posterior compression of 20%" at L1, with slight retropulsion superiorly, and a small disc herniation at L5-S1 with "no clear distal radiculopathy."

Dr. Erickson noted that Petitioner was continuing to wear the brace. He explained that a fusion did not need to be considered so long as Petitioner continued to improve slowly. He kept Petitioner off work and instructed him to return in one month. PX 3, p. 8.

Petitioner saw Dr. Erickson again on August 23, 2013. The doctor described Petitioner's complaints as follows:

"His pain has diminished from 6-7/10 to 4/10 in the interval

since last seen. If he does have radiating pain, it usually affects the inner thighs, worse on the left side."

He noted that Petitioner was still wearing the brace. He refilled the Tramadol prescription and recommended physical therapy. He indicated that therapy should be passive for the first month, at which point the brace restriction could probably be lifted. He described Petitioner as "responding well to conservative treatment of the L1 compression fracture." He directed Petitioner to remain off work. PX 1, p. 11, 13-14.

Petitioner underwent an initial evaluation at Premier Physical Therapy on August 23, 2013. The therapist noted complaints of constant neck and back pain secondary to a work accident two months earlier. The therapist also noted a gait abnormality and reduced mobility in the neck and lumbar spine. PX 5, pp. 12-15.

Petitioner continued therapy thereafter through November 13, 2013. PX 5.

Petitioner returned to Dr. Erickson on October 4, 2013. The doctor noted that Petitioner had "become worse with some burning pain in the paraspinal area near the L4 or L5 level." He also noted that Petitioner was having difficulty sitting and complained of upper back pain. He placed therapy on hold, pending a new lumbar spine MRI, and refilled Petitioner's Tramadol prescription. He continued to keep Petitioner off work. PX 3, pp. 15-18.

The repeat MRI, performed without contrast on October 11, 2013, again demonstrated a subacute compression fracture at L1 with minimal retropulsion and very minimal retrolisthesis at L5. The radiologist again noted a left-sided herniation at L5-S1 with underlying bulge and retrolisthesis narrowing the foramina, left worse than right. PX 4.

On October 18, 2013, Dr. Erickson reviewed the repeat MRI results with Petitioner. He noted no change from the previous MRI. He indicated that Petitioner reported being able to sit for only 15 minutes at a time and typically being able to stand or walk for 25 to 30 minutes at a time. He described Petitioner's improvement as "subtotal." He directed Petitioner to stop wearing the brace in treatment of the L1 fracture. He indicated that much of Petitioner's remaining pain "is in the mid to low lumbar spine and the L5-S1 segment may be a source of the pain." He indicated he would recommend SSEP testing to rule out the presence of a significant S1 radiculopathy if Petitioner failed to improve. He stated that Petitioner "does not have clear symptoms within the distal S1 dermatome." He recommended that Petitioner continue therapy and remain off work. PX 3, pp. 19-21.

At the next visit, on November 15, 2013, Dr. Erickson noted that Petitioner complained of 4/10 back pain "which radiates to the thigh but does not radiate past the knee." He indicated he might consider SSEP testing if Petitioner plateaued. He recommended that Petitioner finish therapy and progress to work conditioning. He estimated that Petitioner would reach maximum medical improvement by June 2014, one year after the fracture. PX 3, pp. 22-24.

On November 18, 2013, Petitioner underwent an initial work conditioning evaluation at Premier Physical Therapy. He attended a total of three work conditioning sessions. PX 5, pp. 95-97.

Petitioner returned to Dr. Erickson on November 22, 2013. The doctor noted a complaint of 3-4/10 low back pain. He performed SSEP testing. He interpreted this testing as showing a "moderate delay at S1 on the left side of 0.9 standard deviations." He addressed causation as follows:

> "It seems this small disc herniation at L5-S1 toward the left side is indeed symptomatic. [Petitioner's] pain currently radiates to the gluteal area, but he denies radicular sensations or distal paresthesias."

On motor testing, Dr. Erickson noted a "slight diminishment of gastroc strength on the left side." He placed work conditioning on hold and ordered an epidural steroid injection. He indicated he might consider performing a discogram if the injection did not help. He continued to keep Petitioner off work. PX 3, pp. 25-27.

On December 9, 2013, Petitioner saw Dr. Louis at Michigan Avenue Medical Associates. The doctor's note sets forth a consistent account of the work accident and subsequent care. He noted that Petitioner denied obtaining relief from therapy and work conditioning. He also noted that Petitioner complained of 4-5/10 low back pain radiating to both buttocks and into the anterior thighs as well as both feet with some numbness and tingling. He noted no significant weakness.

On examination, Dr. Louis noted pain with lumbar flexion and extension and tenderness to palpation over the lower lumbar spine in the midline as well as at roughly L1 and L5-S1. He described straight leg raising as negative bilaterally but noted it aggravated Petitioner's lower back pain at roughly 80 to 90 degrees. He described the testing as "negative for radicular component."

Dr. Louis recommended a gentle stretching program, to be performed at home, along with Baclofen and Tramadol for breakthrough pain. Based on the lack of response to conservative measures, along with the "radicular components down to the bilateral lower extremities," he also found it "feasible to consider an epidural steroid injection." He instructed Petitioner to remain off work pending the injection. PX 3, pp. 29-35. He administered an injection at L5-S1 on January 6, 2014 and directed Petitioner to remain off work and return in about two weeks. PX 3, pp. 36-41.

Petitioner returned to Dr. Erickson on January 10, 2014. The doctor noted that Petitioner's low back pain had increased with very cold weather and that he was still experiencing "occasional paresthesia radiating to the top of the foot." On examination, the

doctor noted poor calf raising on the left relative to the right. He recommended additional pain management, including injections, and indicated he would again discuss surgery with Petitioner if he remained symptomatic, given the amount of time that had elapsed since the accident. He refilled the Baclofen and Tramadol prescriptions and kept Petitioner off work. PX 3, pp. 42-44.

Petitioner returned to Dr. Louis on February 17, 2014, with the doctor noting complaints of persistent low back and bilateral leg pain radiating to the posterior buttocks, posterior knees and calves and into the anterior knees and dorsum of the foot. Petitioner also reported burning pain in his back and legs. Dr. Louis prescribed Gabapentin for the burning pain and directed Petitioner to continue taking Baclofen and Tramadol. He also recommended an epidural injection via an L5-S1 transforaminal approach. He instructed Petitioner to remain off work pending authorization of this injection. PX 3, pp. 50-53.

At Respondent's request, Petitioner saw Dr. Avi Bernstein for purposes of a Section 12 examination on February 24, 2014. In his report of the same date (Bernstein Dep Exh 2), Dr. Bernstein indicated Petitioner was accompanied by a professional interpreter. The doctor also indicated Petitioner denied having any back problems before the June 2013 accident, in which a large wall constructed of wood boards fell on him, forcing him down into a seated position.

Dr. Bernstein noted that Petitioner complained of low back pain "which seems to go up" and bilateral leg pain.

On examination, Dr. Bernstein noted a full range of lumbar spine motion. He described Petitioner as having no trouble bending forward but indicated Petitioner complained of some pain doing this. He described Petitioner's gait as normal. He described straight leg raising as "completely negative."

Dr. Bernstein interpreted the lumbar spine CT scan of June 28, 2013 as showing a compression fracture at L1 with anterior wedging. He described the July 17, 2013 lumbar spine MRI as showing "wedging at L1 consistent with a subacute compression fracture and a small central protrusion at L5-S1 associated with some degenerative change."

Dr. Bernstein opined that the work accident caused an L1 compression fracture that had "completely healed." He found Petitioner's residual subjective complaints as "somewhat out of proportion" with his objective findings. He did not find Petitioner to be a candidate for injections or surgery. He acknowledged that Petitioner has a "mild disc abnormality at L5-S1" but described this as a "minor degenerative condition" rather than a result of the work accident. He did not find Petitioner's current complaints to be in any way related to the L5-S1 abnormality "given [Petitioner's] excellent functional ability" on examination. He found Petitioner to be at maximum medical improvement and capable of resuming full time, full duty work. Bernstein Dep Exh 2.

The Arbitrator sustained Petitioner's Ghere-based objection to a separate AMA impairment rating report Dr. Bernstein issued on February 24, 2014.

Petitioner returned to Dr. Louis on March 17, 2014. Dr. Louis indicated he agreed with Dr. Bernstein that Petitioner's L1 compression fracture had healed but disagreed with the doctor's opinion that Petitioner's L5-S1 disc changes were unrelated to the work accident and that Petitioner was at maximum medical improvement. Dr. Louis responded by noting that Petitioner "does have symptomatology that does correlate with the L5 and S1 nerve root distribution both on his pain as well as his sensory with numbness and tingling radiating down to the plantar aspect of the foot in the S1 nerve root distribution." Dr. Louis also referenced the SSEP and MRI results and the fact that Petitioner exhibited weakness in his hip flexors, weakness with knee extension and weakness of the gastrocs on examination by Dr. Erickson. He again recommended an epidural steroid injection. He continued to keep Petitioner off work, pending authorization of the injection. PX 3, pp. 54-61.

Petitioner returned to Dr. Erickson on March 21, 2014 and complained of 5/10 low back pain, predominantly left-sided, as well as 3-4/10 left leg pain radiating to the back of the heel on the lateral aspect of the foot. On examination, the doctor noted tenderness at the lumbosacral junction bilaterally, positive straight leg raising on the left with referral to the lateral and posterior thigh and diminished gastroc strength on the left.

Dr. Erickson indicated he discussed various treatment options with Petitioner. He noted that Petitioner did not want to proceed with an epidural steroid injection, given the amount of time that had passed since the accident. He indicated that Petitioner "remains an excellent candidate for decompressive surgery at L5-S1 on the left.

Dr. Erickson indicated he agreed with Dr. Bernstein insofar as he felt the compression fracture had healed and was not the source of Petitioner's current complaints. He disagreed with Dr. Bernstein's characterization of the MRI changes as degenerative, stating "it is difficult to ascribe the changes seen at L5-S1 to degenerate[ion,]" in light of Petitioner's young age. He recommended that Petitioner remain off work pending surgery. PX 3.

On September 9, 2014, Petitioner saw Dr. Espinosa, a board certified neurosurgeon. At the hearing, Respondent's counsel indicated that Respondent authorized Petitioner's visit to Dr. Espinosa.

Dr. Espinosa recorded a consistent history of the accident and subsequent care. He noted that Petitioner's symptoms had improved but that his main problem remained "severe left leg pain and occasionally right leg pain." He also noted that Petitioner had not worked since the accident and rated his pain at 4-5/10.

Dr. Espinosa described Petitioner's gait as normal. On examination, he noted no lumbar paraspinal muscle spasm, spinous process tenderness at L5, left sciatic notch tenderness, normal lower extremity strength and diminished sensation to pin in S1 bilaterally. He also noted decreased sensation in the S1 dermatome bilaterally and positive straight leg raising on the left at 40 degrees.

Dr. Espinosa interpreted the October 11, 2013 MRI as showing a "central and left paracentral disc herniation at L5-S1 impinging upon the L5 and S1 nerve roots." He targeted this herniation as the source of Petitioner's pain. He indicated Petitioner could undergo epidural steroid injections but opined that these would only temporarily relieve Petitioner's symptoms. Given the passage of time, and failure to respond to conservative care, he recommended a left L5-S1 microdiscectomy. After securing Petitioner's agreement, he scheduled this surgery for October 6, 2014. He indicated Petitioner remained unable to work. He anticipated that Petitioner would improve during the three to four months following the surgery. PX 6, pp. 1-2.

The surgery did not proceed on October 6, 2014.

Petitioner returned to Dr. Espinosa on October 31, 2014, having undergone another lumbar spine MRI on October 23, 2014. PX 7, pp. 2-3. Dr. Espinosa indicated that the recommended surgery did not take place because the carrier wanted Petitioner to first obtain an updated MRI. He interpreted the October 23, 2014 MRI as showing "disc desiccation at L5-S1 with a left paracentral herniation causing left foraminal stenosis, unchanged from previous study."

On re-examination, Dr. Espinosa noted that Petitioner was still experiencing low back pain and paresthesias down the left leg. He again recommended surgery, consisting of a left L5-S1 microdiscectomy and nerve decompression. He directed Petitioner to remain off work pending this surgery. PX 6, pp. 3-4.

On November 25, 2014, a Corvel nurse sent Dr. Espinosa a utilization review report certifying the requested left L5-S1 microdiscectomy and nerve decompression, based on a review performed by Dr. Kimberly Terry. Dr. Terry, a board certified neurosurgeon, indicated she reviewed records from Drs. Earmon, Erickson, Louis and Espinosa, along with various radiographic reports and Dr. Bernstein's report of February 24, 2014. Dr. Terry opined that Petitioner met the criteria for spinal decompression based on his ongoing back and left leg complaints, his failure to respond to conservative care, the noted decreased sensation over the bilateral S1 dermatomes, the most recent MRI results and the SSEP results. PX 8.

On December 11, 2014, Dr. Bernstein issued another report after reviewing the repeat lumbar spine MRI of October 23, 2014 and other unspecified records. Dr. Bernstein interpreted the repeat MRI as showing "multi-level degenerative changes in the lumbar spine." He noted a "broad disc bulge" at L5-S1 but indicated there was "no distinct nerve root compression" or "distinct disc herniation" at this level. He again opined that Petitioner is not a surgical candidate. Bernstein Dep Exh 3.

Dr. Bernstein re-examined Petitioner on January 22, 2015. In his report of the same date, the doctor noted that his assistant acted as a translator.

Dr. Bernstein noted that Petitioner described his low back pain as worsening when he attended therapy and began increasing his activity level. He also noted that Petitioner complained of pain radiating into both legs, worse on the left and a "sense of numbness in his legs." The doctor described the distribution of this numbness as nondermatomal. He went on to say that it was "clear from talking to [Petitioner] that the radiating leg symptoms of sciatica [are] not a significant issue."

On re-examination, Dr. Bernstein again noted a normal gait, a full range of lumbar spine motion, normal strength and sensation in the legs and "completely negative" straight leg raising bilaterally. He indicated that Petitioner complained of tenderness in his upper lumbar spine but not in the low back.

Dr. Bernstein re-reviewed the October 23, 2014 lumbar spine MRI. He interpreted it as showing "some disc bulging across the posterior wall" at L5-S1, "perhaps slightly greater to the left side." He noted no nerve root compression or displacement.

Dr. Bernstein indicated his partner, Dr. Spencer, came into the room "to evaluate the MRI scan and listen to [Petitioner's] complaints." According to Dr. Bernstein, Dr. Spencer confirmed his impression.

Dr. Bernstein again found Petitioner to be at maximum medical improvement. He found it "ludicrous to think that a left L5-S1 microdiscectomy is in [Petitioner's] best interest." He recommended a functional capacity evaluation, including validity testing, to help assess Petitioner's physical abilities and validity. Bernstein Dep Exh 3.

Petitioner testified he continues to experience the same burning pain. He has to change positions and move around every 20 to 30 minutes. He is able to walk for 1 to 1 ½ hours. He wants to proceed with the recommended surgery. He has not received any temporary total disability benefits since May 5, 2015. Dr. Espinosa directed him to remain off work.

Under cross-examination, Petitioner acknowledged he did not return to Dr. Earmon after July 2, 2013, as he had been directed to do. He switched to Michigan Avenue Medical Associates based on the referral of some friends. He did not have leg pain when he first went to Michigan Avenue Medical Associates on July 11, 2013. Dr. Albert ordered a lumbar spine MRI in order to determine the cause of his back pain. He later saw Dr. Erickson at the same facility and started wearing a back brace at his recommendation. The brace helped with his back and rib pain. His leg pain started two or three months after his accident. He began experiencing foot numbness when his physical therapy intensified. The burning pain he feels in his back is primarily in the middle of his back. Dr. Erickson told him he fractured two discs and also herniated a disc. He cannot recall Dr. Erickson performing straight leg raising. Between July and October 2013, he reported some improvement of his low back pain. As of Dr. Bernstein's examination, he could touch his toes but, when he straightened up from doing this, he told Dr. Bernstein he felt pain. The recommended injection was not done because it was never authorized. He told Dr. Espinosa he was not interested in injections after the doctor told

him injections would simply numb his pain but not repair the herniation. He has not seen any doctor since October 31, 2014. Dr. Bernstein said he could return to work but he did not attempt to do so.

On redirect, Petitioner testified his pain worsens in humid weather. He feels better on some days than others. As he sits and testifies, he is experiencing burning in his back and pain in his feet.

The parties stipulated that, if E. Bradley had appeared on behalf of Respondent, he would have testified that Respondent would have provided work to Petitioner had Petitioner contacted Respondent following Dr. Bernstein's examination.

In addition to the evidence previously summarized, Respondent offered into evidence Dr. Bernstein's deposition of May 5, 2015. Dr. Bernstein testified he is a fellowship-trained spine surgeon. He is board certified in orthopedic surgery. He has been affiliated with Lutheran General Hospital since 1991. RX 2 at 5. Bernstein Dep Exh 1.

Dr. Bernstein testified he performs about 250 spine surgeries per year. He also performs forensic work, including independent medical examinations for both carriers and claimants. RX 2 at 6-7. He sees thousands of patients per year and performs 100 to 200 IMEs per year. RX 2 at 7.

Dr. Bernstein did not independently recall Petitioner. He had to rely on his notes while testifying. RX 2 at 7. He first examined Petitioner on February 24, 2014. RX 2 at 7. Whenever he performs an examination, he has the examinee complete an intake form. He then obtains a history, performs an examination and reviews any records and radiographic studies. RX 2 at 8. Petitioner provided a history of his accident and subsequent treatment. He complained of low back pain "primarily in the upper lumbar spine" and bilateral leg pain. RX 2 at 10. He indicated that Dr. Erickson was recommending epidural steroid injections. Dr. Bernstein testified he uses such injections in his own practice, "when they're relevant." He considers them relevant for disc herniations, spinal stenosis and occasionally incapacitating back pain that does not respond to conservative care when he believes the disc is responsible for the symptoms. RX 2 at 10.

Dr. Bernstein described Petitioner's February 24, 2014 examination as normal. Petitioner complained of some pain with range of motion but was "completely neurologically intact" and "functionally good." Petitioner "was able to change position without pain guarding." RX 2 at 11-12. The fact that straight leg raising was negative meant that Petitioner does not have nerve root compression or nerve irritation from a disc injury. RX 2 at 12. Both the CT scan and the July 17, 2013 MRI showed wedging at L1, from the fracture. The MRI also showed "changes diagnosing a subacute compression fracture and a small central protrusion at L5-S1 associated with some degenerative change." A compression fracture involves bone collapse, with the collapse occurring in a wedge pattern. A compression fracture is painful but it "heals without incidence in this population." RX 2 at 13. The bulge at L5-S1 is not a herniation and is not causing nerve root compression. RX 2 at 13-14. It is degenerative. Discs

begin to show age frequently in the late teens and early twenties. There is a predisposition in many people due to genetic components. RX 2 at 14. When a herniation is acute, as opposed to degenerative, you frequently see an increased signal on MRI, indicative of a tear in the annulus of the disc. In Petitioner's case, the bulge is simply indicative of wear and tear. RX 2 at 15. Petitioner's MRI shows no tears or extruded fragments. RX 2 at 15.

Dr. Bernstein testified he diagnosed Petitioner with a healed L1 compression fracture. He felt there was a "bit of a mis-match," presentation-wise, between Petitioner's complaints and his objective findings. Petitioner had a "very good appearance" and exhibited functional activity but yet was voicing complaints. RX 2 at 15. Moreover, compression fractures typically heal within three months in someone of his age and "by six months certainly."

Dr. Bernstein saw "no indication for surgery." Surgery would only be considered if there were symptoms of sciatica, which Petitioner did not have. When Petitioner completed a pain diagram on February 24, 2014, he marked out his mid and upper lumbar spine and lateral buttocks, "with no involvement of the lower extremities." He also noted "some pins and needles over the knees, the distal thighs, which have nothing to do with a disc herniation." RX 2 at 17.

Dr. Bernstein attributed the disc protrusion to minor early degeneration rather than the work accident. RX 2 at 17-18. Petitioner primarily complained of pain in his upper back, at L1, the area of the fracture. RX 2 at 17-18.

Dr. Bernstein testified that Petitioner was seven months out from the accident as of his first examination and did not require any additional care. RX 2 at 18. Petitioner could resume full duty. RX 2 at 19.

[The Arbitrator sustained Petitioner's Ghere-based objection to Dr. Bernstein's testimony concerning his AMA impairment rating.]

Dr. Bernstein testified he issued an addendum on December 11, 2014 after reviewing an updated MRI scan performed on October 23, 2014. He interpreted this scan as showing a "broad disc bulge at L5-S1" but no distinct herniation or nerve root compression. The new MRI did not prompt him to change his opinion that Petitioner is not a surgical candidate. RX 2 at 26.

Dr. Bernstein testified that, when he re-examined Petitioner on January 22, 2015, he pushed Petitioner a "little bit harder in terms of range of motion to make sure he could move and function and turn." Petitioner was able to perform these exercises. RX 2 at 29. Petitioner was now describing bilateral leg pain, worse on the left. Petitioner completed a new pain diagram, which now showed pain in his entire left leg, front and back. The distribution that Petitioner described was non-dermatomal. A person who is suffering from S1 nerve root compression complains of pain, weakness and numbness in a specific pattern, typically down the back of the thigh and into the lateral aspect or bottom of the foot. Petitioner, in contrast,

complained of diffuse numbness, which "doesn't line up with a distinct nerve injury." RX 2 at 31.

Dr. Bernstein opined that SSEP testing "has no value" in terms of diagnosing nerve root compression or determining whether someone needs back surgery. SSEP testing is a "kind of quackery" when used outside of the operating room, except in "very subtle issues of spinal cord tumors or posterior column disease of the spinal cord." RX 2 at 32. The fact that Petitioner's SSEP results showed moderate delay is of no significance. He believes the kind of SSEP testing Dr. Erickson performed involved patches rather than needles. RX 2 at 33. If you face a "diagnostic dilemma," the correct test is EMG/NCV, not SSEP, but Petitioner does not require EMG/NCV testing since he does not have a neurologic condition. "You need to have an anatomic abnormality to recommend surgery." RX 2 at 36.

Dr. Bernstein testified he asked his colleague, Dr. Spencer, to look at Petitioner's MRI scan so as to give Petitioner the benefit of the doubt. Dr. Spencer agreed with his MRI interpretation. RX 2 at 33-34.

Dr. Bernstein testified it is "ludicrous" to prescribe a microdiscectomy for Petitioner because there is no disc herniation and no nerve root compression. There is nothing on Petitioner's MRI to suggest that a microdiscectomy would relieve Petitioner's complaints. RX 2 at 35. If there is any dispute over Petitioner's abilities, Petitioner should undergo a functional capacity evaluation. RX 2 at 35.

Under cross-examination, Dr. Bernstein testified that a bulge is "where the broad geographic area of the wall of the disc moves out of its normal position." A herniation is "where you have a blowout of a piece of the wall of the disc." A protrusion is an "intermediate form between a bulge and a herniation." Some doctors use the term "protrusion" to mean disc herniation. RX 2 at 37. It is a matter of semantics.

Dr. Bernstein agreed with the radiologist's interpretation of the CT scan, i.e., that the scan showed disc bulging from L2-L3 all the way through L5-S1. However, "CT scans aren't good diagnostic studies for disc pathology." RX 2 at 39. One of Petitioner's X-rays showed a questionable fracture at L5 as well as the fracture at L1. However, the MRI showed no evidence of such a fracture. He disagrees with Dr. Erickson's diagnosis of a small disc herniation at L5-S1. Pain radiating into the thigh could be indicative of a disc herniation but that is not typical. Typically, symptoms from a herniation go past the knee. RX 2 at 41. Given the passage of time, he can no longer attribute Petitioner's complaints to the L1 fracture. Petitioner's current complaints represent either "excessive symptomology" or a degenerative back condition. RX 2 at 42. Disc bulges are never acute. Disc herniations can be acute. RX 2 at 43. The type of accident Petitioner sustained, i.e., a large wall falling on him, could cause an aggravation to a degenerative disc bulge. RX 2 at 43-44. The accident caused an acute injury, i.e., a fracture. RX 2 at 44. He is somewhat familiar with utilization review. He is not aware that the surgery recommended by Drs. Erickson and Espinosa was certified by utilization review. RX 2 at 45. When he saw Petitioner on February 24, 2014, Petitioner told him he had pain in both legs. He

asked Petitioner to characterize this pain. RX 2 at 45-46. A disc bulge can develop into a disc herniation over time but he does not accept that theory in Petitioner's case. RX 2 at 46.

On redirect, Dr. Bernstein testified that, to his knowledge, Dr. Louis is not a spine surgeon. RX 2 at 47. In general, he would defer to the opinion of a spine surgeon over the opinion of a pain doctor, but it depends on the surgeon's experience and knowledge. RX 2 at 47. He does not believe Petitioner sustained structural damage to his disc. The opinions of a utilization reviewer "have no relevance." Utilization has "no meaning" and "no bearing." Doctors are now noting physical findings that don't actually exist in order to persuade carriers to approve surgeries they think are necessary. RX 2 at 48. He sees no evidence that Petitioner's L5-S1 disc bulge progressed to a herniation over time. RX 2 at 49.

Arbitrator's Credibility Assessment

The Arbitrator finds credible Petitioner's testimony that he experienced leg and foot symptoms once he began engaging in therapy and increased his overall activity level. The Arbitrator notes that Petitioner was immobilized in a back brace, secondary to his undisputed compression fracture, until about October 2013, at which point he began attending therapy.

Respondent's examiner, Dr. Bernstein, described Petitioner's complaints as "somewhat out of proportion" to his examination findings but did not note any positive Waddell's signs. Drs. Erickson and Espinosa did not note any symptom magnification.

Overall, the Arbitrator found Petitioner credible.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed accident of June 28, 2013 and his current condition of ill-being?

The Arbitrator finds that Petitioner established a causal connection between his undisputed work accident and his current condition of ill-being. The Arbitrator further finds that Petitioner established causation as to the need for the L5-S1 microdiscectomy recommended by Drs. Erickson and Espinosa and certified by Dr. Terry, a utilization review neurosurgeon advisor. In so finding, the Arbitrator relies on the following: 1) the fact Petitioner was able to successfully perform strenuous laborer duties (RX 6) for Respondent before the accident; 2) Petitioner's credible denial of any pre-accident lumbar spine problems; 3) the fact that a very large, wooden wall fell onto Petitioner, forcing him into a sitting position and causing at least one compression fracture in his lumbar spine; 4) Petitioner's credible testimony that he began experiencing leg and foot symptoms around the time he discontinued the brace and began increasing his activity level in therapy; 5) the radiologists' lumbar spine MRI interpretations; 6) the causation-related opinions of Drs. Erickson and Espinosa; 7) the utilization review certification of the L5-S1 microdiscectomy; 8) Dr. Bernstein's concession that the last MRI showed a "broad disc bulge" at L5-S1; and 9) Dr. Bernstein's admissions, under

cross-examination, that the type of trauma Petitioner sustained could cause a degenerative disc bulge to worsen, that a bulge can evolve into a herniation over time and that a complaint of pain radiating into the thighs can be indicative of a disc herniation.

Overall, the Arbitrator did not find Respondent's examiner, Dr. Bernstein, persuasive. Dr. Bernstein placed great stock in Petitioner's appearance and bending ability, while giving very little weight to Petitioner's reported complaints during range of motion testing. Dr. Bernstein completely discounted the utilization review process and failed to adequately explain the basis of his MRI readings. His opinions concerning work status were inconsistent. He initially found Petitioner capable of resuming his regular laborer duties but later saw the need for a functional capacity evaluation.

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from June 29, 2013, the day after the accident, through the hearing of June 25, 2015. Respondent maintains Petitioner's temporary total disability ended on February 24, 2014, the date of Dr. Bernstein's initial Section 12 examination. Arb Exh 1.

The Arbitrator has previously found that Petitioner established causation as to the need for the L5-S1 microdiscectomy recommended by Drs. Erickson and Espinosa. The Arbitrator views Petitioner's causally related lumbar spine condition as unstable as of the surgical recommendation. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). The Arbitrator also notes that, when Dr. Espinosa last saw Petitioner on October 31, 2014, he recommended Petitioner stay off work pending the surgery. The parties agreed Respondent would have offered Petitioner work had Petitioner contacted Respondent following Dr. Bernstein's examination but the work that would have been offered was full laborer duty. There is no evidence indicating that Dr. Espinosa has found Petitioner capable of restricted, let alone full, duty.

Based on the foregoing, the Arbitrator finds that Petitioner was temporarily totally disabled from June 29, 2013 through the hearing of June 25, 2015, with Respondent receiving credit for the temporary total disability benefits it paid prior to the hearing.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims unpaid balances from Michigan Avenue Medical Associates and Premier Physical Therapy. PX 3(a). PX 5(a). Respondent offered into evidence a print-out of payments it made, including payments to Michigan Avenue Medical Associates and Premier Physical Therapy. The print-out reflects the payment dates and provider names but not the underlying dates of service. RX 1. The Arbitrator is thus unable to determine whether the two claimed balances have already been satisfied.

The Arbitrator has previously found in Petitioner's favor on the issue of causation. The Arbitrator views the treatment rendered by Michigan Avenue Medical Associates and Premier Physical Therapy as reasonable and necessary. The Arbitrator awards the balances set forth in PX 3(a) and 5(a), subject to the fee schedule and with Respondent receiving credit for any payments it has made to the two providers.

Is Petitioner entitled to prospective care?

The Arbitrator has previously found that Petitioner established causation as to the need for the L5-S1 microdiscectomy recommended by Drs. Erickson and Espinosa and certified by utilization review. The Arbitrator awards prospective care in the form of a return visit to Dr. Espinosa, along with the microdiscectomy, assuming the doctor continues to recommend this surgery.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LORI BERNER,

Petitioner,

16IWCC0245

v

No. 09 WC 22338

STATE OF ILLINOIS – MENARD CORRECTIONAL CENTER,

Respondent.

OPINION AND DECISION ON PETITION UNDER §§19(h) & 8(a)

This matter comes before the Commission on Petitioner's Petition under §§19(h) & 8(a). A hearing was held on Petitioner's Petition on November 4, 2015 in Mount Vernon before Commission White. Both parties were represented by counsel and a record was taken.

In the underlying cases, Arbitrator Dibble issued a decision on July 22, 2010, in which he found Petitioner suffered a work-related accident on February 24, 2009 and awarded her 100.75 weeks of permanent partial disability benefits representing loss of 25% of the right arm for a shoulder injury (prior to the decision in *Will County v. Illinois Workers' Compensation Commission,* 970 N.E.2d 16 (3rd Dist. WC Div. 2012)) and 7.5% loss of the person-as-a-whole for a cervical injury. He also found that Respondent had paid for all owing temporary total disability benefits and medical expenses. It was also noted that Dr. Gornet did not recommend cervical surgery as long as Petitioner was able to perform her job as a correctional officer.

On December 11, 2012, Petitioner filed her first Petition under §§19(h) & 8(a). The Commission issued a decision (13 IWCC 1118) on December 26, 2013, granting the §8(a) portion of the Petition and ordered Respondent to authorize and pay for prospective treatment to Petitioner's cervical spine as recommended by Dr. Gornet. However, the Commission also dismissed as baseless the §19(h) portion of the Petition because Petitioner had not yet reached maximum medical improvement at that time. Petitioner filed the instant Petition on February 24, 2015.

Findings of Fact and Conclusions of Law

1. Petitioner testified that she had surgery performed by Dr. Gornet on July 13, 2014. It helped with her "neurological pains that were shooting through the back of" her head and shoulders down to her hands. Prior to the surgery she got to the point she was unable to use her right arm. These symptoms resolved after the surgery. Nevertheless, she still has some pain at the surgical site and general achy neck pain and cannot lift more than 10 pounds when lifting weights or perform certain specific exercises. She used to exercise a lot prior to the surgery. Dr. Gornet released her to full duty.

2. On cross examination, Petitioner testified she thought that Dr. Gornet told her not to lift more than 10 pounds in August. She agreed that it sounded right that she last saw Dr. Gornet on August 17, 2015. However, he wanted to see her once a year for the next three to four years. She could not explain why the lifting restriction recommendation was not included in Dr. Gornet's notes, but it was "probably because it was just one of those last minute ones; his secretary might have left the room. He usually has his secretary in there typing everything and it was like the last minute question that [Petitioner] had for him." Petitioner agreed that sometimes her job of correctional officer at Menard requires lifting of more than 10 pounds. The achiness in her neck varies and she "will go a couple of weeks with nothing." She agreed that she told Dr. Gornet that the surgery dramatically improved her life.

3. The medical records show on July 30, 2014, Dr. Gornet performed disc replacement surgery at C5-6 and C6-7 for cervical radiculopathy. On August 18, 2014, Dr. Gornet observed that Petitioner was doing very well postop. Her x-rays looked excellent. She had 5/5 strength. Dr. Gornet asked her to wean off use of her cervical collar.

4. Dr. Gornet further noted on November 19, 2014, that Petitioner continued to do very well with improvement in her neck and arm symptoms. Dr. Gornet recommended physical therapy to increase strength because of her job as a correctional officer in which she had to protect herself. Dr. Gornet released Petitioner to work without restrictions effective January 2, 2015.

5. On November 21, 2014, Petitioner was initially evaluated by physical therapy for treatment of disc placement and cervalgia. Petitioner reported her arm pain was gone and it really felt good. She had mild neck tightness. There was no tenderness in the neck/shoulder or arms. She had 0/10 pain at rest and light activity around the house.

6. By January 2, 2015, Petitioner reported 0/10 pain most of the time after 16 of 18 scheduled physical therapy sessions, but her neck/shoulders were a little achy that day from a movie marathon the previous day. Petitioner was to return to work at full duty that day and no additional physical therapy was anticipated.

7. On August 17, 2015, a CT scan showed disc placements at C5-6 and C6-7 were in stable satisfactory position. Petitioner indicated to Dr. Gornet that she was very pleased and the surgery made a dramatic difference in her life. Dr. Gornet declared Petitioner to be at maximum medical improvement and released her from treatment.

As noted above. Petitioner was initially awarded 7.5% loss of the person-as-a-whole for her cervical injury in the original arbitration decision before her surgery. Petitioner seeks an additional permanent partial disability award of 12.5% loss of the person-as-a-whole after the surgery to increase the total award to loss of 20% of the person-as-a-whole. The Commission notes that it is clear Petitioner had an excellent outcome from her surgery. Petitioner's claim that Dr. Gornet recommended a 10-pound lifting restriction is simply not credible. Her testimony is not supported anywhere in the record, such restriction would not be in compliance with the requirements of her job as a correctional officer, and because Dr. Gornet was specifically cognizant that Petitioner had to have sufficient physical strength to protect herself before she would be able to return to work as a correctional officer.

Although it could be argued that Petitioner is actually less disabled than she was prior to the surgery, the Commission finds that she is entitled to an additional permanent partial disability award because of her two-level disc replacement surgery. In looking at the record as a whole, the Commission concludes that Petitioner is entitled to an additional permanent partial disability award of loss of 7.5% of the person-as-a-whole for a total permanent partial disability award of loss of 15% of the person-as-a-whole.

There was no evidence of any increased impairment because of Petitioner's shoulder condition and she did not seek any additional permanent partial disability award based on that injury. In addition, while Petitioner framed her petition as including relief under both §§19(h) & 8(a), there was no request for relief under §8(a), and no prospective treatment has been recommended.

IT IS THEREFORE ORDERED BY THE COMMMISSION, that Petitioner's Petition for Relief Pursuant to §19(h) is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION, that Respondent shall pay Petitioner an additional permanent partial disability award of $617.56 a week for 37.5 weeks because Petitioner's disability has increased by the loss 7.5% of the person-as-a-whole since the initial permanent partial disability award.

DATED: APR 4 - 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
D-3/23/16
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STATE OF ILLINOIS)
) SS.
COUNTY OF COLES)

- ☐ 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

Julie Daniels,
Petitioner,

vs.

NO: 07 WC 5820

Aldi, Inc.,
Respondent.

16IWCC0246

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to remand Order of the Appellate Court for a determination of which medical bills, if any, were properly certified or received in response to a Commission subpoena, determine which medical expenses attributable to Petitioner's cervical condition remain unpaid and order Respondent to pay those unpaid expenses for bills determined to be properly admitted into evidence at arbitration.

In his §19(b) Decision filed February 2, 2012, Arbitrator Mathis found Petitioner sustained accidental injuries arising out of and in the course of her employment on August 10, 2006 and that a causal relationship exists between those injuries and her neck and chest conditions of ill-being. However, the Arbitrator found Petitioner failed to prove a causal relationship exists between those injuries sustained on August 10, 2006 and her current condition of ill-being for her low back. The Arbitrator found that Petitioner did not give a history of low back injury or complaints of low back pain until long after the accident. Petitioner's original complaints were to her chest and neck. On June 10, 2009, Dr. Pencek performed C4-5 through C5-6 discectomy and fusion. Petitioner was released from his care on December 15, 2009. Petitioner returned to Dr. Pencek in July 2010 and complained of low back pain. Dr. Pencek prescribed a lumbar MRI, which was unremarkable. The Arbitrator noted that Petitioner did not give any history of low back injury to any of the medical providers before Dr. Pencek in July 2010. A lumbar discogram performed August 5, 2010 was negative. Dr. Pencek recommended low back fusion surgery based only on Petitioner's subjective complaints of pain when the discogram was performed. §12 Dr. Petkovick reviewed the medical records and noted no history

of low back injury or complaints of low back pain prior to Petitioner seeing Dr. Pencek. §12 Dr. Petkovick reviewed all diagnostic films and found them normal without any disc abnormalities. §12 Dr. Petkovick noted that a discogram is naturally a painful study and opined that surgery was not indicated based on Petitioner's isolated complaints of pain during the discogram study. The Arbitrator found average weekly wage of $289.91. The Arbitrator gave Respondent credit of $20,874.00 for overpayment of TTD benefits. The Arbitrator determined that Respondent had paid all reasonable and necessary medical expenses and found Petitioner was not entitled to prospective medical care for her lumbar condition.

Petitioner reviewed the Arbitrator's Decision. In its Decision and Opinion on Review dated January 10, 2013, the Commission modified the Arbitrator's Decision to reduce the amount of credit due Respondent to $8,596.56. The Commission noted that Petitioner's average weekly wage was $289.91 and the Arbitrator found that Petitioner was 33 years old and married with three dependents at the time of the accident. The Commission noted that the statutory minimum TTD rate under these circumstances is $260.00 per week and apparently Respondent paid TTD benefits at a rate less than the statutory minimum. Benefits were paid through the November 30, 2011 date of arbitration. The Arbitrator did not make an award as benefits had been paid. Respondent paid benefits totaling $54,059.38. The Commission found that Petitioner had reached maximum medical improvement on December 15, 2009 and therefore, Petitioner was temporarily totally disabled from August 10, 2006 through December 15, 2009, a period of 174-6/7 weeks. $260.00 TTD rate X 174.857 = $45,462.82. The Commission found Respondent is entitled to credit for overpayment of TTD benefits of $8,596.56 ($54,059.38 paid - $45,462.82 owed). The Commission otherwise affirmed and adopted the Decision of the Arbitrator and remanded for further proceedings pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).

Petitioner appealed the Commission's Decision to the Circuit Court of Fayette County. In its August 30, 2013 Decision, the Circuit Court confirmed the Commission's Decision, finding that it was not against the manifest weight of the evidence.

Petitioner appealed to the Appellate Court. In its Opinion filed September 22, 2014, the Appellate Court found that 1) the Commission's finding that the condition of Petitioner's low back is not causally related to her work accident is not against the manifest weight of the evidence; 2) the Commission's decision to award Respondent a credit for overpayment of temporary total disability benefits in the amount of $8,596.56 is not against the manifest weight of the evidence; but 3) remanded the case to the Commission for a determination of which medical bills, if any, were properly certified or received in response to a Commission subpoena, determine which medical expenses attributable to Petitioner's cervical condition remain unpaid and order Respondent to pay those unpaid expenses for bills determined to be properly admitted.

On remand, the Commission awards Petitioner medical expenses totaling $80,572.82 pursuant to the fee schedule and orders Petitioner to reimburse HealthLink HMO, her husband's group health insurer, a total of $14,229.09 for the reasons set forth below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. At arbitration Petitioner's attorney sought to have the medical records and medical bills admitted into evidence. Respondent's attorney objected claiming the medical bills were not certified. Petitioner's attorney indicated that all the medical records being submitted as exhibits are a direct result of a Commission subpoena, which was on top of each medical record. Petitioner's attorney indicated that the medical bills were part of the subpoenaed records and he personally separated the medical bills from the records to emphasize them as separate exhibits (Tr 00071-00073). The Arbitrator admitted the medical records and medical bills into evidence. The Commission verifies that each of the medical record exhibits contains a Commission subpoena which requests all medical records and medical billings. The Commission is satisfied that the medical records contained in the transcript are true and accurate, including the medical billings.

2. Petitioner testified that she was able to pay for her treatment with Dr. Naddaf and Dr. Pencek through her husband's health insurance plan (Tr 01431). To her knowledge, at that time her treatment was not approved by the workers' compensation insurer (Tr 01432). Petitioner did not have group health insurance through Respondent (Tr 01432). Petitioner further testified that her primary care physician Dr. Oligschlaeger has prescribed medications throughout her treatment. Her medications were paid through her husband's health insurance plan and she paid a co-payment for her prescribed medications (Tr 01473). Px14 contains a list of her prescribed medications. Albuterol, Flovent, Amoxicillin and Azithromycin are not related to her accidental injuries (Tr 01475). In Px15, the highlighted medications are those that are related (Tr 01476). Petitioner stated that she paid $303.37 out of pocket for her prescribed medications (Tr 01476).

3. The Commission has reviewed Px14, a list of prescribed medications purchased at Family Drug prescribed by Dr. Oligschlaeger and lists co-payments made by Petitioner. The total co-payments paid out of pocket by Petitioner for medications prescribed for her causally related conditions of ill-being for her neck and chest amount to $41.10. The Commission finds these reasonable and necessary and awards Petitioner $41.10.

The Commission has reviewed Px15, a list of prescribed medications purchased at Medicine Shoppe prescribed by Drs. Feinberg, Oligschlaeger and Pencek. The total paid out of pocket by Petitioner for medications prescribed for her causally related conditions of ill-being for her neck and chest amount to $303.37. The Commission finds these reasonable and necessary and awards Petitioner $303.37.

4. The medical records of Dr. Naddof, Px9, contain medical billings from October 3, 2008 through February 6, 2009. Dr. Feinberg referred Petitioner to Dr. Naddof, who she saw on October 3, 2008 for complaints of pulling pain in her chest, pain in her neck, pain in her back at the bra line and pain in her right shoulder, lower back and headaches. The pain diagram drawn by Petitioner indicated her complaints of pain were to the neck, lower cervical and thoracic areas as well as her chest and ribs. Dr. Naddof provided manipulative therapy, acupuncture, therapeutic massage and trigger point therapy. The Commission notes that the billings from October 3, 2008 through February 6, 2009 correspond with the treatment records for these dates, contained in Px8, the medical records of Health Solutions. The Commission finds that the treatment Petitioner received by Dr. Naddaf at Health Solutions was reasonable and necessary for the treatment of her causally related conditions of her neck and chest. The total amount billed from October 3, 2008 through February 6, 2009 was $12,573.95. There were insurance payments of $7,488.82, workers' compensation reduction of $2,888.93 and PPO reduction of $2,196.20; total payments and reductions of $12,573.95. The Commission infers that the payments were made by Respondent's workers' compensation insurer. The Commission awards nothing for Dr. Naddof's billings as nothing is owed.

The Commission notes that Petitioner also treated with Dr. Naddaf from May 27, 2010 through June 14, 2010 for complaints of pain in her lower back, buttocks and bilateral legs. The Commission finds that the medical bills for this treatment period were not causally related to the August 10, 2006 accident and, therefore, Respondent is not liable for those medical bills.

5. Px17 is a list of payments made to medical providers by HealthLink HMO, Petitioner's husband's group health insurer. The Commission finds that Petitioner is to reimburse HealthLink HMO for those payments made by this insurer.

6. According to Dr. Prabhu's records, Px18, Petitioner was seen on November 27, 2006 on referral from Dr. Oligschlaeger for complaints of pain across the anterior part of her chest around the sternum region. Petitioner was seen by Dr. Prabhu again on December 3, 2006 and December 18, 2006. The only medical bill contained in Px18 is for date of service December 18, 2006, which shows charges of $90.00, payment of $58.80 by Cigna, adjustment of $16.20 and a balance due of $15.00. The Commission finds this to be reasonable, necessary and causally related to Petitioner's condition of ill-being for her chest and awards Petitioner $15.00.

7. Px20 contains various medical bills from St. Mary's Hospital. The Commission finds the following bills from this provider to be reasonable, necessary and causally related to Petitioner's conditions of ill-being for her cervical spine:
-Date of Service March 11, 2009 for cervical discography: $6,241.83 charged. The Commission awards $6,241.83 and Petitioner is to reimburse $4,993.46 to HealthLink HMO (Px17).
-Date of Service March 11, 2009 for cervical CT scan and thoracic MRI: $5,612.00 charged. The Commission awards $5,612.00 and Petitioner is to reimburse $2,252.00 to HealthLink HMO (Px17).
-Date of Service June 2, June 10 and June 11, 2009 for cervical surgery: $45,843.08 charged. The Commission awards $45,843.08 and Petitioner is to reimburse $3,000.00 to HealthLink HMO (Px17).
-Date of Service July 21, 2009 for cervical x-rays: $317.22 charged. The Commission awards $317.22 and Petitioner is to reimburse $253.78 to HealthLink HMO (Px17).
-Date of Service September 15, 2009 for cervical x-rays: $317.22 charged. The Commission awards $317.22 and Petitioner is to reimburse $253.78 to HealthLink HMO (Px17).

The Commission notes that the other medical bills contained in Px20 were for services pertaining to Petitioner's lumbar condition and were not causally related to Petitioner's condition of ill-being for her cervical and chest. Therefore, Respondent is not liable for the following dates of service: October 6, 2009, August 5, 2010, November 30, 2010 and May 4, 2011.

8. Px21 consists of Dr. Pencek's bill for the cervical surgery he performed on June 10, 2009. The Commission finds this to be reasonable, necessary and causally related to Petitioner's conditions of ill-being for her cervical spine. Charges were $21,882.00. The Commission awards $21,882.00 and Petitioner is to reimburse $3,476.07 to HealthLink HMO (Px17).

Therefore, the Commission awards Petitioner medical expenses totaling $80,572.82 ($41.10 + $303.37 + $15.00 + $6,241.83 + $5,612.00 + $45,843.08 + $317.22 + $317.22 + $21,882.00), pursuant to the fee schedule. Petitioner shall reimburse HealthLink HMO a total of $14,229.09 ($4,993.46 + $2,252.00 + $3,000.00 + $$253.78 + $253.78 + $3,476.07).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $80,572.82 for reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act. Petitioner shall reimburse HealthLink HMO the sum of $14,229.09.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent is entitled to credit of $8,596.56 for overpayment of TTD benefits paid.

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 this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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 4 - 2016
MB/maw
o03/10/16
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Mario Basurto

Joshua D. Luski

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BYRON LAWRENCE,

Petitioner,

16IWCC0247

vs.

NO: 10 WC 043870

PINCKNEYVILLE CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

In arriving at its Decision and Opinion, the Commission concurs with Arbitrator Michael Nowak excluding from the record the depositions of Dr. James Williams, Correctional Officer Robert Schuchert, Correctional Officer Jimmy Phillips, Correctional Officer Donna Jones, Correctional Officer Jason Thompson, and Correctional Officer Jaelene Bryan. In each instance, the proffered depositions related to a workers' compensation claim other than Petitioner's and were offered into evidence without any attempt to lay a proper foundation over Respondent's hearsay objections. Despite the exclusion of these exhibits, the Commission finds Petitioner's testimony and the admitted medical records persuasive enough on their own for Petitioner to satisfy his burdens under the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 14, 2015 is hereby affirmed and adopted.

16IWCC0247

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:
KWL/mav APR 7 - 2016
O: 02/08/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0247

LAWRENCE, BRYON
Employee/Petitioner

Case# **10WC043870**

SOI PINCKNEYVILLE CORRECTIONAL CENTER
Employer/Respondent

On 4/14/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
FARRAH HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

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

APR 14 2015

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

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)

16IWCC0247

Bryon Lawrence
Employee/Petitioner

v.

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

Case # **10** WC **43870**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael K. Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **November 20, 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 Exhibits**

16IWCC0247

FINDINGS

On the date of accident, **November 3, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$56,218.00**; the average weekly wage was **$1,081.12**.

On the date of accident, Petitioner was **42** 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, $0 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $0.

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses as outlined in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act.. Respondent shall have credit for all amounts paid through its group carrier, but shall indemnify and hold Petitioner harmless from any claims regarding payment of any amount for which it is receiving this credit, pursuant to §8(j) of the Act

Respondent shall authorize and pay for any medical treatment recommended by Dr. Brown, including but not limited to surgery, as provided in §8(a) and 8.2 of the Act.

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

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

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

Signature of Arbitrator

3/30/15
Date

ICArbDec19(b)

APR 14 2015

16IWCC0247

FINDINGS OF FACT

The Petitioner has worked for the State of Illinois, Department of Corrections since July, 1998. He was hired at and continues to work in the Pinckneyville Correctional Center. He is a Correctional Officer (CO). Petitioner has no comorbid factors for the development of carpal tunnel syndrome. He does not have diabetes, gout, hypothyroidism or rheumatoid arthritis. He does have hypertension, but it is controlled by medication. Petitioner testified that he had the opportunity to review all material prepared by Respondent, including the DVD's, the job site analysis, and the demands of the job form which were admitted into evidence. Petitioner testified that they do not show the frequency and pace at which he works. With the exception of the first six months of his employment Petitioner worked his entire career on the 7-3 shift, where there is the most movement of inmates. Petitioner worked the majority of his 16 year career as a wing officer or segregation officer. He indicated that although Respondent does maintain an assignment roster it is seldom accurate because people are moved to where they are needed. He testified that when working in general population it is not uncommon to have to key and manipulate 200 to 300 doors per day. Maj. Jason Thompson testified as well. He indicated that from July 1998 through December 2011 he worked at Pinckneyville correctional center where he was Petitioner's supervisor. He stated Petitioner was a hard worker. Maj. Thompson did not find any significant issues with Petitioner's testimony at the hearing.

Petitioner claims bilateral carpal tunnel and bilateral cubital tunnel syndrome as result of repetitive trauma with an effective date of loss of November 30, 2010. Petitioner testified that over the course of time he developed progressive symptoms of numbness, tingling and paresthesia in his upper extremities. He indicated he began to experience these problems in approximately 2009. Petitioner had previously treated with Dr. David Brown for an unrelated TFCC injury. Being familiar with Dr. Brown, he returned to see him on November 3, 2011 relative to the bilateral upper extremity symptoms he was experiencing. (PX3) Dr. Brown conducted a physical examination which he felt was positive for bilateral carpal tunnel syndrome and possible cubital tunnel syndrome. He referred Petitioner that same day to Dr. Daniel Phillips for nerve studies. The studies indicated evidence of bilateral carpal and cubital tunnel syndromes. (PX3; PX4) Petitioner indicated that it was at this point he realized he had a condition related to his employment. He filled out an employee's notice of accident on November 5, 2010. (RX 2) when Petitioner returned to Dr. Brown December 8, 2010 surgery was recommended to correct Petitioner's bilateral carpal tunnel and cubital tunnel syndromes.

Dr. Brown testified by way of deposition. He indicated that repetitive trauma injuries are, by their nature, cumulative and that "latency" or the span of time between exposure and manifestation of injury is a key concept. He felt this concept is critical to the issue of repetitive injury because each individual has a threshold, over which they begin to exhibit symptoms. He testified that the longer a person is exposed to activities such as forceful pinching, the greater the risk for developing a compression neuropathy. While some individuals are capable of tolerating extreme occupational stressors for long periods of time, or even indefinitely, some are not and manifest symptoms quickly. The doctor indicated that when he saw Petitioner for the earlier TFCC injury he did have secondary symptoms but they were minor compared to the injury he was treating for at that time. He therefore did not conduct an examination of the entire upper extremity at that point. When Petitioner returned to him on November 3, 2011, however symptoms and physical examination demonstrated perceptible evidence of compression neuropathy. This was confirmed by the objective findings from electro-diagnostic studies. Initially Dr. Brown tried conservative measures, but when those failed to alleviate the symptoms he recommended surgery when Petitioner returned in December. That surgery has not yet been performed due to lack of authorization and approval from Respondent. It was Dr. Brown's opinion that Petitioner's exposure to repeated forceful pinching and wrist turning while operating keys, opening and closing cell doors, cuffing and un-cuffing inmates, and lifting food trays was at least an aggravating factor in the development of his upper extremity symptoms which led to his need for treatment. (PX5) Prior to his testimony, Dr. Brown reviewed multiple

documents relative to Petitioner's job duties, including exhibits submitted by Respondent at arbitration. Dr. Brown also had the benefit of a detailed job description which been provided to him by Petitioner. (PX5)

Respondent obtained a medical records review by Dr. James Williams. (RX 12) Dr. Williams agreed with the diagnosis of bilateral carpal and cubital tunnel syndromes and further agreed that the treatment recommended by Dr. Brown is reasonable. (RX 12) Dr. Williams did not, however believe that the activities performed by correctional officers involved any significant impact, vibration, or sustained repetitive force and therefore opined Petitioner's job duties did not cause or aggravate Petitioner's carpal and/or cubital tunnel syndrome. (*Id.*)

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

These issues are somewhat overlapping, therefore the Arbitrator will address them jointly. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999)

The Petitioner is relying upon a repetitive trauma theory rather than one of traumatic injury. In such cases the claimant generally relies on medical testimony to establish causal connection between the claimant's work duties in the claimant's condition of ill being. *Peoria County Bellwood Nursing Home v. Industrial Commission,* 505 N.E.2d 1026 (1987). In Illinois. "[t]here 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." *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773,at 780 (2nd Dist. 2005). Similarly, the Commission recently noted that while in a repetitive trauma claim a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or even the primary cause. Further, 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. *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991).

In this case, the evidence shows that Petitioner used his hands extensively. The Arbitrator found the Petitioner to be credible in his testimony. In addition, Major Thompson corroborated Petitioner's testimony for the most part. Further, the Exhibits offered by both parties indicate the work of Corrections Officers is hand and upper extremity intensive.

Both Dr. Brown and Dr. Williams agreed that Petitioner suffers from bilateral carpal tunnel and cubital tunnel syndromes. It was Dr. Williams' opinion, however that the work activities performed by correctional officers were not significant enough to cause or aggravate carpal tunnel and/or cubital tunnel syndrome. On the other hand, Dr. Brown explained thoroughly in his testimony how the job duties of Petitioner resulted in the development and/or aggravation of his bilateral carpal tunnel and cubital tunnel syndromes.(PX5)

The Arbitrator finds the testimony of Dr. Brown more persuasive. The Arbitrator further notes that based upon Petitioner's unrefuted testimony, which is consistent with the medical records, Petitioner was unaware of his true diagnosis and its relationship to his employment until the electro-diagnostic studies were performed by Dr. Phillips on November 3, 2010.

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner did sustain an accident which arose out of and in the course of his employment on November 3, 2010, the date of manifestation. Further, the Arbitrator finds Petitioner's current condition of ill being is causally related to the accident.

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

It is unrefuted that Petitioner provided written notice to Respondent on November 5, 2010. (RX 2) Having ruled that Petitioner proved an accident date of November 3, 2010, notice was provided to Respondent within 45 days as required by the Act. The Arbitrator therefore finds that appropriate notice was given to 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): Is Petitioner entitled to any prospective medical care?

Medical services were disputed based on accident and causal relationship. Both Dr. Brown and Respondent's records reviewer agreed that Petitioner required surgery to alleviate the symptoms from which he suffers. Given the above findings, Respondent is directed to pay the medical bills identified in PX 1 pursuant to section 8 (a) and the fee schedule. Respondent shall be entitled credit for any and all amounts previously paid but shall hold Petitioner harmless, pursuant to section 8 (j) of the act, for any group health care reimbursement requests for such payments. Further, Respondent shall pay for the medical treatment recommended by Dr. Brown, including but not limited to surgery, subject to the fee schedule.

Issue (O): Admissibility of Exhibits?

At the time of arbitration Petitioner offered the following exhibits to which Respondent objected:

Exhibit 8	deposition of Dr. Williams taken in the case of Jimmy Phillips
Exhibit 10	deposition of Robert Schuchert
Exhibit 11	deposition of Jimmy Phillips
Exhibit 12	deposition of Donna Jones
Exhibit 13	deposition of Jason Thompson
Exhibit 14	deposition of Jaelene Bryan

At the time of arbitration the Arbitrator reserved ruling on exhibits 8, 10 through 12, and 14. Exhibit 13, the deposition of Jason Thompson taken in another case, was rejected by the Arbitrator at the hearing. Major Thompson testified during this arbitration hearing. If Petitioner wished to utilize this deposition in order to impeach Major Thompson with prior inconsistent statements that would have been permissible. The Arbitrator ruled, however that having failed to utilize the deposition for that appropriate purpose it is hearsay and therefore inadmissible. Exhibits 10 through 12 and 14 are depositions of other corrections officers taken in different cases. The Commission has previously considered the admissibility of these depositions (or at least depositions of the same individuals) in the case of *Dustin Bowles v. Pinckneyville Correctional Center*, 14 IWCC 842 (2014) the Commission found "the deposition testimony is inadmissible hearsay as it relates to the case at bar." For that same reason Exhibits 10 through 12 and 14 are rejected and stricken from the record in this case.

Exhibit 8, the deposition of Dr. Williams, while not addressed in the *Bowles* decision, raises the same issue as the exhibits therein considered. For the same reasons therefore Exhibit 8 is rejected.

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

Brian Fagerland,

Petitioner,

vs. NO: 11 WC 38770

State of Illinois, Pinckneyville Correctional Center,

16IWCC0248

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, notice, evidentiary issues, medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator with the exception of all references to Petitioner's exhibits eight (8) and eleven (11). The Commission further strikes the aforementioned exhibits from the record entirely. The Decision of the Arbitrator is attached hereto and made a part hereof.

The Commission finds that Petitioner's exhibits eight (8) and eleven (11) are depositions that were not taken for the case at bar. Therefore, Petitioner's exhibits 8 and 11 should be stricken from the record of this case. Accordingly, all references to those depositions in the Decision of the Arbitrator are stricken as well. The Commission has based its Decision upon the testimony and the totality of the evidence from this case only.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 19, 2015 is hereby affirmed and adopted with the exception of all references to Petitioner's exhibits eight (8) and eleven (11).

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's exhibits eight (8) and eleven (11) are stricken from the record of this case.

16IWCC0248

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 7 - 2016

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

TJT/ gaf
O: 2/8/16
51

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

FAGERLAND, BRIAN
Employee/Petitioner

Case# **11WC038770**

SOI-PINCKNEYVILLE CORR CTR
Employer/Respondent

16IWCC0248

On 5/19/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

0498 STATE OF ILLINOIS
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100 W RANDOLPH ST 13TH FL
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0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

MAY 19 2015

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

16IWCC0248

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)

Brian Fagerland
Employee/Petitioner

v.

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

Case # 11 WC 38770

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 **March 24, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **September 26, 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 $**57,708.00**; the average weekly wage was $**1,109.77**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **4** dependent children.

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

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

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

ORDER

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

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

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

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

5/19/15
Date

ICArbDec19(b)

MAY 19 2015

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

16IWCC0248

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN FAGERLAND
Employee/Petitioner

v.

Case # 11 WC 38770

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

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time his injuries manifested, Petitioner was a 38-year-old Correctional Officer for Respondent, Pinckneyville Correctional Center. (AX1). Petitioner testified that his job title has not changed at all since he began his employment with Respondent as a Correctional Officer in July of 1998. (T.8, 9). Petitioner candidly testified that he also served as a basketball coach for junior high girls basketball. (T.10).

Petitioner testified that he has worked in all areas of Respondent's facility, including segregation, general population, tower patrol, caustics and writs. (T.11). He testified, however, that he spent approximately 90% of his time as a wing officer. (T.11). Petitioner has spent the last 5 years working the 7:00 a.m. to 3:00 p.m. day shift.

As a general population wing officer, Petitioner testified that he frequently used a "wing entrance key" which was smaller than a Folger Adams key, but larger than a regular key. (T.22, 23). Petitioner also performed wing checks every 30 minutes, which required him to go down the wing and forcefully pull on the cell doors to make sure they are locked. (T.24). Petitioner used his left and/or right arm depending on which side of the wing he walked. (T.43). Petitioner testified that this was necessary because "inmates will stick something in the lock sometimes to make the door appear closed and it's not." (T.24). Petitioner also performed shakedowns, which required him to take the inmates out of the cell, and search through everything in the cell to make sure it is clear of contraband. (T.25).

Petitioner testified that he restrained violent inmates. (T.26, 27). He also stated that in the summer, Respondent's steel doors swell due to the heat. (T.25). Petitioner testified that when the facility goes on lockdown, his workload increases "ten times," and even removing one inmate from a cell becomes arduous. (T.17, 10). He stated:

> Everything goes – we treat – the lockdown inmates that are in general population, we basically treat them as segregation inmates. Every movement has to go through the chuckhole. We don't get them out for passes unless we've been directed to by the shift commander or lieutenants

> and it depends what level lockdown that you're on. If it's level one there's absolutely no movement. Level four it's modified movement to where if an inmate does have a healthcare pass then as an officer you and another officer go down there and you'll restrain the inmates through that chuckhole. If there's two in a cell you restrain both of them, open the door, take the one out that you want, hand them to the other officer, shut the door, have the other inmate come up and take the restraints off him and close the chuckhole while that inmate goes on his pass with the other officer. It's escorted movement, one staff, five inmates. (T.18).

Petitioner testified that Respondent's facility was on lockdown 20% to 25% of its operational time during the year before his injuries manifested. (T.17).

Petitioner testified that he occasionally worked in R5 segregation, at which time his duties required him to rap bars, frequently use chuckholes, and repeatedly turn Folger Adams keys. (T.14-16). Petitioner testified that the chuckholes were difficult to open because the dried food, bodily waste and rust that corrodes the mechanisms which allow them to open. (T.15, 16, 19). Petitioner testified that he had to forcefully turn the lock and wiggle the key until it opened; if it did not open, he called for help. (T.19, 20). Petitioner testified that he had to "open a chuckhole to do anything," such as to escort an inmate or deliver laundry and mail. (T.15, 16). He stated that when a chuckhole sticks or won't close, he does whatever he can to get it to work, including slamming it with his hand and/or kicking it. (T.24). Petitioner also testified that the doors in segregation are lined with a thick rubber strip to keep the inmates from flooding the gallery with toilet water. (T.25, 26).

Petitioner testified that the number of cell doors he has pulled on, the number of keys he has turned, or the number of chuckholes he has opened is innumerable. (T.26). Respondent submitted job site analyses performed by CorVel, which indicate that 70% of the key turning is done by Wing Officers. (RX3). Both of Respondent's job site analyses categorizes the strength demands Petitioner's job as "Medium" which is defined as "lifting 50 pounds maximum with frequent lifting and/or carrying up to 25 pounds. *Id.* "Frequent" is defined as 2.5 to 5.5 hours per day, 34% to 66% of a day, or 33 to 200 repetitions per day. *Id.* Correctional Officers also engage in "frequent" wrist turning and "frequent" finger manipulation. *Id.* The wrist turning was associated with the opening of doors and chuckholes up to 150 times per shift in the housing unit. *Id.* More keys would be turned during lockdown. *Id.* These analyses provide far more detail and documents a much higher level of hand and arm use than Respondent's "Demands of the Job" form, which fails to give any indication as to how frequent or how much weight is lifted by Petitioner with intermittent rest and indicates that Petitioner engages in fine and gross manipulation up to only 2 hours per day. (RX1).

Respondent's analyses and videos were created by Melanie Welch. (PX7). Ms. Welch is an employee of CorVel, which is a national corporation providing services to employers, third party administrators, insurance companies, and government agencies. (PX7, p.44). When asked if she had ever done a job site analysis for an injured worker, the following interchange took place:

> Q: As far as performing a job site analysis for an injured worker, have you ever done that?
> A: Yes.
>
> Q: Ma'am, I took your deposition on—in the case of Darin Hathaway versus IYC, State of Illinois on June 9, 2011, and I specifically asked you on line

14 through 18 on page 23, "As far as performing job site analysis for an injured worker, have you ever done that?" Your answer under oath at that point, ma'am, was, line 16 through 17, "For the employer. The injured worker did not call us, no." Do you remember that answer, ma'am? Have you done one since June 9, 2011?

A: Since June 9, 2011. Oh, you mean requested by an injured worker.

Q: No, ma'am. My question was pretty clear, and I caught you in a lie right out of the box. Now, my question now is very simple. Have you performed a job site analysis for an injured worker since June 9?

A: Not requested by an injured worker, but when I do, like, an ergonomic assessment, I consider that to be for the injured worker, for their behalf.

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

A: It's requested by the State of Illinois.

Q: I see.

A: For the injured worker.

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

A: Okay.

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

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

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

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

Ms. Welch testified that she had neither seen nor lifted a property box, and was completely unaware that they contained TVs, radios, books, paperwork, computers, clothing. *Id.* at 63-64. She further acknowledged that the video showed nothing about Correctional Officers having to carry crates filled with cartons of milk or juice weighing hundreds of pounds up flights of steps to feed inmates. *Id.* at 66. When asked whether it would be important in consider whether a Correctional Officer had to carry a milk carton and/or food tray and simultaneously open and close difficult chuckholes that often

stick, Ms. Welch answered, "I don't know, I didn't try it." *Id.* at 67. She also believed that restraining a combative inmate at a Respondent's Pinckneyville Correctional Center would fall in the "medium" category of job requirements. *Id.* at 64.

She further acknowledged that there was nothing in the job site analysis or video about keying and un-keying doors for moving of inmates through the housing units in passes run on any given day; nothing about the transfer box, writs, medical furloughs, medical and furlough bags. *Id.* at 68-69.

She did not videotape or observe any cell shake downs and, in fact, believed that shake downs were performed on Correctional Officers themselves when they entered the prison. *Id.* at 76. She did not video tape the Correctional Officers having to push buttons and operate toggles to open doors, which required the officers to hold down the button with their thumb and toggle the switch with their little and pinky fingers at the same time. *Id.* at 77-78. She had no idea that this happened almost 250 times in an hour and thousands of times in a day. *Id.* at 78. After going through all this information, Ms. Welch testified that whether Correctional Officers are constantly and repetitively using their arms and hands in a forceful manner depended on their post. *Id.* at 88-89. Despite Ms. Welch's limited knowledge and the omissions of the CorVel analyses, the analyses still confirm that greater hand and arm activity occurs than what is indicated on Respondent's Demands of the Job form. (RX1; RX3).

Respondent called Jason Thompson, who worked at Pinckneyville Correctional Center from July of 1998 until December of 2011. (T.53). He also testified that wing checks were performed every 30 minutes, although he disagreed with the amount of average force required. (T.61, 62). He agreed, however, that if he suspected an inmate jimmied the door, he had to pull on the door harder. (T.62). He also testified that a lot of Respondent's electronic door sensors "went bad pretty quick and not a lot of faith was given to them." (T.62). He testified that the malfunctioning sensor caused a "wild goose chase going and checking doors," which resulted in all the doors being systematically checked. (T.62, 63). On cross-examination, Mr. Thompson testified that he had the opportunity to work with Petitioner since Petitioner hired in and testified that he was a good employee. (T.65).

Petitioner also submitted video deposition testimony of Mr. Thompson, who at the time of the deposition was serving as a Correctional Lieutenant at Pinckneyville. (PX11). On cross-examination by counsel from the State during his deposition, the following exchange took place with regard to the condition of the chuckhole locks:

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

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

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

With regard to the doors, his deposition testimony revealed that sometimes the pins in the door become loose and caused problems. (PX11). When asked to describe the cell doors, the following exchange took place:

> Q: Comparing it to like your front door at home --
> A: Uh-huh.
>
> Q: -- the key -- is it more smooth than that, or less smooth, as long as your house key or house door is in functioning -- it's --
> A: I would say in general it's comparable to a front door, except for the fact that it -- there's more constant tension on some of ours, whereas with a house key it's only when the lock engages and disengages. But yes. Similar.
>
> Q: Are the cell doors -- are they heavy?
> A: They're heavy, but they're on fairly stout hinges. I mean, the doors themselves are very heavy.
>
> Q: Are they easy to open?
> A: Comparatively speaking, like with a house door -- they're harder than your average house, like your civilian residence. They're -- you have to be -- get more momentum to open them, because they're heavy.
>
> Q: Would they be comparable to like a hospital door?
> A: Well, luckily, I haven't spent much time in a hospital, so I –
>
> Q: Or is there a door that -- outside of a prison -- that you can say it would be comparable to?
> MR. RICH: Look, Ms. Hagan, what you're doing is you're asking this witness for opinions. Unless you want to lay some foundation as an expert, then I need to start objecting. That's my objection.
>
> -: (By Ms. Hagan) You can answer.
> A: Is it comparable to the outside door on the prison?
>
> Q: Any outside door.
> A: Let me try and think of one it would be comparable to. I can't really -- they're heavy doors. They're a lot harder than most doors you're ever going to come across in the civilian world. *Id.*

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

Respondent also called John Jones, a Chief Stationary Engineer or maintenance supervisor who has been employed at Pinckneyville Correctional Center since 1998. (T.66). He testified that prior to working as a stationary engineer, he worked as a Correctional Officer; however, he could not recall much detail about the duties of a Correctional Officer, as he had not been one for 12 years. (T.68). He testified on cross-examination, however, that he recalled that as a Correctional Officer, "The biggest issue we had was with our keys." (T.70). He testified that he tried whatever means he could to get a key to work. (T.70). He testified on direct examination that he was unaware of the problems with the condition of the locks at the facility, but stated that a yearly preventive maintenance round is made by a locksmith. (T.68). When asked a similar question on cross-examination, but with clarification that the problem pertained to chuckholes, he stated, "I'm not aware of any issues with that but it could be." (T.71). He testified that there were issues with "sliders" which were boxes built around the chuckholes to prevent more aggressive inmates from throwing substances on the officers. (T.72). He described:

> You got this lid, you open it up, put your tray in, you close the lid back down, you lock it, it's got a rubber padlock on it. You got a slider on the backside of the door itself that slides open and the inmate pulls his tray and you shut it and you lock it back but when you're getting the inmates out you have to open it up – open the lid up, pull the slider, you handcuff the inmate on waist chains and everything and you got to – back when I was there you left the slider open just a little bit so you could still open the door and when they do that sometimes that slider hits the wall and bends. (T.72, 73).

Petitioner submitted a video evidence deposition of Robert Schuchert, a Pinckneyville Correctional Center locksmith. (PX8). He also operates an outside business called Schuchert's Lockshop in Chester, Illinois. *Id.* He began working for the State of Illinois in 1981 at Menard Psychiatric Center, and transferred to Pinckneyville Correctional Center on August 16, 1998. *Id.* He served as a Correctional Officer, like Petitioner, from 1998 until January 2004. Since 2004, he has been a locksmith at Pinckneyville. *Id.* Schuchert viewed the videos from Menard Correctional Center and Pinckneyville Correctional Center. *Id.* He also reviewed a job site analysis. *Id.* He testified that while employed as a locksmith at Pinckneyville, he developed bilateral compression neuropathies and filed a Workers' Compensation Claim that was accepted by Respondent. *Id.* He was voluntarily paid for his time off and received a settlement. *Id.* He attributed his injuries to his repetitive work at Menard and Pinckneyville Correctional Centers. *Id.* He testified that his problems began while working in the segregation at Menard and progressed while performing his job duties at Pinckneyville. *Id.* He testified that, "It got to the point where if I had a tool box full of locks I couldn't carry them with my left hand, especially from one cell house to the next. I had to keep switching hands because it hurt so bad." *Id.* When asked to describe the difference between the locks in the segregation unit and the general population, he stated:

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

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

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

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

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

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

Over his last 5 years as a wing officer, Petitioner began noticing numbness and tingling in his fingers. (T.27). Petitioner testified that he does not suffer from gout, hypothyroidism, rheumatoid arthritis or diabetes. (T.12, 13). Petitioner has a hobby of deer hunting with a shotgun, which he does for one week out of an entire year. (T.13). Petitioner is right-hand dominant. (T.20). Petitioner also demonstrated that he has a partially amputated index finger on his right hand; but he past Respondent's pre-employment physical and Respondent hired him despite same. (T.20).

On September 26, 2011. Petitioner saw Dr. George Paletta, who noted Petitioner's history of a gradual onset of symptoms over the last 6 months. (PX3, 9/26/11). Dr. Paletta also noted that Petitioner had no identifiable risk factors for peripheral compression neuropathy. *Id.* Physical examination was positive for bilateral ulnar neuropathy, which was confirmed by EMG and nerve conduction studies done by Dr. Phillips. (PX3, 9/26/11; PX4). Dr. Paletta diagnosed bilateral cubital tunnel syndrome. (PX3, 9/26/11). Dr. Paletta recommended conservative care with splinting and Medrol Dosepak followed by non-steroidal anti-inflammatory medication. *Id.* Dr. Paletta hoped for improvement over the course of the next few months rather than recommending surgery. *Id.* He also expressed his opinion that Petitioner's condition was caused or aggravated by his job duties as a Correctional Officer. *Id.*

Petitioner testified that September 26, 2011, was the first time he had ever filed any workers' compensation claims for his arms or hands. (T.27). He testified that no consultations were sought, no wrist or elbow diagnostic tests were performed, and no diagnosis was made prior to that date. (T.27, 28, 30). After Petitioner received the results of his nerve conduction studies, he completed and submitted an incident report to Respondent on October 8, 2011. (T.28; PX6).

On August 27, 2014, Respondent had Petitioner examined by Dr. James Williams, who testified by way of deposition. (RX6). At the time of Dr. Williams' examination, Petitioner was experiencing bilateral elbow pain, right greater than left, with intermittent numbness and tingling in the middle, ring and small fingers bilaterally. *Id.* at 13. Petitioner also reported that he frequently dropped things and that his pain level increased with activity from 4 out of 10 to 5 or 6 out of 10 on the right, and from 3 out of 10 to 4 out of 10 on the left. *Id.* at 13. Dr. Williams noted Petitioner's occasional hobbies and testified that reviewed the records of Dr. Paletta and Dr. Phillips. *Id.* at 13, 14. He shortly thereafter stated, however, that he was not provided with the nerve conduction study done by Dr. Williams, but rather "gleaned" that it has occurred from the records that he had. *Id.* at 15, 16.

Dr. Williams' physical examination showed tenderness over the right lateral epicondyle and positive Tinel's over the right ulnar nerve, clinically confirming Petitioner's right cubital tunnel syndrome. *Id.* at 16, 17. Although his physical examination was not impressive for left cubital tunnel syndrome, he acknowledged the electrophysiological evidence of left cubital tunnel syndrome shown on Petitioner's nerve conduction studies. *Id.* at 16, 17, 21.

Dr. Williams testified that he toured Respondent's Pinckneyville facility and performed some of the duties performed by Correctional Officers; and he testified that he did not believe that the job duties of a Pinckneyville Correctional Officer would cause or aggravate cubital tunnel syndrome, since he did not believe that their job duties involved significant exposure to vibration, did not involve significant trauma to the inside of the elbow, or involve any other type of activity that he felt would aggravate and/or cause cubital tunnel syndrome. *Id.* at 19, 21, 22. He felt that Petitioner's bilateral cubital tunnel syndrome "could be idiopathic in nature" or something that just developed over time. *Id.* at 23. He testified that majority of neuropathies such as carpal and cubital tunnel syndrome were idiopathic or of unknown origin. *Id.* at 23, 24.

On cross-examination, Dr. Williams testified that he has made between $800,000.00 to $900,000.00 performing independent medical evaluations for the State of Illinois over the last 2 to 3 years. *Id.* at 27. He acknowledged that Petitioner has no comorbid risk factors for the development of cubital tunnel syndrome; and he admitted that he was not provided with any roster sheets for Petitioner and did not know whether Petitioner worked any overtime. *Id.* at 29. Dr. Williams further testified that he did not dispute the diagnosis of bilateral cubital tunnel syndrome, and testified that he would offer Petitioner surgery if conservative measures failed to improve his condition. *Id.* at 30. He testified that his placement of Petitioner at "maximum medical improvement" did not mean that Petitioner did not require further care, only that he did not feel that Petitioner's need for treatment was work-related. *Id.* at 40, 41.

Although he testified that he did not have any problems with the doors or locks he opened during his tour, he testified that he was unaware of whether the conditions of the locks and/or chuckholes have worsened since his visit. *Id.* at 27, 28, 31. He also could not recall seeing rubber stoppers on the bottom of Respondent's segregation doors. *Id.* at 37. He testified that if the chuckholes at Respondent's facility were corroded and door locks were difficult to operate, then opening and closing these doors and/or operating these locks could contribute to the development of bilateral compression neuropathy. *Id.* at 31, 35. He also testified that forceful gripping and repeated pulling could cause and contribute to the development of cubital tunnel syndrome. *Id.* at 31. Dr. Williams was not provided with the deposition testimony of the locksmith, Robert Schuchert, or any of the testimony given by the Pinckneyville Correctional Officers regarding the conditions at Respondent's facility, although he has asked Respondent for same. *Id.* at 32, 33. He also has not seen the deposition testimony

of Melanie Welch, who testified concerning the limitations or omissions of the job site analyses. *Id.* at 33. He acknowledged that if Respondent's information upon which his opinion was based was flawed, then his opinion as to causal connection could change. *Id.* at 33.

Petitioner's treating physician, Dr. Paletta, also testified by way of deposition. (PX5). Dr. Paletta testified that he also has performed independent medical evaluations at the request of the State of Illinois, and has given an unfavorable causation opinion in cases involving counsel for Petitioner. (PX5, p.7, 8). Dr. Paletta testified that he reviewed the deposition testimony from several Pinckneyville Correctional Officers, the testimony of Lt. Thompson, the testimony of the locksmith, Mr. Schuchert, Respondent's job site analyses and the accompanying DVDs documenting the duties of a Correctional Officer many times. *Id.* at 12. Dr. Paletta was also aware of Petitioner's sports hobby, and testified that unless it was something done seven days a week, they would not likely be a risk factor. *Id.* at 14. He testified that weight-lifting could potentially be a factor, depending on what type of lifting was performed. *Id.* at 14, 15. Dr. Paletta stated, however, that Petitioner's job duties were a factor based on his understanding of Petitioner's job requirements and the correlation between the onset and/or increase in Petitioner's symptoms and Petitioner's performance of his job duties. *Id.* at 19.

Dr. Paletta testified that his review of the deposition testimony of the employees of Respondent's facility gave him a clearer understanding of what is required of a Correctional Officer, as it is from the perspective of an officer or an employee with first-hand familiarity with the conditions of the facility, and reaffirmed his finding of causal connection. *Id.* at 20, 21, 25, 26. He stated:

> Well, it provided me with a picture of the job duties from the perspective of the correctional officer, and that description or that sot of profile tells e that they do activities that are what we call hand-intensive. They involve repetitive grip. The involve repetitive pinch, such as keying. They involve, depending on where they work, bar rapping, which would expose them to vibration, and depending on how they have to handle doors, it exposes them to repetitive flexion-extension of the elbow with load. All of those activities are factors that in my opinion could contribute to a peripheral compression neuropathy such as cubital tunnel syndrome and provide additional information [sic] that really supports my opinion with regard to Mr. Fagerland's particular case. *Id.* at 20, 21.

Dr. Paletta also testified that the job site analyses that he reviewed supported his opinion regarding causation:

> A: Well, the JSA provided me with additional information, particularly with regard to the frequency of activities that the correctional officer has to do I guess from what you would call a third-party perspective, as opposed to the perspective of the person that was performing it. So it provided additional information as to the activities that they have to do and specifically gave ranges or estimates of how frequent they had to do those activities. *Id.* at 22, 23.
>
> Q: And did the information contained in the JSA support your causation opinion in you – in this case?
> A: Well, again, the answer to that is yes. The JSA does document that they have to do, again, hand-intensive activities such as those that I've testified

to – grip, pinch, repetitive flexion-extension, and depending on where they work, bar rapping, which would expose them to vibration. *Id.* at 23.

Dr. Paletta testified that even Respondent's key estimation study supported his finding of causal connection. *Id.* at 23, 24. If he sees Petitioner again, he would order repeat nerve conduction studies; and if these were the same or worse, he would recommend ulnar nerve decompression. *Id.* at 28, 29.

Petitioner testified that he continues to have persistent symptoms and wishes to have the treatment recommended by Dr. Paletta. (T.29).

CONCLUSION

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

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

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

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

The Appellate Court's decision in *Edward Hines Precision Components v. Indus. Comm'n* highlights that there is no standard threshold which a claimant must meet in order for his or her job to classify as sufficiently "repetitive" to establish causal connection. *Edward Hines*, 365 Ill.App.3d 186,

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

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

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

Additionally, Courts have recognized that a claimant's symptoms can manifest, persist or even worsen following retirement. *See Lemes v. Peko Tile, Inc*, 07 I.W.C.C. 1545 (2007) (holding the current employer with which the injury manifested itself liable for the entire claim when both employers contributed to the development of the resulting injury); *See Rachel Vasquez v. Menard Correctional Center*, 10 I.W.C.C. 0826 (2010) (where claimant's condition did not improve after she switched to a non-repetitive job and the Commission held the previous employer liable after the termination of the employer/employee relationship); *Mastrangeli v. Illinois State Toll Highway Authority*, 12 I.W.C.C. 1371 (2012) (wherein claimant's condition worsened after retiring); *See also A.C.& S. v. Industrial Comm'n*, 710 N.E.2d 837 (Ill. App. 1st Dist., 1999); and *White v. Illinois Workers' Compensation Comm'n* 873 N.E.2d 388 (Ill. App. 4th Dist. 2007) (holding that repetitive injuries can manifest after the termination of the employer/employee relationship).

The Commission has also found the at the job duties of a Correctional Officer at Pinckneyville

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

Dr. Paletta's understanding of Petitioner's job duties is entirely consistent with Petitioner's testimony at trial. The Arbitrator finds it significant that Petitioner spent 90% of his time as a wing officer. (T.11). Dr. Paletta testified that Petitioner's job duties, including keying and handling heavy steel doors, are occupational activities that would cause and/or contribute to the development of cubital tunnel syndrome. (PX5). The Arbitrator finds that the causation opinion of Dr. Paletta is more credible than the opinion of Dr. Williams. Dr. Paletta had a thorough understanding of not only Petitioner's job job duties, but also the difficulties faced by Correctional Officers while trying to operate keys and open doors and chuckholes. (PX5). The Arbitrator does not believe that Dr. Williams' brief performance of some of the job duties of a Correctional Officer the most favorable, controlled circumstances would give him an accurate understanding of the toll these duties would take when performed repetitively for over a decade. Dr. Williams cuffed a static Correctional Officer with no resistance; this does not in any way simulate the needed force or the strain created during the cuffing of a combative inmate. (RX6, p.19). Additionally, the information upon which Dr. Williams' opinion was based was incomplete. Dr. Williams was entirely unaware of what Respondent's Job Site Analyses were lacking. Dr. Paletta, on the other hand, had not only Respondent's information, but also first-hand information from Petitioner and other employees at Respondent's facility concerning actual conditions.

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

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

Repetitive-trauma injuries occupy an odd niche between accidental injury, compensable under the Act, and occupational disease, compensable under the Workers' Occupational Diseases Act. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 879, 710 N.E.2d 837, 840 (Ill. App. 1st Dist., 1999). In choosing to cover such injuries as accidental injuries, as noted by the Appellate Court in *A.C. & S.*, the Supreme Court **deliberately** modified the standards for determining the date of injury for repetitive trauma cases in order provide protection for injured workers. *A.C. & S. v. Industrial Commission*, 304 Ill.App.3d 875, 710 N.E.2d 837, 840-841 (Ill. App. 1st Dist., 1999).

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 902 N.E.2d 1269 (2009). Hence, the Supreme Court has established a flexible but fair standard for determining

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

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

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

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

> The evidence in this case establishes that Dr. Carl Johnson discussed Dr. Block's report of the EMG results with petitioner. . . No direct evidence was presented regarding whether Dr. Johnson ever told Petitioner that his injury was work related. . . . It was not until July 10, when petitioner met with Dr. McKechnie, that it became clear that petitioner's condition necessitated surgery. . . Based on the evidence of record, it could be reasonably inferred that petitioner first learned that his condition of ill-being was work-related at some point between July 10, and the first of August, 1984. Applying the reasonable person test to these facts, we find that although petitioner persisted in his employment until August 10, a reasonable person in these circumstances would have been on notice that the condition was both work-related and medically disabling on July 10, 1984. *Three "D" Discount Store v. Industrial Commission*, 556 N.E.2d 261, (1989) [emphasis ours].

The Arbitrator finds it instructive that the Supreme Court in *Durand* noted that the manifestation date is typically set on the date the employee requires medical treatment or the date on which the employee can no longer perform work activities. *Durand,* 862 N.E.2d at 929. In the case at bar, Petitioner first south treatment and was first diagnosed with bilateral cubital tunnel syndrome following his nerve conduction studies on September 26, 2011. (T.27, 28, 30). Therefore, his manifestation date is appropriate under the law. Petitioner completed and submitted a notice of injury within 45 days of his manifestation date on October 8, 2011. (PX6). Accordingly, the Arbitrator finds that Petitioner 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?

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

The Arbitrator finds that all of Petitioner's care has been conservative and reasonable. However, Petitioner has not been cured or relieved of the effects of his injuries. Dr. Williams agreed based on the second nerve conduction studies that Petitioner indeed suffers from bilateral cubital tunnel syndrome, and requires further treatment. Petitioner testified that his symptoms persisted despite conservative care, and that he would like to have the surgery recommended by Dr. Paletta. (T.29).

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

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

STATE OF ILLINOIS)
) SS.
COUNTY OF)
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

James O'Hara,

Petitioner,

16IWCC0249

vs.

NO: 09 WC 13185

State of Illinois – Tamms Correctional Center

Respondent.

DECISION AND OPINION PURSUANT TO §8(A) OF THE ACT

This claim comes before the Commission on a petition for review under §8(a) of the Act, filed by Petitioner on June 27, 2014. No question has been raised concerning the timeliness of the petition. Commissioner White conducted a hearing in this matter on August 6, 2015 and a record was made. The issue on review is whether Petitioner is entitled to an additional award of medical benefits to obtain further treatment for his right shoulder. Petitioner, a 46-year-old correctional officer, sustained a compensable work related accident when he was struck by an automatic sliding door on November 12, 2008. On November 17, 2008, five days after the accidental injury, Petitioner sought treatment with his family physician, Dr. Smith. As a result of the injury, Petitioner was diagnosed with a right shoulder contusion and tendonitis and was able to return to work without restrictions. At his follow-up visit on November 24, 2008, Petitioner made no complaint of any ongoing shoulder problems. Petitioner filed an Application for Adjustment of Claim on March 25, 2009. Petitioner sought no further treatment and Respondent did not have Petitioner examined pursuant to §12.

At arbitration on July 16, 2009, Petitioner testified that since the accident he noticed difficulty lying on his right shoulder and with painting and dry walling using his right shoulder. In a decision dated August 3, 2009, the arbitrator found that Petitioner sustained no permanent disability as a result of the November 12, 2008 accident. The arbitrator ordered Respondent to pay for Petitioner's two medical visits with his primary care physician. Neither party petitioned for review of the arbitrator's decision and the decision became final.

The medical records of Logan Primary Care were admitted into evidence as Respondent's

exhibit 6. The records show no further right shoulder complaints after November of 2008 until January 26, 2010, when Petitioner complained of right-sided neck, shoulder and hand numbness while sleeping on his right side. On February 10, 2010, Dr. Smith diagnosed right elbow epicondylitis and administered a right elbow injection. At Petitioner's next follow-up visit, he continued to complain of multiple symptoms including right arm numbness radiating downward and an occurrence of electric shock type pain in the right shoulder.

In May of 2010, Petitioner filed a new Application for Adjustment of Claim alleging repetitive trauma to his neck, right shoulder, right elbow and right and left wrists as a result of his employment by Respondent. On June 7, 2010 Petitioner was first examined by Dr. Milne, an orthopedic surgeon at the Orthopedic Center of St. Louis, on referral from his attorney. Petitioner gave a history of the June 2008 accident, reporting that he was "pinned" in a cell door in June of 2008 and had intermittent pain in his right shoulder that progressed to constant pain. Petitioner complained that his right shoulder just did not "feel right." Dr. Milne noted Petitioner's concurrent treatment with Dr. Gornet for cervical spondylosis including epidural steroid injections and physical therapy. He also noted that Petitioner was concurrently being evaluated for bilateral elbow and wrist complaints. On exam, Dr. Milne noted the normal appearance of Petitioner's right shoulder and full range of motion. Petitioner had mild tenderness over the posterior superior aspect of the shoulder and very slightly positive Hawkin's and Neer's tests. X-rays of Petitioner's right shoulder showed type III acromion and mild acromioclavicular joint arthritis. Dr. Milne recommended an MRI and opined that the need for further evaluation of Petitioner's right shoulder was based on a history of "acute injury" in 2008. Dr. Milne recommended light duty work, but Petitioner reported that he had not been working since March of 2010 due to a foot injury.

On June 17, 2010 Dr. Milne reviewed Petitioner's MRI and diagnosed right shoulder impingement, acromioclavicular joint osteoarthritis, right shoulder partial thickness rotator cuff tear and supraspinatus tear. Petitioner reported that his pain level varied on a daily basis and with activity. Dr. Milne offered Petitioner the option of right shoulder injections or surgery. On July 19, 2010, Dr. Milne performed a right shoulder arthroscopic rotator cuff repair with a subacromial decompression and distal clavicle resection. Petitioner participated in post-operative physical therapy at Joyner Therapy Services and followed up with Dr. Milne. He was released to return to regular duty work for the right shoulder on December 14, 2010, however Dr. Milne noted that Petitioner was off of work and had surgery scheduled with Dr. Brown in two days. Petitioner saw Dr. Milne a final time on January 11, 2011. Dr. Milne noted that Petitioner had good strength and range of motion and had reached maximum medical improvement for his right shoulder.

Petitioner's repetitive trauma claim went to arbitration on June 4, 2014, and several weeks later on June 27, 2014 Petitioner filed the instant §8(a) petition. In a decision dated August 5, 2014, the Arbitrator found that Petitioner failed to prove that he sustained a repetitive trauma accident and causal connection between Petitioner's work duties and the condition of his neck, right shoulder, bilateral arms, wrists or hands. The Commission affirmed the decision of the Arbitrator on February 5, 2015. Petitioner's §8(a) petition in the case at hand was set for hearing on August 6, 2015.

At the §8(a) hearing, Petitioner testified that he experienced ongoing symptoms in his right shoulder despite the fact that this is not corroborated by the medical records. Petitioner testified that if he had a medical visit for another issue he would not necessarily mention his right shoulder complaints. He denied sustaining any other injuries to his right shoulder.

Dr. Richard Johnson was deposed in advance of the §8(a) hearing and his deposition transcript is in evidence as Respondent's exhibit 2. Dr. Johnson is an orthopedic surgeon at Parkcrest Orthopedics and he practices reconstructive surgery specializing in knees, hips and shoulders. He examined Petitioner at the request of Respondent with respect to Petitioner's right shoulder claim as well as Petitioner's separate repetitive trauma claim. Dr. Johnson's report and testimony in connection with Petitioner's other case is not in evidence. Dr. Johnson opined that Petitioner's work-related right shoulder injury on November 12, 2008 did not cause rotator cuff pathology. Dr. Johnson testified that Petitioner had substantial preexisting conditions that put him at risk including smoking, grade III acromion, arthritis, and degenerative joint disease at the acromioclavicular joint. Dr. Johnston further agreed that activities such as golf, painting and hanging drywall are activities that can cause or exacerbate rotator cuff pathology. Dr. Johnson opined that he interpreted the operative report as describing a degenerative-type tear. Although Dr. Johnson believed that Petitioner had inadequate conservative treatment, he agreed that right shoulder surgery was not unreasonable if conservative treatment had been attempted and failed to improve Petitioner's symptoms. On cross examination, Dr. Johnston testified that shoulders surgery represents approximately 5% of his practice but that shoulder surgery is still an active part of his practice and he has been doing shoulder surgeries for twenty-five years. He disagreed that the opinion of Dr. Milne would be more persuasive merely because shoulder surgeries consume a larger part of Dr. Milne's practice. Dr. Johnston testified that he saw no reason why attempting conservative treatment would not have been recommended and attempted before surgery.

Dr. Milne testified for Petitioner on April 20, 2015 and his deposition transcript is in evidence as Petitioner's exhibit 10. On direct examination, Dr. Milne confirmed that he reviewed no records of prior treatment incurred before his initial evaluation of Petitioner on June 7, 2010.
On that date, he noted Petitioner had full range of motion and strength with only mild tenderness to palpation of the shoulder and weakly positive Hawkin's and Neer's tests. Dr. Milne reasoned that given a lack of known evidence or other reasons why Petitioner may have shoulder pain, the work injury described was the primary reason for the shoulder evaluation. Dr. Milne testified that his causal opinion was based "100 percent" on Petitioner's reported history. Dr. Milne believed that Petitioner's impingement syndrome was probably pre-existing. Dr. Milne testified that he released Petitioner at maximum medical improvement for the right shoulder on January 11, 2011 and at that time Petitioner was still treating with Dr. Brown for his elbows and hands.

On cross examination, Dr. Milne testified that in addition to reviewing no prior records, he furthermore reviewed no records from concurrent treatment with Dr. Gornet or Dr. Brown. He was aware on June 7, 2010 that Petitioner was already in treatment for bilateral carpal tunnel syndrome and cubital tunnel syndromes. Dr. Milne admitted that Petitioner's presentation was not highly impressive: "there's not a whole lot there on his physical examination." Dr. Milne testified that he could not confirm whether Petitioner had made no complaints for two years prior to his evaluation without seeing the records. Dr. Milne agreed that people with type III acromion tend to have more impingement symptoms and rotator cuff problems. He further testified that impingement, which he believed was pre-existing, also predisposes people to developing rotator cuff problems and he noted that rotator cuff tears, impingement syndrome and subacromial spurs are very commonly seen together and can occur without any injury. Dr. Milne further agreed that smokers have a higher risk of rotator cuff problems. Dr. Milne agreed that painting and hanging drywall are activities that could also aggravate these conditions.

16IWCC0249

Based on Petitioner's reported history, Dr. Milne opined that the accident could have caused, aggravated or accelerated an underlying condition. Dr. Milne did not know how hard the cell door supposedly struck Petitioner, and he would not speculate as to the force necessary to cause or aggravate the condition he diagnosed. Dr. Milne was advised that an arbitrator of the Commission concluded that Petitioner sustained no permanent injury from the November 12, 2008 accident. Dr. Milne testified that he did not see Petitioner until a significant amount of time had passed, and he addressed pathology he diagnosed in June of 2010 independent of any historical data other than Petitioner's statements. Regarding the question of conservative treatment, Dr. Milne testified that he offered Petitioner the option of an injection for therapeutic purposes although Petitioner decided to forego conservative treatment. He further opined that a cortisone injection would not have healed Petitioner's rotator cuff tear and physical therapy would only delay surgery Dr. Milne believed was inevitable.

After considering all of the evidence the Commission denies Petitioner's §8(a) petition. The Commission previously determined that Petitioner sustained no permanent injury. We note that the decision of the arbitrator was not appealed. Furthermore, the credible evidence shows a significant period of time where Petitioner made no right shoulder complaints to his doctor between November of 2008 and early 2010. Petitioner began to complain of right shoulder pain along with diffuse symptoms of chronic neck and bilateral arm and hand pain in 2010. Dr. Milne testified candidly that he addressed Petitioner's right shoulder condition as it appeared to him in 2010 with no medical referral and no information regarding Petitioner's accident, prior treatment, or concurrent treatment other than Petitioner's reported history. Dr. Milne acknowledged that his causal opinion depended upon the veracity of Petitioner's reported history, and we find Petitioner's history is not corroborated by the evidence. We find that Petitioner failed to prove causal connection between his current condition and the work-related injury of November 12, 2008 previously determined by the Commission to have resulted in no permanent injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition under §8(a) 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 7 - 2016
RWW/plv
o-02/09/16
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Raymond Bollacker,
Petitioner,

vs.

NOs: 01 WC 19910
08 WC 03628
08 WC 47675
11 WC 34310
11 WC 34311
11 WC 34312
11 WC 34313
11 WC 34314

City of Chicago,
Respondent.

16IWCC0250

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on a timely filed Petition for Review having been filed by the claimant. The Commission, following a hearing with the parties before Commissioner Luskin on February 25, 2016 on review, and after considering all of the relevant issues and being advised of the facts and law, modifies the Arbitrator's award as delineated below and otherwise affirms and adopts the Decision of Arbitrator Brian Cronin filed on May 19, 2015, which is attached hereto and made a part hereof.

The parties first identify and concur that two (2) typographical errors are present in the decision; first, the cover page to the decision noted a case number of "08 WC 003528" as opposed to the correct "08 WC 003628." The signature of the Arbitrator is also dated "May 18, 2011" and should read "May 18, 2015," consistent with the decision being filed on May 19, 2015. The Commission corrects these accordingly.

16IWCC0250

These consolidated claims were tried at a series of hearings before Arbitrator Cronin during calendar years 2013 and 2014. Ultimately, Arbitrator Cronin awarded TTD for 237 & 3/7 weeks (from March 7, 2001 to September 23, 2005), as well as maintenance benefits for 76 & 4/7 weeks (from August 2, 2011 through January 18, 2013), and permanent total disability benefits commencing on May 6, 2013. He also awarded certain medical expenses and denied the claimant's request for penalties and fees. The parties have advised the Commission that following examination of the decision and evidence, they concur that each mutually confesses certain aspects of their opponent's case. The respondent consents to liability for maintenance benefits from January 19, 2013 to May 5, 2013 (all dates inclusive) which had been denied by the Arbitrator. The petitioner withdraws its requests for penalties and fees, as well as consenting to the Arbitrator's calculation of benefit rates, causal relationship to the date of loss, medical costs incurred, and the other issues addressed by the Arbitrator in his Decision.

Under these circumstances, the Commission modifies the decision of the Arbitrator regarding maintenance benefits to conform according to the parties' mutual consent as delineated above. All else is hereby affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the May 19, 2015 Decision of the Arbitrator is modified regarding the award of maintenance as described above. The Respondent shall pay the Petitioner the sum of $570.67/week for 237 & 3/7 weeks, from March 7, 2001 through September 23, 2005, that being the period of temporary total incapacity for work under §8(b) of the Act; the Respondent shall further pay the Petitioner the sum of $570.67/week for 91 & 6/7 weeks, from August 2, 2011 through May 5, 2013, as maintenance.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $570.67week for life, commencing May 6, 2013, as provided in Section 8(f) of the Act. Commencing the second July 15 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 reasonable and necessary medical expenses of $143,765.19, and shall reimburse the Petitioner for $208.91 in out of pocket medical costs, as provided in §8(a) and 8.2 of the Act. Respondent shall have credit for all expenses it has heretofore paid, and shall be entitled to receive credit for any expenses paid by its group health provider, but shall hold the claimant harmless for any reimbursement requests for same, pursuant to Section 8(j) 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 injuries, including but not limited to the $182,110.53 in disability and maintenance benefits as noted in the Decision of the Arbitrator.

16IWCC0250

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000. 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 - 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-04/12/16
jdl/jdl
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOLLACKER, RAYMOND
Employee/Petitioner

CITY OF CHICAGO
Employer/Respondent

Case# 01WC019910

~~08WC003528~~ 3628
08WC047675
11WC034310
11WC034311
11WC034312
11WC034313
11WC034314

On 5/19/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

16IWCC0250

5511 DeCARLO LAW GROUP LTD
ANITA M DeCARLO
6525 W NORTH AVE SUITE 204
OAK PARK, IL 60302

0766 HENNESSY & ROACH PC
JOSEPH A ZWICK
140 S DEARBORN ST 7TH FL
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

16IWCC0250

Raymond Bollacker
Employee/Petitioner

v.

Case # 01 WC 19910

Consolidated cases: 08 WC 03628
08 WC 47675, 11 WC 34310, 11 WC 34311
11 WC 34312, 11 WC 34313, 11 WC 34314

City of Chicago
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **5/17/2013, 8/20/2013, 9/19/2013, 10/17/2013, 11/18/2013, 1/8/2014, 5/7/2014, 7/15/2014, 8/14/2014 and 9/4/2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ 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

16IWCC0250

On **03/06/2001**, 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 $**44,512.00**; the average weekly wage was $**856.00**.

On the date of accident, Petitioner was **36** years of age, *married* 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 $**135,486.24** for TTD, $**0.00** for TPD, $**46,624.29** for maintenance, and $**0.00** for other benefits, for a total credit of $**182,110.53 for all eight consolidated cases in this matter.**

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

ORDER

By agreement of the parties, Respondent shall pay directly to the providers for all eight cases, charges for the reasonable and necessary medical services of up to $**143,765.19,** as provided in Sections 8(a), and subject to Section 8.2 of the Act where applicable. Respondent is entitled to a credit for the medical bills that they have previously paid. Respondent shall reimburse Petitioner $**208.91** in out-of-pocket expenses. Respondent shall hold Petitioner harmless for payments made by his group carrier, Blue Cross/ Blue Shield pursuant to Section 8(j) for all eight consolidated cases in this matter.

Respondent shall pay Petitioner temporary total disability benefits of $**570.67**/week for **237-3/7** weeks, from **03/07/2001** through **09/23/2005**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of $**570.67**/week for **76-4/7** weeks, from **08/2/2011** through **01/18/2013**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $**570.67**/week for life, commencing on **05/06/2013**, as provided in Section 8(f) of the Act.

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

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 18, 2011
Date

FINDINGS OF FACT AND CONCLUSIONS OF LAW

01 WC 19910 – D/A: 3/6/2001

FINDINGS OF FACT:

On December 18, 1996, Petitioner, Raymond Bollacker, began working for the City of Chicago as a garbage truck driver.

It is undisputed that on March 6, 2001, while in the course of his employment for Respondent, Petitioner sustained an accidental injury. On that day, Petitioner was climbing into his garbage truck when his foot slipped and he fell five or six feet. He fell flat-footed on the ground, felt a sharp pain in his back and "couldn't move from the waist down." He was taken to MercyWorks and was later referred to Edward J. Goldberg, M.D.

As a result of the accident, Petitioner sustained injuries to his back that required three lumbar surgeries.

Dr. Goldberg performed the first two surgeries.

The first surgery, which he performed on October 11, 2001, consisted of a laminectomy at L5 with partial facetectomies at L4-5, as well as posterolateral spinal fusions at L4-5 and L5-S1 using posterior segmental pedicle screw instrumentation and iliac crest bone graft. Dr. Goldberg's postoperative diagnosis was degenerative disk disease at L4-5 and L5-S1 and spinal stenosis at L4-5. (PX 40)

The second surgery, which he performed on May 13, 2003, consisted of a posterior lateral spinal fusion at L5-S1, using posterior nonsegmental pedicle screw at L5-S1 and iliac crest bone graft. Dr. Goldberg's postoperative diagnosis was failed posterior lateral spinal fusion (pseudoarthrosis) at L5-S1 and healed posterior lateral fusion at L4-5. (PX 40)

Srdjan Mirkovic, M.D., performed the third surgery on March 31, 2005. Such surgery consisted of an anterior L4-5 lumbar interbody fusion with a prosthetic intervertebral device, exploration of the anterior lumbar fusion at L5-S1, anterior lumbar fusion L5-S1, placement of

intervertebral device prosthetic device at L5-S1 and harvesting of left anterior anterior iliac crest bone graft. Dr. Mirkovic's postoperative diagnosis was L4-5 discogenic low back pain and L5-S1 pseudoarthrosis. (PX 40)

In August 2005, Petitioner reported lower extremity numbness and random weakness in the left leg with the leg giving way twice weekly with occasional episodes of falling down. (PX 44) In a letter dated August 23, 2005 and addressed to Homer Diadula, M.D., Dr. Mirkovic wrote, *inter alia*, the following:

> At this junction I have recommended that if Mr. Bollacker has plateaued with physical therapy, consideration be given to a functional capacity evaluation, and, according to the functional capacity evaluation, a possible course of work conditioning with determination of permanent restrictions. If pain issues remain, he may require further pain management.

In the MercyWorks chart note for Petitioner dated September 26, 2005, Dr. Diadula wrote, in pertinent part, the following:

> He went back to work on 9/21/05, driving a minivan. He fell down in the corridor or hallway of the district offices when there was a sudden occurrence of sharp pain in the lower back down to the left leg to the left foot, and the left foot buckled . . . Note that in the course of the examination inside the room, his left leg suddenly buckled and he fell . . . He states he is hurting in the lower back. (PX 37)

In the MercyWorks chart note for Petitioner dated September 30, 2005, Dr. Diadula wrote, in pertinent part, the following:

Per FCE, no recommendations at this time due to patient's inability to complete the FCE . . . At present, the pain level is 7-8/10 on the scale . . . Present exam suggestive of bilateral lumbar spine polyradiculopathy (L5-S1 and possible new at L3-4) . . . Limited duty as of 9/30/05, 1) sitting no more than 30 minutes. 2) walking no more than 20 minutes. 3) should vary positions. 4) intermittent rest breaks. 5) bilateral carry of 10 lbs. No more than 20 feet. (PX 37)

Petitioner testified that in September 2005, Dr. Mirkovic gave him permanent light-duty restrictions.

Petitioner testified that on September 25, 2005, while keeping his former title as motor truck driver, he began working at a clerical desk job for the City of Chicago, Department of Streets and Sanitation – Safety Department.

Petitioner testified that in November 2005, Respondent sent him for an examination by Dr. Wehner.

Petitioner testified that he returned to MercyWorks on September 18, 2006. He further testified that in November of 2006, Dr. Mirkovic referred Petitioner to Dr. Cabin, a neurologist. Dr. Mirkovic was also referred him to a neurologist named Dr. Habib. Petitioner testified that he continued to experience falls and that he followed up with Dr. Cabin and MercyWorks after a fall on May 13, 2007. (Tr. 5/17/13, pp. 46-47)

On November 27, 2007, September 22, 2008, October 7, 2008, October 25, 2010, January 31, 2011 and March 10, 2011, Petitioner's left leg gave way while working for Respondent, and he fell. The Arbitrator addresses each of these events in his Decisions for case numbers 08 WC 03628, 08 WC 47675, 11 WC 34310, 11 WC 34311, 11 WC 34312 and 11 WC 34313, respectively.

On July 27, 2011, Petitioner sustained an accidental injury while working for Respondent. The Arbitrator addresses this accident in his Decision for case number 11 WC 34314.

Effective August 2, 2011, Respondent chose to no longer accommodate Petitioner's restrictions and placed him on disability. (PX 18)

In January and February 2012, Petitioner began an independent, self-directed job search. (PX 24, pp. 1-10)

On February 28, 2012, Petitioner underwent a functional capacity evaluation.

On that same day, Rehabilitation Consultant Julie L. Bose, M.S., CRC, of MedVoc Rehabilitation, Ltd., authored a letter of introduction to Petitioner. (PX 23) Respondent hired Ms. Bose.

On March 1, 2012, Dr. David Rosania, who was overseeing Petitioner's pain management, issued more stringent work restrictions with decreased lifting limits along with no bending, no twisting, and limited sitting/standing. Dr. Rosania also indicated that Petitioner required two breaks per shift for supine stretching and needed a cane for balance. Dr. Rosania noted that Petitioner is on schedule II narcotic medications and anti-spasticity medication and may require medication for flare-up of pain during work to allow for improved function. Dr. Rosania strongly recommended that Petitioner not operate heavy machinery and not drive an automobile while taking pain medications. Dr. Rosania stated that Petitioner "remains at maximum medical improvement for low back and lower extremity condition at this time." He advised Petitioner to follow up with his primary care physician as scheduled. (PX 19)

In a letter to Petitioner's Counsel dated April 24 2012, Ms. Bose described the services MedVoc would provide and stated MedVoc's expectations of Petitioner. (RX 4) Ms. Bose testified that she had a vocational plan, but that she did not personally review the vocational rehabilitation plan with Petitioner. She testified that Michael Wyness reviewed "it in a form, he reviewed every single job title" with him. (Tr. 1/8/14, pp. 15-16)

Ms. Bose conducted the initial meeting with Petitioner.

Ms. Bose conducted a labor market survey that indicated Petitioner could return to work at a light-medium work level, which is similar to the level of office work that he performed for Respondent. Ms. Bose opined that Petitioner had transferable skills and semi-skills in the area of clerical work. (Tr. 11/18/13, p. 68) Ms. Bose testified that she felt Petitioner was employable, and targeted clerical, sedentary or sit-stand positions. She did not target driving positions. (Tr. 11/18/13, pp. 49-50)

Michael Wyness, a MedVoc employee, was in charge of Petitioner's job placement.

Petitioner was to follow through on many of the job leads that were sent to him and to perform his own job search. Mr. Wyness was to respond to job openings on behalf of Petitioner.

From April 7, 2012 through August 29, 2012, Petitioner did not receive any TTD benefits.

On September 4, 2012, Respondent paid Petitioner the accrued TTD benefits.

On November 16, 2012, Respondent asked MedVoc to close their file. In their FINAL VOCATIONAL REHABILITATION PROGRESS REPORT, Ms. Bose and Mr. Wyness opined that Petitioner was not following job placement protocol, despite two warning letters. (PX 25, p. 2) Ms. Bose testified that Petitioner was uncooperative with the vocational rehabilitation process. (Tr. 11/18/13, pp. 66-67) Ms. Bose further testified that, from assessing Petitioner's behavior, it did not appear to her that Petitioner was motivated to find alternative employment. (Tr. 11/18/13, pp. 77-78) Ms. Bose testified that pain was limiting him in his job search in general and that there "was almost an implied complaint that he can't work at all." (Tr. 11/18/13, p. 79) Ms. Bose refuted some of Lisa Helma's criticism with regard to the appropriateness of the job leads that MedVoc provided to Petitioner. Subsequent to MedVoc closing their file, Respondent terminated all benefits to Petitioner.

On cross-examination, Ms. Bose testified that she did not administer a typing test or a computer skills test to Petitioner. Ms. Bose further testified that when she gave Petitioner job leads, she had no idea whether or not his restrictions would be accommodated. (Tr. 11/18/13, pp. 103-104) Petitioner would have to broach that subject during the interview. Ms. Bose testified that she was aware that there was a period of time during the vocational rehabilitation program

that Petitioner was not being paid benefits. She was also aware that in-person job searches would require him to travel and travel would require money for transportations costs. (Tr. 1/8/14, pp. 6-7)

On March 28, 2013, Lisa Helma, M.S., CRC, of Vocamotive, interviewed Petitioner. She also reviewed medical records as part of her evaluation and issued a report dated May 6, 2013. (PX 27) Such report indicates the medical records that she reviewed. Petitioner hired Ms. Helma. Ms. Helma testified at arbitration. She testified that it appeared that the February 28, 2012 FCE appeared to be more restrictive than the 2002 FCE. Ms. Helma testified that, within a reasonable degree of vocational certainty, based upon his previous experiences, his level of education, and his current physical capabilities, Petitioner did not have any transferable skills. Ms Helma further testified that within a reasonable degree of vocational certainty, her opinion is that Petitioner has lost access to any stable labor market. She testified that she did not feel that a labor market survey was warranted based on situational factors such as age, education, previous work experiences, lack of transferable skills and physical capabilities and given her opinion that he had lost access to any stable labor market. She opined that there is no work that is regularly and continuously available to Petitioner. Ms. Helma testified that it is her opinion that Petitioner is permanently and totally disabled. Ms. Helma testified that she reviewed Julie Bose's vocational rehabilitation plan. It was her understanding that such plans need to be filed with the IWCC every four months. Ms. Helma testified that she did not rely on the Dictionary of Occupational Titles in formulating her opinions. Ms. Helma reviewed many of the job leads that MedVoc provided Petitioner and opined that Petitioner was not qualified for such positions. Ms. Helma testified that she was aware that Dr. Rosania recommended that Petitioner be given two extra breaks per shift and that based on that restriction, she opined that it would be an extremely difficult thing for employers to accommodate.

On cross-examination, Ms. Helma testified that she does not agree with the statement that the number one factor in terms of success in job placement is whether or not someone is motivated and wants to go back to work. She would agree that motivation is a significant factor in terms of success in job placement. Ms. Helma testified that she believes the library in which she interviewed Petitioner was two to three miles from Petitioner's apartment and had computers and internet access. She testified that she did not rely on the 2002 FCE because it is ten years

old and not relevant. All of her opinions are based on Petitioner's current restrictions. Ms. Helma did not give Petitioner a typing test to see how fast he can type. She testified that Petitioner provided the job description of the job he performed for Respondent in 2011. Ms. Helma testified that the job listings that she reviewed and described and set forth in PX 28 are job descriptions and job leads that she got on her own from the summaries in the MedVoc reports. Ms. Helma understood that the MedVoc fieldwork was done primarily by Michael Wyness. Ms. Helma testified that her understanding of Petitioner's restrictions is based on Dr. Rosania's note as well as a handwritten work status release form that went with it. It was Ms. Helma's understanding that Petitioner was independent with driving and that Dr. Rosania only said that Petitioner was not to drive while on the medications.

On redirect examination, Ms. Helma testified that the most significant factor in finding a job is physical capabilities. She stated that she has had very motivated clients who, because of their physical capabilities, were unable to find a job. Ms. Helma further testified that in addition to being restricted from driving while on pain medications, Petitioner is limited to sitting for thirty minutes. She testified that such sitting limitation would affect his driving capabilities.

On April 23, 2013, at the request of Respondent and pursuant to Section 12 of the Act, Matthew J. Ross, M.D., examined Petitioner. Dr. Ross opined, *inter alia*, that Petitioner has some persistent radicular symptoms in his left leg, but, unfortunately, there is also a degree of symptom amplification. His motor examination is inconsistent. He also has nondermatomal sensory loss in the left leg. This makes it more difficult to assess his true capabilities. Dr. Ross also noted that Petitioner is able to reproduce a noticeable clicking noise with slight flexion and extension movements of his spine. The clicking is at approximately the L3 level. Dr. Ross was also concerned that Petitioner's level of narcotic analgesia is excessive for his current condition. The doctor thought it would be prudent to make an effort to wean him from the Opana ER and IR and that this should be done in conjunction with an effort to identify the painful clicking in his back. Finally, Dr. Ross opined that Petitioner is certainly not capable of returning to work as a garbage collector in his current condition. (RX 2)

Michael Wyness testified at arbitration on behalf of Respondent. Mr. Wyness testified that he is a job placement specialist. He works under the supervision of Julie Bose. He testified that Ms. Bose completed the vocational assessment of Petitioner, compiled a report and came up

with a vocational plan. Ms. Bose explained the vocational plan and the target jobs to him and then assigned him Petitioner's plan for job placement. Mr. Wyness scheduled the first job placement meeting with Petitioner and further testified that Petitioner drove to the library for the meeting. At the meeting, he went over the job placement packet with Petitioner that included job-seeking skills and interview techniques. Mr. Wyness gave Petitioner his contact information and asked him to call with any questions. Mr. Wyness also gathered additional work history to create a resume'. Petitioner advised Wyness that he had been submitting job logs to Respondent before he started with MedVoc. Mr. Wyness testified that he advised Petitioner that he was to conduct a job search on a weekly basis. He was advised of the protocol and of the minimum required contacts per week. Mr. Wyness testified that the vocational plan was explained to him at the first meeting on May 1, 2012. The second job placement meeting took place on May 16, 2012 at the local library. Among other things, Mr. Wyness provided Petitioner with job leads formulated by MedVoc and explained to him how to follow up on such lead. He also explained to Petitioner that if a follow-up is required, it will say so in the job lead letter. Mr. Wyness also held a mock interview with Petitioner. Mr. Wyness took notes at every meeting he had with Petitioner and turned those notes over to Julie Bose. Mr. Wyness testified that Ms. Bose authors the reports and Mr. Wyness reviews the reports for accuracy and content. He further testified that the introduction letter and the rough draft resume' did not have Petitioner's apartment unit # on it. Mr. Wyness testified that he emailed the rough draft resume' to Petitioner and Petitioner emailed back such rough draft to him with his changes to the resume'. Mr. Wyness testified that a July 6, 2012 letter from MedVoc to Petitioner advised Petitioner that MedVoc was asked to place his vocational case on hold. Mr. Wyness testified that an October 12, 2012 letter from MedVoc was sent to Petitioner with additional resumes, cover letters and potential employer contact sheets. Mr. Wyness testified that although several of these letters from MedVoc to Petitioner did not have Petitioner's apartment unit # on them, Wyness did not recall Petitioner having any issues in that regard. Mr. Wyness testified that he reviewed the reports in Exhibit No. 3 and concluded that they were consistent and accurate.

On cross-examination, Mr. Wyness testified that he hold a B.A., but has no schooling in job placement. Mr. Wyness testified that target jobs are the types of jobs outlined in the vocational plan by rehab counselors. These would be positions that are within a worker's restrictions. Then, job leads are formulated. Mr. Wyness testified that Petitioner came to the job

placement meetings with a single-point cane and did have pain complaints if he had to stand. He testified that he told Petitioner that if he applied for different positions in the same company, he would only be able to count that as a single job contact. To Mr. Wyness' knowledge, Petitioner never signed and agreed to a rehab plan. However, if one does not agree with a plan, one is to formulate another plan and submit it to the rehab counselor. Mr. Wyness testified that for a confidential job lead, he has no physical proof that he submitted Petitioner's resume' and cover letter to the prospective employer. Mr. Wyness testified that for many of the contacts that he himself made, he has handwritten notes that indicate that such resumes and cover letters were sent.

On redirect examination, Mr. Wyness testified that he sent all the cover letters and resumes that are reflected in the job leads. It was Mr. Wyness' understanding that MedVoc did not receive a vocational plan that was signed by Petitioner.

On recross examination, Mr. Wyness testified that he did not review the vocational rehabilitation plan with Petitioner, but reviewed the target jobs with him.

Sandra Bland, Petitioner's ex-wife, testified at arbitration on Petitioner's behalf. Ms. Bland was married to Petitioner on March 6, 2001, and divorced him in April 2011. Ms. Bland testified that before Petitioner's March 6, 2001 accident, Petitioner would go out dancing with her and would often play with their two children. He taught his daughter how to ride a bike and play volleyball. However, after he returned to work in 2005, he would come home at the end of a workday and go straight to bed. Petitioner had sleepless nights. When the family moved to a new house after 2005, Ms. Bland had to move everything. When the witness and Petitioner separated in 2009, Petitioner would pick up their son twice a week to do homework and every other weekend he would have visitation. Ms. Bland testified that since July 26, 2011, things are different. Ms. Bland testified that since July 26, 2011, she notices that if the weather changes, Petitioner does not leave the house to pick up their son. When he does pick up their son, Petitioner looks haggard, his face is red and he would really be hunched over while walking. Since July 26, 2011, Ms. Bland testified, Petitioner would go months without seeing his son and does not see his daughter at all.

On cross-examination, Ms. Bland testified that when he comes to the house now, he would mostly wait in the car. Ms. Bland testified that Petitioner is a very smart man and that she does not think it is right that he is wasting away. Ms. Bland testified that she witnessed, on two occasions, Petitioner falling in family court. Ms. Bland testified that she is neither a doctor nor a nurse.

On redirect examination, Ms. Bland testified that before July 26, 2011, Petitioner would walk up the stairs and pick up their son at the front door. Since July 26, 2011, when Petitioner comes to the house to pick up their son, he does not walk to the door but phones from the car. The witness testified that from 2001 to 2009, she has witnessed Petitioner's falls.

On rebuttal, Petitioner testified that he never received a mileage reimbursement from Respondent for his visit to Dr. Ross in Winfield. Petitioner testified that when he was packing and unpacking, there was a lot of lifting and twisting back and forth between boxes and drawers. Petitioner testified that he continues to treat with Dr. Rosania and this doctor has recommended that Petitioner see a psychiatrist or psychologist for depression because of the pain and everything that has been going on. Petitioner testified that the chronic pain has affected his ability to sleep at night. He finds it difficult to get up in the morning. Petitioner testified that he wants to work and that he has a family to support. Petitioner testified that he did not attend three of the work comp. hearings due to storms and barometric pressure that affect his back. Petitioner testified that he has not had any intervening accidents since the first hearing date in May of 2013.

On cross-examination, Petitioner confirmed the type of equipment and furniture that was in his cubicle at the 120 North Racine offices. Petitioner testified that he did not actually move the file cabinets.

CONCLUSIONS OF LAW

In support of his decision with regard to issue (G) "What were Petitioner's earnings?", the Arbitrator concludes as follows:

In Arbitrator's Exhibit #1, Petitioner claims that his average weekly wage was $1,000.00 while Respondent claims that Petitioner's average weekly wage was $855.96.

Petitioner testified that in the 52 weeks prior to March 6, 2001, he earned $21.40 per hour. (Tr. 5/17/13, p. 42)

Then, Petitioner's Counsel asked Petitioner the following:

Q: And on average, would you say you were working about 45 hours a week?

A: Yes.

Q: If the City were to present any evidence to the contrary showing the actual hours that you worked, would that evidence be more accurate than your recollection today?

A: Yes. (Id., p. 43)

*****

Q: Was it about 40 hours you think, or how many hours a week do you think you worked?

A: Average 40.

Q: Okay. (Id., p. 44)

*****

Q: What do you want to say about your - -

A: There were variables because of the season.

Q: Because you were a garbage truck driver at that time, correct?

A: Correct, and a salt plow driver and a salt spreader.

THE ARBITRATOR: And a salt spreader?

THE WITNESS: Yes.

Q: And you got - - so you worked overtime in the winters?

A: Correct.

Q: So, on average, you may have worked more like 45 hours a week if we averaged it out over the year?

A: Average could be around 45. (Id., pp. 44-45)

It is true that Petitioner attempted obtain the wage records from the City, but to no avail. (PX 31)

However, it is Petitioner's burden of proof and he failed to meet that burden for the following reasons:

First, it appears that Petitioner is speculating that he worked 45 hour per week in the year preceding the March 6, 2001 accident.

Second, Petitioner did not prove that the overtime hours he worked in the winter were mandatory overtime hours.

Third, Petitioner did not offer any documentary evidence to support his claim, such as pay stubs, income tax returns or deposit slips/pertinent portions of bank statements.

Therefore, the Arbitrator finds that in the 52-week period preceding Petitioner's March 6, 2001 accident, his average weekly wage was $21.40/hour x 40 hours/week = $856.00.

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator concludes as follows:

Petitioner sustained an accident on March 6, 2001 that required three lumbar fusion surgeries.

On October 11, 2001, Dr. Goldberg performed a two-level fusion at L4-5 and L5-S1.

On May 13, 2003, Dr. Goldberg performed a redo posterior fusion at L5/S1. As Petitioner continued to have complaints, Dr. Goldberg referred him to Dr. Mirkovic for a second opinion.

On March 31, 2005, Dr. Mirkovic performed a two-level anterior fusion at L4-5 and L5-S1. Dr. Mirkovic diagnosed Petitioner with failed back syndrome on August 15, 2005.

In August 2005, Petitioner reported lower extremity numbness and random weakness in the left leg with the leg giving way twice weekly with occasional episodes of falling down.

Petitioner testified that in September 2005, Dr. Mirkovic released Petitioner to return to a return to work with permanent light-duty restrictions that included sitting or standing for no more than 30 minutes at a time. The MercyWorks physician confirmed these permanent light-duty restrictions.

Petitioner returned to work with the City of Chicago as a clerical worker although he kept his original title of motor truck driver.

Respondent has stipulated to the causal connection between Petitioner's current condition of ill-being and the accident of March 6, 2001. The medical records corroborate Petitioner's testimony that he has had ongoing pain in his back and symptoms in his left (primarily) and right legs since the accident of March 6, 2001.

The record is replete with numerous occurrences in which Petitioner, following the March 6, 2001 accident and three fusion surgeries, fell at work, at a baseball game, and at home.

In each of his Decisions for case numbers 08 WC 03628, 08 WC 47675, 11 WC 34310, 11 WC 34311, 11 WC 34312 and 11 WC 34313, the Arbitrator found that Petitioner did not sustain an accident. The Arbitrator found that Petitioner fell due to an internal condition and that such condition was a result of the March 6, 2001 accident. (Please see Decisions.)

On April 23, 2013, Matthew Ross, M.D., reviewed many of the records, took a history and conducted a physical examination of Petitioner, pursuant to Section 12 of the Act. Dr. Ross concluded that based upon the information he had, Mr. Bollacker's current symptoms and deficits are the result of the accident of March 6, 2001 and furthermore that the falls he has had

since such accident appear to be precipitated by his pain from such accident and that there is not a good neurologic explanation, other than the pain, for Mr. Bollacker's reported giving out of his leg underneath him.

When a "primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment." Caterpillar, Inc. v. Indus. Comm'n, 228 Ill. App. 3d 288, 293, 591 N.E.2d 894, 169 Ill. Dec. 390 (1992)

In Compass Group v. Illinois Workers' Compensation Commission, 28 N.E.3d 181 (2d Dist. 2014), the Appellate Court causally related claimant's condition of ill-being following a fall at home to a lifting injury he sustained at work six days earlier. On Thursday, March 19, 2009, claimant sustained a back injury when he picked up a case of bottled soda at work. He saw his doctor the next morning; she prescribed Vicodin and chiropractic treatment. Claimant worked the rest of the day in pain. On Saturday, claimant sought treatment with the chiropractor. The following Monday, claimant went to work despite having difficulty walking. That evening, he sought medical treatment with a physician, who ordered an MRI and prescribed a cane. Claimant did not have a cane, so he used his wife's walker. Claimant worked on Tuesday, March 24, 2009. He was in excruciating pain and used the walker to ambulate. On Wednesday morning, March 25, 2009, claimant arose to go to work. He was descending the stairs in his house when his left foot gave way due to severe pain in his back and radiating down his leg. Claimant fell down the stairs, sustaining lacerations and bruises on his elbows, arms and chest. Claimant was also bleeding from his nose as a result of the fall. Consequently, claimant's condition deteriorated and he received a substantial amount of medical treatment.

In his Decision for case number 11 WC 34314, one of the cases at bar, the Arbitrator found that Petitioner sustained an accident but that such accident resulted in a temporary exacerbation of Petitioner's chronic condition. The Arbitrator found that Petitioner's condition of ill-being was not related to the accident of July 27, 2011, but rather to the accident of March 6, 2001. (Please see Decision.)

In support of his decision with regard 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 concludes as follows:

The Arbitrator concludes that Petitioner has proved by a preponderance of the evidence that the medical services he received were reasonable, necessary and related to the accidents of March 6, 2001 and July 27, 2011, as well as to the manifestation of his internal condition that he experienced on November 27, 2007, September 22, 2008, October 7, 2008, October 25, 2010, January 31, 2011 and March 10, 2011. This conclusion is based on the testimony of the Petitioner, a careful review of the treating medical records and the Section 12 examination reports.

By agreement of the parties, Respondent shall pay, directly to the providers, charges for the reasonable, necessary and related medical services up to $143,765.19, pursuant to Section 8(a) and subject to Section 8.2 of the Act, where applicable. Respondent is entitled to a credit for all medical bills previously paid. Respondent shall reimburse Petitioner $208.91 in out-of-pocket expenses. Respondent shall hold Petitioner harmless for payments made by his group carrier, Blue Cross/ Blue Shield, pursuant to Section 8(j) of the Act.

In support of his decision with regard to issue (K) "What temporary benefits are in dispute? TTD and Maintenance", the Arbitrator concludes as follows:

The period of TTD following the March 6, 2001 accident is not in dispute. Respondent paid temporary total disability benefits for 237-3/7 weeks, from March 7, 2001 through September 23, 2005, after which Petitioner returned to work within the light-duty restrictions of Doctors Mirkovic and Diadula.

Petitioner claims that he is entitled to TTD benefits after July 26, 2013. The Arbitrator found, in the Decision for case number 11 WC 34314, that Petitioner sustained an accident on July 27, 2011, but that such accident was a temporary exacerbation of a chronic condition. (Please see Decision.) Petitioner visited the emergency room of Northwestern Memorial Hospital on July 27, 2011, and followed up with Dr. Singh on what appeared to be his regularly scheduled appointment of August 12, 2011. After July 27, 2011, Petitioner remained on the same light-duty

restrictions with which he performed office work for Respondent until more stringent restrictions were imposed following the February 28, 2012 FCE. Therefore, the Arbitrator finds that Petitioner is not entitled to any additional TTD benefits.

The Arbitrator finds that Petitioner is entitled to maintenance benefits from August 2, 2011 through January 18, 2013.

After the exacerbation of Petitioner's low back condition on July 27, 2011, Respondent chose to place Petitioner on disability, effective August 2, 2011. Angie Matos testified that Commissioner Burn would not accommodate Petitioner's restrictions and that if Petitioner were not able to perform his duties as a motor truck driver, he would no longer be able to return to work.

The Arbitrator finds that Petitioner was entitled to vocational rehabilitation at that time. Yet, Julie Bose did not author a letter of introduction to Petitioner until February 28, 2012.

There appears to have been a miscommunication between Julie Bose and Petitioner's Counsel with regard to who would present the vocational plan to Petitioner for signature.

A copy of the vocational plan offered into evidence does not bear the signature of Petitioner. (PX 22, PX A) However, there is no evidence that Petitioner submitted an alternative vocational plan.

Respondent provided vocational rehabilitation services from late April 2012 through mid November 2012. After that, Petitioner searched for jobs on his own through January 18, 2013. (PX 24)

Respondent is entitled to a credit for TTD benefits previously paid in the amount of $135,486.24. Respondent is also entitled to a credit for maintenance benefits previously paid in the amount of $46,624.29.

In support of his decision with regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator concludes as follows:

Respondent argues that Petitioner is entitled to a man as a whole award as a result of the March 6, 2001 accident. Respondent further argues that Petitioner has not proven entitlement to a medical permanent and total disability award.

Petitioner argues that he is entitled to an 8(d)2 award for each of the first seven filings, and is entitled to an 8(f) award as the result of the eighth filing.

However, in each of his Decisions for case numbers 08 WC 03628, 08 WC 47675, 11 WC 34310, 11 WC 34311, 11 WC 34312 and 11 WC 34313, the Arbitrator found that Petitioner did not sustain an accident. The Arbitrator found in each case that Petitioner fell due to an internal condition and that such condition was a result of the March 6, 2001 accident. Petitioner's left leg first began giving way approximately five months after his third fusion surgery.

In his Decision for case number 11 WC 34314, the Arbitrator found that Petitioner sustained an accident but that such accident resulted in a temporary exacerbation of Petitioner's chronic condition. The Arbitrator found that Petitioner's current condition of ill-being is not causally related to the accident of July 27, 2011, but rather to the March 6, 2001 accident.

The Act clearly contemplates a single determination as to the permanency of a claimant's condition as a result of an employment accident. Baumgardner v. Illinois Workers' Compensation Commission, 947 N.E.2d 856, 349 Ill. Dec. 842 (1st Dist. 2011)

The Arbitrator finds the opinions of Lisa Helma, M.S., CRC, to be more persuasive than those of Julie Bose, M.S., CRC.

In a thirteen-page report dated May 6, 2013 and admitted into evidence as PX 27, Ms. Helma concluded:

> Based upon the above noted situational factors, this consultant offers the following opinions. First, it is the opinion of this consultant that Mr. Bollacker has lost access to his usual and customary line of occupation as a Truck Driver. Second, it is the opinion of this consultant that

based upon the medical records provided, Mr. Bollacker has lost access to any viable labor market, thus concluding that his disability is total. Without a substantial change in medical status, it is the opinion of this consultant that Mr. Bollacker's total disability would be permanent. The opinions provided in this report are rendered to a reasonable degree of rehabilitation certainty and consistent with the guidelines articulated in the National Tea case. The opinions provided by this consultant and the bases for them are stated above.

In her report, Ms. Helma noted that among the restrictions imposed by Dr. Rosania on March 1, 2012, Petitioner has a sitting tolerance of thirty minutes, he is not to operate heavy machinery or drive an automobile while taking pain medications and he is to be given two extra breaks per shift. Ms. Helma further noted that Petitioner uses a single-point cane.

Ms. Helma opined that given his previous experiences and physical capabilities, it is her opinion that Petitioner does not have any transferability of skills.

Ms. Helma also noted that Petitioner was non-compliant with vocational rehabilitation.

Ms. Bose testified that she felt Petitioner was employable, and targeted clerical, sedentary or sit-stand positions. She did not target driving positions. Ms. Bose opined that Petitioner had transferable skills and semi-skills in the area of clerical work. During the vocational rehabilitation program, Ms. Bose was unable to line up a single interview for Petitioner.

After carefully reviewing the testimony offered, and the medical treatment received by Petitioner, after May 6, 2013, the Arbitrator concludes that Petitioner's medical status has not improved, much less substantially improved.

As a result of upon the accidental injury of March 6, 2001, and based on Petitioner's testimony, the medical records and Lisa Helma's opinions, the Arbitrator finds that Petitioner has proven that he is permanently and totally disabled under the odd-lot theory.

In City of Chicago v. Illinois Workers' Compensation Comm'n, 373 Ill. App. 3d 1080 (1st Dist. 2007), a pipefitter was injured on the job. The opinions expressed in medical reports indicated that claimant could not return to work as a pipefitter. There were conflicting reports by the vocational rehabilitation experts as to whether claimant had transferable skills to return to the work force. Although claimant never looked for a new job, the Court decided that claimant was an odd-lot permanent total. The Court took into account the claimant's age (54), minimal education, his ability to sit for only 20 minutes at a time and the fact that the employer never offered him a job. The Court stated: "Although claimant made no attempt to search for a job on his own, he did attend various interviews scheduled by respondent. Respondent argued that claimant hindered the interview process through various tactics, claimant did attend the meetings and he was placed on at least two eligibility lists. Nevertheless, respondent never offered claimant a position."

Respondent accommodated Petitioner's restrictions from September 24, 2005 through August 1, 2011. Respondent chose to no longer accommodate Petitioner's restrictions, effective August 2, 2011.

The Arbitrator finds that from March 6, 2001 through May 17, 2013, the date of the first arbitration hearing, Petitioner did not sustain an intervening accident that broke the causal chain.

It stands to reason, then, that Petitioner's accident of March 6, 2001 was *a* cause of the tightening of Petitioner's work restrictions on March 1, 2012.

In formulating her opinions, Lisa Helma relied on the restrictions Dr. Rosania imposed on March 1, 2012.

The Arbitrator finds Petitioner to be credible, albeit a bit dramatic in his presentation. While he worked in the clerical position for Respondent, he took 30 OSHA safety courses. While he worked in the clerical position for Respondent, in spite of the numerous instances in which he experienced an onset of low back pain, a giving way of the leg and a fall, Petitioner soldiered on for nearly six years.

In support of his decision with regard to issue (M) "Should penalties or fees be imposed upon Respondent?", the Arbitrator concludes as follows:

The Arbitrator finds that neither penalties nor attorneys' fees are warranted in this case. The Arbitrator finds that throughout the vocational rehabilitation process, neither Petitioner nor Respondent completely fulfilled their obligations.

During the vocational rehabilitation process, Respondent did not pay Petitioner maintenance benefits for nearly five months (although they did catch him up on such benefits). There appears to have been a miscommunication between Julie Bose and Petitioner's Counsel with regard to who would present the vocational plan to Petitioner for signature. A copy of the vocational plan offered into evidence does not bear the signature of Petitioner. (PX 22, PX A) However, there is no evidence that Petitioner submitted an alternative vocational plan. Respondent argued that Petitioner was uncooperative with the program. However, according to Lisa Helma, Respondent forwarded many job leads to Petitioner for which he was not qualified.

On the other hand, Petitioner did not fully comply with the process. He did not always meet the required number of contacts per week. Petitioner stated that during the five months that he was not receiving maintenance benefits, he could not afford the transportations costs in order to make the required in-person contacts. Ms. Bose testified that once Respondent reinstated maintenance benefits, Petitioner only showed a slight improvement in compliance.

The Arbitrator finds that, based on his determination of the average weekly wage, Respondent did not underpay Petitioner TTD benefits.

Petitioner's Counsel sought to have a pre-trial on the issue of wage, but Respondent's Counsel declined.

The Arbitrator's interpretation of Section 7030.20 (b) of the Rules with regard to holding a pre-trial conference is that it is pursuant to agreement of the parties.

Respondent's Counsel suggested a full hearing on the issue of wage or a 19(b) hearing. However, the Arbitrator indicated that, based on judicial economy and proper procedure, such a hearing would not make sense. These are eight consolidated cases wherein Petitioner has reached maximum medical improvement.

Petitioner claims penalties and fees on unpaid medical bills. Petitioner offered into evidence medical bills totaling $143,765.19. Yet, Respondent explained that they were unaware of a claim for outstanding medical bills until May 17, 2013, which was the date of the initial hearing. The bills given to Respondent at that time reflected balances from more than twenty providers that covered more than ten years of treatment. Yet, RX 11 and RX 12 demonstrate that Respondent has paid a significant number of medical bills. Moreover, when Respondent first attempted to review the bills for payment, they discovered that some of the bills had already been paid. Respondent stated that this led to difficulties in ascertaining the amounts of the balances. Ultimately, Respondent indicated that they were willing to pay any additional reasonable and necessary medical bills, directly to the providers, up through the date of the evaluation by Dr. Ross.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ 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

CONNIE LOVE,

Petitioner,

16IWCC0251

vs.

NO: 15 WC 013194

RGIS INVENTORY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of medical, TTD, and evidentiary rulings 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 by striking the medical records of Dr. Conkling dated June 23, 2015, June 29, 2015, and July 2, 2015, and Dr. Gornet's medical records from the record. The reason for this action is because all of those records were erroneously admitted into evidence, over Respondent's timely objection, as they were not disclosed to Respondent more than 48 hours prior to the commencement of the arbitration hearing on June 24, 2015.

In support of its position, Respondent cited *Ghere v. Industrial Commission*, 278 Ill. App. 3d 840, 663 N.E.2d 1046, 215 Ill. Dec. 532 (4th Dist 1996), and *Mulligan v. Illinois Workers' Compensation Commission*, 408 Ill. App. 3d 205, 946 N.E.2d 421, 349 Ill. Dec. 227 (1st Dist. 2011). Arbitrator Lee found both cases "predominantly pertain to the *testimony* of physician . . . ." (Emphasis in the original.) The Commission recognizes this to be true, but it also recognizes it

is nevertheless the report that the physician is to testify about that must be disclosed no later than 48 hours prior to the arbitration hearing. *Ghere*, 278 Ill. App. 3d at 845. In the instant matter before the Commission, the objected-to records were not proffered upon the commencement of the arbitration hearing on June 24, 2015, but at a subsequent hearing held on July 8, 2015, for the purpose of closing proofs.

Arbitrator Lee also concluded that Respondent was made "fully aware" of the identity of Petitioner's medical providers, including Dr. Gornet, and the recommended course of treatment as a result of the May 20, 2015, referral Petitioner received from Dr. Conkling to see Dr. Gornet. The Commission, however, notes that Petitioner's evidence indicates she was to be seen by Dr. Gornet on July 6, 2015, but was actually seen by Dr. Gornet on June 17, 2015. The Commission is unable to find Respondent at fault for not being aware that Petitioner was seen on a date earlier than what had been communicated to them. For this reason, and consistent with *Ghere*, the Commission finds Dr. Gornet's medical records inadmissible under Section 12 of the Act.

The Commission, in finding the above-referenced records inadmissible, vacates the prospective medical treatment awarded to Petitioner by Arbitrator Lee.

With respect to the contested medical records of Dr. Conking, the Commission notes Petitioner was seen on the eve of the commencement of the arbitration hearing and then several time thereafter. The Commission finds Respondent would have had to have tendered an open-ended subpoena to Dr. Conkling to allow it to come into possession of medical records created the day before the arbitration hearing began and subsequent to it as well. Even then, these records would not have been tendered in time to comply with Section 12 of the Act. The Commission finds these records to also be inadmissible.

The Commission finds, even without these records, no reason to overturn Arbitrator Lee's findings with respect to causal connection between Petitioner's work accident and its relationship between Petitioner's period of being temporarily totally disabled or of the medical treatment received by Petitioner. In so doing, the Commission finds the opinions of Dr. Hurford unpersuasive.

Dr. Hurford, Respondent's Section 12 examining physician, concluded Petitioner suffered a lumbar sacral strain that had resolved and attributed Petitioner's lingering complaints to degenerative changes unrelated to any work injury. The Commission puts greater credence on Petitioner's credible testimony and the content of Dr. Conkling's medical records through June 1, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $240.00 per week for a period of 7-6/7 weeks, commencing March 18, 2015, through May 11, 2015, 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.

16IWCC0251

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as outlined in Petitioner's Group Exhibit #1, as provided in §8(a) and §8.2 of the Act, except for medical services incurred treating with Dr. Conkling after June 1, 2015, and with Dr. Gornet.

IT IS FURTHER ORDERED BY THE COMMISSION that the order that Respondent authorize and pay for the treatment recommended by Dr. Conkling and Dr. Gornet be vacated as recommendations were made in medical records deemed inadmissible.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,000.00. 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 8 - 2016
KWL/mav
O: 02/08/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0251

LOVE, CONNIE
Employee/Petitioner

Case# **15WC013194**

RGIS INVENTORY
Employer/Respondent

On 8/18/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.24% 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
MICHELLE RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

5074 QUINTAIROS PRIETO WOOD ET AL
MICHAEL TRYBALSKI
180 N STETSON AVE SUITE 4525
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF **Jefferson**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0251

Connie Love
Employee/Petitioner

v.

RGIS Inventory
Employer/Respondent

Case # **15** WC **13194**

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, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0251

FINDINGS

On the date of accident, **December 23, 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 $**18,720.00**; the average weekly wage was $**360.00**.

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**2,886.12** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $**2,886.12**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, outlined in Petitioner's group Exhibit 1, as provided in § 8(a) and § 8.2 of the Act.

Respondent shall authorize and pay for the treatment recommended by Dr. Conkling and Dr. Gornet, including but not limited to injections, as provided in § 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$240.00**/week for a *further* period of **7 6/7** weeks, commencing March 18, 2015, through May 11, 2015, as provided in § 8(b) of the Act.

Respondent shall be given a credit of $2,886.12, for temporary total disability benefits that have been paid.

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.

E J Lee
Signature of Arbitrator

7/31/15
Date

ICArbDec19(b)

AUG 18 2015

FINDINGS OF FACT

Petitioner is a sixty-three (63) year old team leader who has been employed with Respondent for fifteen (15) years. (T.15). At trial, Petitioner testified that her job as a team leader requires her to travel to different businesses to inventory supplies, namely pharmacies. (T.15). She testified that on occasion, employees would meet in a designated area and drive to the inventory site together. (T.16). Petitioner confirmed that she was paid for her travel time as well as reimbursed for gas if the inventory site was over 30 miles away, and that she was also paid for her time on the premises performing inventories. (T.16). She also testified that she is required to carry a full-size printer, as well as a laptop computer to each jobsite for each individual performing inventories. (T.27). Petitioner testified that this equipment was supplied to her by Respondent. (T.17).

On December 23, 2014, Petitioner had performed an inventory at a business in Highland, Illinois, and was paid for her travel time as the business was over thirty (30) miles away. (T.18). As she was attempting to leave the building's premises and carrying her printer and laptop down a flight of stairs, her laptop carrying case began to slide off her arm. (T.19). As Petitioner attempted to set the laptop carrier case down, her printer began to fall. (T.19). In an attempt to catch her printer from falling down the stairs, Petitioner twisted her back and felt immediate pain in her low back. (T.19-20). She believed her shoes were damp from taking equipment out to her vehicle in the parking lot. (T.19). Petitioner confirmed that the route she was taking to exit the building was the only means of ingress and egress to the office where her equipment was set up. (T.21).

Following the accident, Petitioner testified that she continued loading her vehicle with equipment, and proceeded to her second inventory at a different business. (T.20). She testified that her low back continued to hurt throughout the day. (T.20). Immediately following the completion of her second inventory, she notified her supervisor Connie Sandifer that she had been injured. (T.20).

The next day, Petitioner presented to Dr. Rick Conkling, a chiropractic physician, for care and treatment. (T.22). Petitioner testified that Dr. Conkling had treated her following an auto accident in August of 2013 for injuries sustained to her cervical spine, but that he had never provided any treatment to her low back prior to December 24, 2014. (T.22). When asked if she had sustained any prior injuries to her low back before December 23, 2013, Petitioner candidly testified: "I've had problems. I've fallen off a ladder at work and I've twisted my back other times taking equipment in and out of my trunk, but nothing that required doctor care." (T.23).

Petitioner presented to Dr. Conkling on December 24, 2014. The following history was taken:

> Ms. Connie Love, a 63-year-old female, reports in our clinic today explaining that she was injured at work yesterday while coming down a flight of steps, after completing work at a particular job while working for RGIS. She explained that as she was coming down a flight of steps with a laptop in one hand and a printer strap

> in the other hand, she slipped on steps that were set. She further indicates that her left foot and leg slipped and her body twisted, where she experience[d] lower thoracic spine pain and lower lumbar pain. She indicates that she has had no work currently scheduled with her company, and that any type of lifting is very painful today as she attempts to get moving this morning after getting out of bed. (PX5, Conkling Chiropractic, 12/24/14).

On physical exam, Dr. Conkling noted tenderness to palpation of the third, fourth, and fifth spinous processes in the lumbar spine, as well as complaints of considerable right-sided lumbosacral pain on bilateral Kemp's testing, and positive straight leg raising. *Id.* Muscle spasm in the lumbosacral region bilaterally was also noted. *Id.* Petitioner's pain was listed as a 7/10. *Id.*

Dr. Conkling diagnosed Petitioner with a lumbar sprain/strain, low back pain, sacroiliac joint sprain and myofascitis, and recommended a ten (10) pound lifting restriction for the next thirty (30) days, as well as continued follow up four (4) times per week for the next two weeks. *Id.* Dr. Conkling indicated that if Petitioner failed to improve with treatment in a reasonable amount of time, an MRI would be recommended. *Id.* He also kept Petitioner off work. *Id.*

Petitioner continued to follow up with Dr. Conkling. (PX3). On January 5, 2015, it was noted that Petitioner had made a 30% improvement since beginning treatment. (PX3, Conkling Chiropractic, 1/5/15).

Respondent also referred Petitioner to Dr. Patricia Hurford, an orthopedic physical medicine and rehabilitation specialist, for treatment. Dr. Hurford took a consistent history of the injury sustained while trying to stop a printer from falling down the stairs, which resulted in immediate onset of severe back pain. (PX4, 2/17/15). Dr. Hurford noted that Petitioner's pain level was 70 on a scale of 100. *Id.* Petitioner's pain was aggravated with sitting more than any other positions and negatively impacted her normal daily activities and sleep. *Id.* She noted the following significant limitations:

> Aggravating factors that make pain worse are exercise, sitting, standing, walking, twisting, bending forward or backward, coughing, sneezing and work activities. Relieving factors are lying down, heat/massage and ice. With some turning or twisting movements she will have symptoms going down the left or right leg but otherwise no radiating pain symptoms. . . *Id.*

Physical examination demonstrated tenderness to deep palpation in the right lower lumbar region over the lateral masses at L5-S1 and in the right PSIS and positive SI compression on the right. *Id.* Dr. Hurford noted, "She has significant limitations in lumbar range of motion with extension significantly effected [sic] with positive facet loading on the right and flexion is also impaired with limitations to 40 degrees before onset of pain." *Id.* Internal rotation of the right hip also increased lower lumbar pain. *Id.*

Dr. Hurford diagnosed Petitioner with lumbar sacral syndrome and recommended a trial of a steroid dose pack, a muscle relaxer to help reinstitute normal sleep patterns, an MRI of the lumbar sacral spine, and a trial of aquatic therapy. *Id.* With regard to causal connection, Dr. Hurford stated: "The twisting event of 12/23/14 is the prevailing factor in the treatment outlined above with comorbid degenerative conditions and history of prior injury affecting prognosis." *Id.* Dr. Hurford also recommended restrictions of no lifting more than 5 to 10 pounds, no pushing or pulling more than 20 pounds, and no repetitive bending, twisting or squatting activities given Petitioner's pain level. *Id.*

Petitioner's February 23, 2015 MRI revealed mild bilateral foraminal stenosis at L5-S1 and fluid in the bilateral facet joints at L2-3. (PX6). Petitioner returned to Dr. Hurford on March 3, 2015, with persistent axial back pain despite oral steroids, therapy, and restricted activity. (PX4, 3/3/15). Petitioner continued to have difficulty sitting in hard chairs and with movements outside of the pool environment. *Id.* Petitioner remained under restrictions which precluded her from performing essential job duties such as lifting her printer and laptop. *Id.* After reviewing Petitioner's MRI, Dr. Hurford diagnosed Petitioner with a lumbar sacral strain injury and recommended an advanced work conditioning program. *Id.* She thereafter stated: "If significant tenderness persists consider trigger point injections to help with patient progress." *Id.*

Immediately following this recommendation for additional care, Respondent requested that Dr. Hurford perform an independent medical evaluation of Petitioner under § 12, despite the fact that Dr. Hurford had been providing treatment to Petitioner, and Respondent had made this referral. (T.28; PX8, RX1) Petitioner also received a check for mileage to attend the visit on April 8, 2015. *Id.* Dr. Hurford noted that Petitioner aggravated her back while grocery shopping, but the increase in pain was gradually decreasing. (RX1). She also noted that Petitioner's pain persisted in a band-like distribution bilaterally across the lower back. *Id.* It was also noted that no other work conditioning was completed beyond the initial visit due to significant guarding and pain, which resulted in a transfer of Petitioner's care and treatment back to Dr. Conkling. *Id.* Dr. Hurford also noted that Petitioner was only able to lift 3 pounds from waist to shoulder and was unable to lift from floor to waist or waist to 12 inches. *Id.* Physical examination continued to demonstrate pain with palpation at the lumbar sacral junction at the level of the cephalic portion of the SI joints bilaterally, pain with extension, and pain on external rotation of both hips. *Id.* However, rather than performing injections as previously recommended prior to Respondent's retention under § 12, Dr. Hurford placed Petitioner at maximum medical improvement with respect to her work injury and opined that Petitioner needed no further treatment with respect to her work injury. *Id.*

Petitioner testified that Dr. Conkling's treatment was more effective than the therapy recommended by Dr. Hurford. (T.25). Dr. Conkling continued to treat Petitioner for myofascitis, muscle spasm in the region of the iliolumbar ligament, and increased pain with activity. (PX3, 1/6/15 through 3/30/15). On March 30, 2015, Dr. Conkling made arrangements to discuss a release for Petitioner to light duty beginning April 3, 2015. (PX3, 3/30/15). However, Petitioner continued to experience significant pain with prolonged walking or activity. (PX3, 4/3/15). Additionally, no one from Respondent's office responded to Dr. Conkling's message or contacted the office regarding Petitioner's return to light duty work. (PX3, 4/6/15). Evaluation on

April 30, 2015, reflected improvement with orthopedic testing and improvement with straight leg raising, but Dr. Conkling noted that "pain remains the main problem." (PX3, 4/30/15).

Respondent returned Petitioner to work full duty on May 12, 2015. (PX3, 5/4/15, 5/11/15, 5/13/15). Petitioner reported that she was "extremely sore" after returning to work. (PX3, 5/13/15). Dr. Conkling noted slow, cautious movements from Petitioner during the visit secondary to pain. *Id.* Petitioner's pain increased and her improvement plateaued and regressed following her return to work. (PX3, 5/18/15, 5/20/15). Dr. Conkling ultimately recommended a referral to Dr. Matthew Gornet, an orthopedic spine surgeon. (T.25; PX3, 5/20/15).

Petitioner came under the care of Dr. Gornet on June 17, 2015. (PX7, 6/17/15). Dr. Gornet took the history of the accident and noted that Petitioner was working, but in a different job capacity. *Id.* Physical examination demonstrated an antalgic gait, bilateral low back pain, decreased EHL function on the right at L4-5, and positive straight leg raise for low back pain bilaterally at 45 degrees. *Id.* Dr. Gornet noted that Petitioner's symptoms were constant, worse with bending, lifting, prolonged sitting and/or prolonged standing. *Id.* After reviewing Petitioner's MRI, Dr. Gornet believed that Petitioner suffered from symptomatic foraminal stenosis on the right at L5-S1 as well as aggravation of some preexisting facet arthropathy. *Id.* He recommended a single epidural steroid injection on the right at L5-S1 with some consideration given to facet rhizotomies at L5-S1. *Id.* He also recommended a new MRI of more appropriate quality. *Id.* Based on the history of the injury and his review of Dr. Conkling's notes, Dr. Gornet stated: "I do believe her current symptoms and their level of magnitude and severity are causally connected to her work related injury as described." *Id.*

Petitioner saw Dr. Conkling again on July 2, 2015, at which time Dr. Conkling summarized Petitioner's treatment outcomes to date, and outlined her prospective care and her prognosis. (PX3, 7/2/15). He noted that Petitioner was making steady progress up until the time she began work hardening prescribed by Dr. Hurford, which "negated" the improvement which took place in late December and the month of January. *Id.* He stated, "The patient was in no condition to be performing multiple exercises for three to four hours a day during that period of time." *Id.* Based on the examination he performed on that date, Dr. Conkling believed that Petitioner required further manipulative treatment of a corrective nature due to the chronicity of her sacroiliac problem with gradual institution of strengthening exercises. *Id.*

CONCLUSIONS OF LAW

Issue (O): Admission of Records.

During the conclusion/evidentiary hearing on July 8, 2015, Respondent objected to the admission of several treatment notes from June 23, 2015, June 29, 2015 and July 2, 2015, as well as a letter addressed to Petitioner's attorney dated July 2, 2015 (which the Arbitrator notes is *not* a report prepared for use in litigation, but a detailed treatment/progress report on Petitioner's injury, her treatment, her current condition and response to treatment, her prognosis and am outline for future care), on the basis that they were not provided 48 hours prior to the start of the initial hearing pursuant to *Ghere v. Indus. Comm'n*, 278 Ill. App. 3d 840, 663 N.E.2d 1046 (4th Dist. 1996), and *Mulligan v. Illinois Workers' Comp. Comm'n*, 408 Ill.App.3d 205946 N.E.2d

421 (1st Dist. 2011). (T.6-7 [7/8/15 Transcript]). Petitioner responded that these exhibits should be admitted, as they are records from the treating physician, which, as discussed recently by the Appellate Court in the matter of *City of Chicago – Dept. of Aviation v. Illinois Workers' Compensation* (R23), are not subject to the 48 hour rule regarding § 12 examination reports, and further, that the records are admissible on their face pursuant to § 16 of the Act. (T.7 [7/8/15 Transcript]).

As a preliminary matter, the Arbitrator notes that *Ghere* and *Mulligan* predominantly pertain to the *testimony* of physicians, a distinction which is crucial to proper application of the law in this evidentiary ruling. The purpose of the Court's findings in aforementioned cases, which require treating physicians and § 12 examiners alike to provide reports 48 hours prior to hearing or evidence deposition is to prevent surprise *testimony* as to causation, which would prejudice one of the parties. In this case, however, no deposition testimony has been tendered by either party, and no physician testified at the hearing. Rather, the only evidence at issue is written treatment records. Treatment records, specifically *treatment records* generated by a *treating physician*, fall squarely under § 16 of the Act. Specifically, Section 16 states that the records, reports and bills kept by a treating provider, once certified "shall be admissible without any further proof as evidence of the medical and surgical matters stated therein." 820 ILCS 305/16. Further, the Arbitrator notes that even assuming *arguendo* expert testimony was involved in this matter, the opinions of treating physicians are not subject to *Ghere* when records in the employer's possession are sufficient to put the employer on notice that the treating physician will have an opinion as to causation. *City of Chicago v. Workers' Comp. Comm'n*, 387 Ill. App. 3d 276, 280, 899 N.E.2d 1247, 1250 (1st Dist. 2008); *Ghere v. Indus. Comm'n*, 278 Ill. App. 3d 840, 842, 663 N.E.2d 1046, 1048 (4th Dist. 1996).

Additionally, it is well settled that there is no provision for discovery in the Workers' Compensation Act, and neither party is under an obligation to provide medical records to the other. 50 Ill. Adm. Code § 7020.10 *et seq.; Boyd Electric v. Illinois Workers' Comp. Comm'n*, 403 Ill.App.3d 256, 932 N.E.2d 638, 641 (1st Dist. 2010). Even under *Ghere*, cited as the authority by Respondent, the Court noted that as discussed in *Nollau,* the burden is on Respondent to make an attempt to procure medical records before any objection can be sustained to the admission of evidence. *Ghere*, 633 N.E.2d at 1050; *Nollau Nurseries, Inc. v. Indus. Comm'n*, 32 Ill. 2d 190, 193, 204 N.E.2d 745, 747 (Ill.1965). The Commission Rules confirm same. Under 50 Ill. Adm. Code § 7110.70(c), Respondent must initially seek the desired records from the medical providers. The evidence submitted at the time of trial reveals that Respondent was fully aware of the identity of Petitioner's medical providers and her course of treatment, including Dr. Gornet, to whom a clear, open and obvious referral was made in his May 20, 2015 treatment record, which was in Respondent's possession well in advance of the hearing on June 24, 2015. (PX3, 5/20/15). Yet, Respondent produced no evidence that it sought to procure the records to which it objected.

Based upon the aforementioned, the Arbitrator admits the disputed treatment records over Respondent's objection.

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

"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. Indus. Comm'n.*, 6 Ill.2d 296 at 300, 128 N.E.2d 718, 720 (1955) citing *Baggot Co. v. Industrial Comm.*, 290 Ill. 530, 125 N.E. 254 (1919); *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982).

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (2011). An injury "arises out of" one's employment if "its origin is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n,* 189 Ill.2d 623, 627, 244 Ill.Dec. 948, 727 N.E.2d 247 (2000); see also *Parro v. Industrial Comm'n,* 167 Ill.2d 385, 393, 212 Ill.Dec. 537, 657 N.E.2d 882 (1995). A risk is "incidental to the employment" when it "belongs to or is connected with what [the] employee has to do in fulfilling his duties." *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 58, 133 Ill.Dec. 454, 541 N.E.2d 665 (1989); *Stembridge Builders, Inc. v. Industrial Comm'n,* 263 Ill.App.3d 878, 880, 201 Ill.Dec. 656, 636 N.E.2d 1088 (1994).

"In the course of the employment" refers to the time, place, and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 66 Ill.2d 361, 366, 5 Ill.Dec. 854, 362 N.E.2d 325 (1977). Injuries sustained at a place where the claimant might reasonably have been while performing her duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment. *Caterpillar Tractor Co.,* 129 Ill.2d at 57, 133 Ill.Dec. 454, 541 N.E.2d 665.

The Arbitrator notes that Petitioner is a traveling employee, or, one whose work requires travel away from the employer's office. *Kertis v. Illinois Workers' Comp. Comm'n*, 2013 IL App (2d) 120252WC, ¶ 16, 991 N.E.2d 868, 873, reh'g denied (July 19, 2013). It is not necessary for an individual to be a traveling salesman or a company representative covering a large geographic area in order to be considered a traveling employee; rather, a traveling employee is any employee for whom travel is an essential element of employment. *Id.* A traveling employee is deemed to be in the course of employment from the time that she leaves home until she returns. *Id.*

Petitioner testified that her job as a team leader requires her to travel to different businesses to inventory supplies, namely pharmacies. (T.15). She testified that on occasion, employees would meet in a designated area and drive to the inventory site together. (T.16). Petitioner confirmed that she was paid for her travel time as well as reimbursed for gas if the inventory site was over 30 miles away, and that she was also paid for her time on a business's premises performing inventories. (T.16).

The law holds that the determination of whether an injury occurs in an area where the general public is allowed is irrelevant and likewise, the "increased risk" analysis is also improper where the injury occurs to a traveling employee. Rather, "the proper analysis for a traveling employee is 'the reasonableness of the conduct in which [the employee] was engaged and

whether it might normally be anticipated or foreseen by the employer." *Kertis v. Illinois Workers' Comp. Comm'n*, 2013 IL App (2d) 120252WC, ¶ 18, 991 N.E.2d 868, 873.

On December 23, 2014, Petitioner testified that she had performed an inventory at a business in Highland, Illinois, and was paid for her travel time as the business was over thirty (30) miles away from her location. (T.18). She indicated that as she was attempting to leave the building's premises and carrying her printer and laptop down a flight of stairs, her laptop carrying case began to slide off her arm. (T.19). As Petitioner attempted to set the laptop carrier case down, her printer began to fall. (T.19). In an attempt to catch her printer from falling down the stairs, she twisted her back and felt immediate pain in her low back. (T.19-20). Petitioner was clearly in the course of her employment at the time of the accident and the conduct she was engaged in was clearly reasonable and foreseeable. Consequently, the Arbitrator finds that the uncontroverted evidence irrefutably demonstrates that Petitioner met her burden of proof on the issue of accident.

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

Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). If a preexisting condition is present and is aggravated, accelerated or exacerbated by the work accident, it is compensable. *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

Additionally, the law holds that the mere act of experiencing symptoms following a work-related injury while performing other activities does not rise to the standard of an intervening cause. *Lasley Const. Co., Inc. v. Indus. Comm'n,* 274 Ill.App.3d 890, 655 N.E.2d 5 (5th Dist., 1995). *See also Vogel v. Industrial Comm'n,* 821 N.E.2d 807, 813 (2d Dist. 2005). 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. Specifically, as the Court in *Lasley Const. Co.*, aptly stated: "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) (finding no intervening accident since there would have been no aggravation due to bowling "but for" the original work related accident and the initial injury).

The Arbitrator finds that the evidence leaves no room for a dispute as to causal connection. Petitioner testified that she did not require any formal treatment for her lumbar spine prior to her accidental injury on December 23, 2014. (T.22, 23). Following her accidental injury, however, Petitioner was unable to work. The circumstantial evidence alone supports Petitioner's claim; "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." *Darling v. Indus. Comm'n of Illinois*, 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135, 1140 (1988); *International Harvester v. Industrial*

Comm'n, 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982). Yet, the preponderance of the credible expert opinion evidence in the record also supports a finding of causal connection. Dr. Hurford, prior to her retention by Respondent as a Section 12 examiner, acknowledged that Petitioner's work accident was the "prevailing factor" in Petitioner's need for further evaluation. (PX4). Dr. Conkling likewise believed that Petitioner's current condition was related to her December 23, 2014 injury." (PX3, 7/2/15). Dr. Gornet also stated his belief that Petitioner's current symptoms in their level of magnitude and severity are causally connected to her work related injury as described. (PX7, 6/17/15). The Arbitrator is not persuaded by the second opinion of Dr. Hurford, who, after being retained by Respondent as a Section 12 examiner, changed her opinion and placed Petitioner at maximum medical improvement without administering the injections she had previously recommended if Petitioner remained symptomatic, despite the clear presence of continued symptoms and objective findings on physical examination.

The Arbitrator therefore finds that Petitioner met her burden of proof on the issue of causal connection.

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

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

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

As causal connection has been resolved in Petitioner's favor, the Respondent is therefore ordered to pay the medical expenses outlined in Petitioner's group exhibit 1. Respondent shall authorize and pay for the further necessary care recommended by Dr. Conkling and Dr. Gornet, including but not limited to injections, as required by § 8(a) of the Act.

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

Respondent disputes Petitioner's entitlement to temporary total disability benefits and ceased paying same beyond March 17, 2015. However, the evidence in the record does not support a termination of benefits due and owing beyond that date. Even Respondent's physician, Dr. Hurford, had not released Petitioner with restrictions which would allow her to perform her job duties as of March 17, 2015. (PX4, 3/3/15). In fact, on March 3, 2015, Dr. Hurford restricted Petitioner to no lifting greater than 10 to 15 pounds and no pushing or pulling more than 20 pounds. She also noted that Petitioner's job required lifting a 15 to 20 pound printer with a 10 pound laptop, in addition to various equipment weight 5 pounds each, and moving these items together on a rolling cart, which is clearly work in excess of Petitioner's restrictions. Further, Respondent failed to acknowledge or accommodate Dr. Conkling's attempt to return Petitioner to light duty work on April 3, 2015. (PX3, 3/30/15, 4/6/15).

The evidence in the records of Petitioner's treating physicians, as well as the initial opinion of Dr. Hurford, clearly demonstrate that Petitioner is not at maximum medical improvement and was unable to work until her return to full duty on May 12, 2015. (PX3, 5/4/15, 5/11/15, 5/13/15). Respondent paid benefits from December 24, 2014, through March 17, 2015. The Arbitrator finds that Petitioner is entitled to benefits paid by Respondent, and is entitled to further benefits for the unpaid period of temporary total disability through May 11, 2015. Respondent shall therefore pay further benefits for a period of 7 6/7 weeks for Petitioner's disability from March 18, 2015, through May 11, 2015.

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jerome Mathews,
Petitioner,
vs.

NO: 13WC 11261
16IWCC0252

North Shore University Health System,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical, permanent partial disability, penalties, fees, evidentiary rulings, objections of record 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 28, 2015, is hereby affirmed and adopted.

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

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

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

DATED:
o032416
DLG/mw
045

APR 12 2016

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MATHEWS, JEROME
Employee/Petitioner

Case# 13WC011261

12WC039479

NORTHSHORE UNIVERSITY HEALTH SYSTEM
Employer/Respondent

16IWCC0252

On 8/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.20% 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:

2986 PAUL A COGHLAN & ASSOC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

2965 KEEFE CAMPBELL BIERY & ASSOC
TIMOTHY O'GORMAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0252

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JEROME MATHEWS
Employee/Petitioner

v.

NORTHSHORE UNIVERSITY HEALTH SYSTEM
Employer/Respondent

Case # 13 WC 11261

Consolidated cases: 12 WC 39479

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **July 27, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [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] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **3/1/2013**, 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.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner failed to establish both accident and causal connection. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

In the year preceding the injury, Petitioner earned $**100,077.10**; the average weekly wage was $**1,924.56**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **1** dependent child.

Respondent shall be given a credit of $**.00** for TTD, $**.00** for TPD, $**.00** for maintenance, and $ for other benefits, for a total credit of $**.00**.

The parties agree Respondent is entitled to a credit of $**22,322.32** under Section 8(j) of the Act. Arb Exh 2.

ORDER

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner failed to meet his burden of proof on the issues of accident and causation. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues. Compensation is denied in this case.

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.

Molly C Mason
Arbitrator Molly C. Mason

8/26/15
Date

AUG 28 2015

Jerome Mathews v. Northshore University Health System
12 WC 39479 and 13 WC 11261 (consolidated)

Summary of Issues

In the first case, 12 WC 39479, the parties agree Petitioner sustained an accident while working for Respondent on September 16, 2012. The disputed issues include causation, medical and permanency. Arb Exh 1.

In 13 WC 11261, Petitioner alleges a left shoulder injury of March 1, 2013. At issue are accident, notice, causation, medical, temporary total disability, nature and extent and penalties/fees. Arb Exh 2.

Arbitrator's Findings of Fact Relative to Both Cases

Petitioner testified he is currently 59 years old. He has worked as a CT scan technician for Respondent for seven years. Before being hired by Respondent, he worked elsewhere as a CT technician for fifteen years. He obtained national certification/registration in CT scan technology three years ago, after passing a test.

Petitioner testified he served as a corpsman in the United States Navy for ten years. During that time, he obtained an associate's degree in radiology technology.

Petitioner denied having any neck or back problems before his undisputed accident of September 16, 2012. He also denied being under medical care at that time. On September 16, 2012, a transporter brought a patient to his room for scanning. The patient indicated she felt able to transfer herself but she ended up falling between the gurney and the scan table. Petitioner testified he felt and heard a pop in his low back as he tried to prevent the patient from falling. He experienced an immediate onset of low back pain and pain radiating down his right leg. He took Aleve and managed to finish his shift.

Petitioner first sought treatment at Highland Park Hospital's Emergency Room the same day, September 16, 2012. The history reflects that, while working as a CT scan technician the previous night, Petitioner "was trying to catch a patient to prevent from falling and felt sudden onset of low back pain." The examining provider noted a "history of similar in past x 1" and also noted that Petitioner's personal care physician had indicated Petitioner might require an MRI.

The provider noted that Petitioner complained of right-sided lower back pain. On examination, the provider noted mild spasm in the right lumbar region. He indicated that Petitioner's pain was likely secondary to a disc. He recommended an outpatient MRI, medication and follow-up with a physician. PX 6.

Petitioner testified he saw his longtime personal care physician, Dr. Bhalala, on September 17, 2012. Dr. Bhalala's handwritten note is difficult to read but it references an

injury of September 15, 2012 and subsequent Emergency Room care. Dr. Bhalala recommended an MRI, Motrin and Vicodin. He released Petitioner to light duty with no lifting over ten pounds. PX 6.

On September 18, 2012, Petitioner saw a certified nurse practitioner at Respondent's employee health facility. The certified nurse practitioner diagnosed a work-related lumbar strain and released Petitioner to light duty with no lifting over 10 pounds, no repositioning of patients and no shifts lasting over 8 hours. PX 5.

Petitioner underwent a lumbar spine MRI on October 24, 2012. The history section of the MRI report reflects that Petitioner had been experiencing low back pain and intermittent right leg pain since moving a patient a month earlier. The radiologist interpreted the MRI as showing "lumbar spondylosis and degenerative disc disease with a small central disc protrusion at L3-L4 resulting in partial effacement of both subarticular recesses. " PX 6.

Petitioner returned to Dr. Bhalala on November 2, 2012. The doctor recommended a back brace and physical therapy. He released Petitioner to work subject to a 20-pound lifting restriction. PX 6.

On November 8, 2012, Petitioner saw Dr. Dewan at the American Center for Spine & Neuro. Dr. Dewan's records reflect a referral from Dr. Bhalala. Dr. Dewan's history reflects that Petitioner "developed severe back and leg pain after lifting a patient at work." Dr. Dewan noted that she had the MRI report but not the images. She noted no abnormalities on examination. She instructed Petitioner to undergo another MRI based on Petitioner's reporting of significantly increased back and leg symptoms since the October 24, 2012 MRI. She instructed Petitioner to remain off work until further notice. PX 6, 10.

Petitioner underwent a second lumbar spine MRI on November 12, 2012. The interpreting radiologist noted mild degenerative disc disease at L2-L3 and L3-L4, a small central disc herniation at L2-L3 with facet arthropathy but no stenosis, a moderate central disc herniation at L3-L4 with facet arthropathy causing moderate central canal stenosis and a small disc herniation at L4-L5 with severe facet arthropathy causing a moderate central canal stenosis and bilateral neural foramen stenosis greater on the right. PX 6, 10.

On November 13, 2012, Dr. Dewan reviewed the MRI results with Petitioner and recommended physical therapy, injections and Vicodin. PX 6, 10. She took Petitioner off work, indicating she planned to re-evaluate him on January 15, 2013. PX 10.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Kolavo on January 4, 2013. Dr. Kolavo's report of that date reflects that Petitioner reported experiencing an abrupt onset of low back and right buttock pain while helping transfer a patient on September 15, 2012. The report also reflects that Petitioner denied any history of significant back problems before this incident.

Dr. Kolavo noted that Petitioner complained of 6/10 lower back pain, particularly with changes of position, and an occasional "flutter" in his left calf.

Dr. Kolavo described Petitioner's gait as normal. He indicated that Petitioner was able to walk on his heels and toes but complained of discomfort in his right anterior thigh with squatting. He also indicated that Petitioner was able to touch his fingers to the floor on forward bending but complained of pain on returning to the upright position. The doctor noted normal motor strength in all lower extremity groups and negative sitting straight leg raising bilaterally.

Dr. Kolavo indicated he had access to the November 12, 2012 lumbar spine MRI but not the October 2012 MRI. He interpreted the November 12, 2012 MRI as showing a small central bulge at L2-L3, a moderate right central disc herniation at L3-L4, creating some compression of the shoulder [sic] in the L4 nerve root and the thecal sac and degenerative changes at L4-L5, with facet arthritis and early lateral stenosis.

Dr. Kolavo assessed Petitioner as having a "lumbar herniated disc without neurologic involvement." He saw no indication for epidural steroid injections or surgery. He saw no reason why Petitioner could not resume full duty after a short course of work conditioning. He addressed causation as follows:

> "He obviously has multi-level degenerative disc disease pre-existing his injury. The herniated disc at L3-L4 could be causally related to his injury of record."

Dr. Kolavo described the treatment to date as reasonable and necessary. He indicated that Petitioner's complaints and perceived disability were "disproportionate to both his radiographic findings and objective physical findings."

In an addendum paragraph, Dr. Kolavo clarified he was recommending two more weeks of physical therapy and two weeks of work conditioning, followed by a return to full duty. He indicated Petitioner could immediately resume working so long as he worked only 8 hours per day and avoided patient transfers and prolonged sitting. PX 12. RX 3-4.

Petitioner returned to Dr. Dewan on January 17, 2013, with the doctor noting some improvement secondary to physical therapy. The doctor recommended an epidural steroid injection and eight more weeks of therapy. She released Petitioner to sedentary duty as of January 21, 2013 with a lifting restriction of ten pounds. PX 10.

Dr. Lanoff administered an epidural injection on January 29, 2013. Petitioner testified that this injection was administered above his right buttock. PX 6.

On February 13, 2013, Petitioner went to Respondent's employee health facility, with a provider (possibly Dr. Gutman – the signature is difficult to read) diagnosing work-related

lumbar pain and releasing Petitioner to restricted duty. The provider indicated Petitioner could transfer a patient weighing up to 150 pounds, with assistance, and could not independently transfer any patient weighing over 150 pounds. The provider instructed Petitioner to return on February 27, 2013. PX 5.

Petitioner returned to employee health on February 27, 2013, with the same provider again diagnosing work-related lumbar pain and slightly revising the restrictions so as to allow Petitioner to transfer patients weighing up to 175 pounds, with assistance. The provider indicated Petitioner could not independently transfer any patient weighing over 175 pounds. PX 5.

Petitioner testified he returned to work for Respondent about three weeks before March 1, 2013. Respondent did not provide different, lighter duties but did allow him to work fewer hours at a time. Before the September 16, 2012 accident, it was common for him to work sixteen-hour shifts.

Petitioner testified that after moving patients for about twelve hours on March 1, 2013, he developed left biceps pain that moved down his left forearm. He took Aleve and set up an appointment to see Dr. Bhalala. Before he reported the pain to anyone affiliated with Respondent, he called his attorney. He testified he called the attorney first because he was not sure whether the injury would be considered a continuation of his existing claim. He "thought it was all related."

Under cross-examination, Petitioner acknowledged having experienced left shoulder pain years before March 1, 2013. He testified this pain resolved within a couple of months, after he underwent injections. [Records in PX 7 reflect that Petitioner saw Dr. Portland at the Illinois Bone & Joint Institute on January 28, 2010. Dr. Portland noted a complaint of left shoulder pain and weakness of six months' duration, possibly "related to lifting weights inappropriately." Dr. Portland interpreted an outside MRI (performed on January 18, 2010) as showing a partial thickness tear of the supraspinatus and evidence of a Type 2 SLAP tear. He diagnosed injected the left subacromial space with Kenalog, Lidocaïne and Marcain. He recommended therapy and directed Petitioner to return in one month. Petitioner returned to Dr. Portland on May 12, 2010 and reported only transient relief from the injection. On left shoulder re-examination, the doctor noted full motion, negative AC joint tenderness and positive Hawkins testing. The doctor's note is incomplete but it appears he discussed various treatment options, with Petitioner opting to undergo therapy. PX 7.]

Petitioner returned to Dr. Dewan on March 12, 2013. The doctor noted that Petitioner's low back symptoms had improved and that he had returned to work but that, upon resuming work, he "noticed significant neck and right arm pain with numbness and tingling in a nondermatomal distribution." On examination, the doctor noted "significant pain upon pronation of the right arm." She recommended a cervical spine MRI. PX 10.

On March 14, 2013, Petitioner's attorney sent a letter to the attorney who was then representing Respondent, referencing a date of loss of September 16, 2012. The letter stated, in relevant part:

> "Please be advised that upon returning to work per Dr. Gutman's recommendations Petitioner began to experience shoulder and neck pain. Dr. Dewan has ordered an MRI of the cervical spine for further evaluation of Petitioner's symptoms. Please find attached the prescription for the MRI. Please provide authorization for said treatment or provide your basis for denial."

PX 6.

On April 5, 2013, Petitioner underwent the recommended cervical spine MRI. The radiologist interpreted the MRI as showing osteophyte complexes at C3-C4 and C5-C6 causing mild central stenosis and bilateral foraminal stenosis. PX 6, 10.

On April 5, 2013, Petitioner filed an Application for Adjustment of Claim numbered 13 WC 11251 alleging injuries of March 1, 2013 involving the person as a whole, cervical spine and both shoulders. PX 14.

Petitioner returned to Dr. Bhalala on April 25, 2013. The doctor's handwritten notes reflect Petitioner complained of left shoulder pain. A separate typed note reflects Petitioner complained of bilateral shoulder pain. The origin of the pain is not described. The doctor prescribed a left shoulder MRI. On April 25, 2013, Dr. Bhalala released Petitioner to work with no lifting/pushing/pulling over ten pounds "due to cervical muscle strain and right shoulder pain." PX 6. The following day, the doctor issued another work status note imposing the same restrictions "due to cervical muscle strain and bilateral shoulder pain."

At Respondent's request, Dr. Kolavo re-examined Petitioner on May 3, 2013. In his report of that date, the doctor recorded the following history:

> "I have currently been asked to evaluate Mr. Mathews for his cervical and lumbar spines. Mr. Mathews tells me that he began having pain, not in his neck, but in his shoulders during work conditioning. He denies specific neck injuries. Apparently, this is somewhat of a gradual onset. First, he had shoulder symptoms on the right and then on the left. He has subjective weakness. He tells me in his own words that his low back is no longer a problem for him. He tells me he is doing his home exercises and is not using medications for his back anymore. He is

using Advil regularly for his shoulder. He is left-hand dominant."

Dr. Kolavo described Petitioner's gait as normal. He noted no abnormalities on cervical spine examination. He noted no complaint of pain on lumbar spine range of motion testing. On shoulder examination, he noted "pain with range of motion of the right shoulder, especially with abduction and internal rotation, suggestive of an impingement syndrome." He described the rotator cuff as "intact." He also noted soft tissue tenderness in the biceps and forearm, suggestive of tendinitis.

Dr. Kolavo found Petitioner to be at maximum medical improvement with respect to his back. He saw no need for cervical spine treatment but noted he had not been provided with the recent cervical spine MRI. He indicated he would not render any opinions concerning the current shoulder complaints. PX 12. RX 3.

At Respondent's request, Petitioner saw Dr. Aribindi for purposes of a Section 12 examination on May 6, 2013. See below for a summary of the doctor's testimony concerning his examination findings and opinions.

Petitioner testified that Dr. Bhalala referred him to Dr. Summerville, an orthopedic surgeon. Petitioner first saw Dr. Summerville on May 14, 2013. Handwritten entries on a medical history form reflect that Petitioner complained of left shoulder pain and immobility secondary to a work injury of February 10, 2013 and acknowledged having undergone two left shoulder injections by Dr. Portland in 2010.

Dr. Summerville's typewritten history of May 14, 2013 reflects that Petitioner reported left shoulder pain of three months' duration. The history also reflects that Petitioner "believes his injury may have been work related." The doctor noted a positive impingement sign and 5-/5 strength on initial left shoulder examination. He obtained left shoulder X-rays and interpreted the films as showing no degenerative changes or acute findings. He diagnosed left shoulder bursitis and administered a corticosteroid injection. He indicated Petitioner would require an MRI if he failed to respond to the injection. PX 7.

On May 22, 2013, Petitioner presented to the Emergency Room at Advocate Condell Medical Center complaining of worsening episodic low back pain of one week's duration. Petitioner also complained of difficulty urinating. He gave a history of a past L3-L4 injury which required an MRI and therapy. He also reported taking Norco as needed for a rotator cuff problem. The Emergency Room physician prescribed a CT scan of the abdomen to rule out a kidney stone. The scan was essentially negative. The physician indicated Petitioner planned to follow up with his personal care physician. PX 8.

Petitioner returned to Dr. Summerville on June 11, 2013 and reported no significant improvement following the shoulder injection. Petitioner complained of localized pain along the lateral deltoid region, especially with overhead lifting. On re-examination, the doctor noted

significant tenderness with abduction, a positive impingement sign and 5-/5 strength. He prescribed an MR arthrogram and released Petitioner to full duty. PX 7. RX 6.

On July 19, 2013, Petitioner saw Dr. Bhalala, with the doctor noting complaints relative to both shoulders, worse on the left. The doctor started Petitioner on Norco. PX 6.

Petitioner underwent the left shoulder MR arthrogram on July 24, 2013. The radiologist interpreted the study as showing a large, non-displaced SLAP tear, a partial-thickness tear involving the articular surface of the supraspinatus tendon and mild subacromial encroachment secondary to a combination of AC degenerative changes and anterior downsloping of the acromion. PX 6.

On July 29, 2013, Petitioner returned to Dr. Summerville and complained of persistent left shoulder pain radiating to the biceps. On re-examination, the doctor noted forward elevation and abduction to 140 degrees with tenderness, positive SLAP and impingement testing and 5-/5 strength. The doctor diagnosed a "symptomatic left shoulder SLAP tear" and recommended surgery. RX 5-6.

On August 15, 2013, Dr. Summerville sent a letter to Petitioner's counsel in response to a causation-related inquiry. The doctor addressed causation as follows:

> "Based on the alleged work injury the patient describes,
> the SLAP tear is more likely than not related to the injury.
> The rotator cuff tear is less certain, however more likely
> related if the patient had no prior symptoms in his shoulder."

PX 7. RX 5.

On August 27, 2013, Petitioner saw Dr. Koh at North Shore. The doctor noted that Petitioner complained of "left shoulder pain for 8 months." On examination, he noted positive Neer, Hawkins and Speed testing, tenderness at the biceps tendon and mild popping and clicking at the elbow. He interpreted the MRI as showing an "essentially full-thickness tear, impingement and labral tearing." He recommended left shoulder surgery. PX 8.

Petitioner testified he underwent left shoulder surgery on October 4, 2013. Petitioner testified that Dr. Koh, rather than Dr. Summerville, performed this surgery because Dr. Summerville is "not in his group." Dr. Koh's operative report reflects the following post-operative diagnoses: left shoulder rotator cuff tear, biceps tendinitis, labral tearing, adhesive capsulitis and loss of shoulder motion. PX 8.

On October 15, 2013, Petitioner saw Dr. Koh's assistant in follow-up. The assistant described Petitioner as doing well and taking Norco only occasionally. He recommended that Petitioner stay off work and start physical therapy. PX 8.

On October 21, 2013, Petitioner underwent an initial physical therapy evaluation at North Shore University Health. He attended left shoulder therapy regularly thereafter. PX 9.

Petitioner testified that, following his left shoulder surgery, he remained off work until March 1, 2014. Dr. Koh kept him off work during this time. As of November or December 2013, his left shoulder was still very painful and he had almost no range of motion but Dr. Koh told him that his recovery would be slow.

On February 27, 2014, Petitioner returned to Dr. Bhalala and complained of "left shoulder pain with joint cracking." The doctor continued Petitioner's medications, including Norco, and directed Petitioner to return in four weeks. PX 6.

In February 2014, Petitioner underwent additional left shoulder therapy at Highland Park Hospital. PX 9.

Petitioner testified he resumed his prior CT technician job for Respondent in March 2014. At that point, his left shoulder was still very painful and he was still experiencing chronic low back pain. During his first month or two back on the job, an assistant helped him.

At his attorney's request, Petitioner underwent an evaluation by Dr. Gross on February 27, 2014. The doctor's lengthy report of that date sets forth a consistent history of the accident of September 16, 2012. The report reflects that, when Petitioner returned to work in February 2013, he returned with restrictions that "were not followed." The report further reflects that, on March 1, 2013, while Petitioner was still subject to restrictions, he began experiencing right shoulder and arm pain while "using his upper body compensating for his low back," and consulted Dr. Bhalala, who prescribed a cervical spine MRI. The report also states that, by late April 2013, Petitioner was complaining of "increased left shoulder pain, worse than the right."

Dr. Gross noted that Petitioner complained of lower back pain, especially when lifting, and lower back stiffness on rising in the morning. He also noted that Petitioner complained of left shoulder stiffness and numbness with extension of the arm. He described Petitioner as left-handed.

On lumbar spine examination, Dr. Gross noted limited forward flexion and lateral flexion, slight tenderness in both sacroiliac joints, straight leg raising to 70 degrees on the right and 80 degrees on the left and normal heel/toe walking. Dr. Gross diagnosed "herniated disc syndrome, residuals of a low back injury and pre-existing lumbar spine arthritis."

On left shoulder examination, Dr. Gross noted atrophy of the left trapezius and posterior shoulder girdle muscles, tenderness over the anterior aspect of the left shoulder, a reduced range of motion in all planes, positive rotator cuff testing (versus negative on the right), weakness of the supraspinatus muscles (compared to the right), difficulty with overhead reaching and limited active abduction. He diagnosed "residuals of a soft tissue and ligament

injury of the left shoulder, rotator cuff tear, left shoulder (post-operative state), labral tear, left shoulder (post-operative state) and biceps tendinitis (post-operative state)."

Dr. Gross indicated he reviewed a number of treatment records as well as Dr. Kolavo's and Dr. Aribindi's examination reports.

Dr. Gross attributed Petitioner's lower back complaints to the September 16, 2012 accident. He attributed Petitioner's shoulder problems to "compensating for his low back by using his upper body more," indicating that the left shoulder ended up being more symptomatic than the right. He acknowledged that Petitioner had some underlying arthritis in the left shoulder but opined that this was aggravated by the duties he performed at work while recovering from his lower back injury.

Dr. Gross proceeded to perform an AMA impairment rating, while conceding that Petitioner might not yet be at maximum medical improvement, since he was still participating in left shoulder therapy. With respect to the back injury he arrived at a whole body impairment rating of 8%. With respect to the left shoulder condition, he arrived at an upper extremity impairment rating of 4% and a whole person impairment rating of 2%. PX 2.

Petitioner saw Dr. Koh's assistant on March 25, 2014. The assistant described Petitioner as "doing quite well." Specifically, he indicated that Petitioner was performing full duty, experiencing "minimal discomfort" and taking Ibuprofen occasionally. On examination, the assistant noted "minimal atrophy" in the left trapezius, no scapular winging, no tenderness to palpation, mild impingement, negative Jobe and Yerguson testing, no pain with neck motion and a strong grip. He indicated that Petitioner could resume "lifting at the gym, light weights and high reps to start, with a day of rest after." He released Petitioner from care on a PRN basis. PX 8.

On June 27, 2014, Petitioner returned to Dr. Bhalala and requested medication for back pain. The doctor noted negative straight leg raising bilaterally on examination. He injected the right sacroiliac joint with Kenalog and refilled Petitioner's medications, including Norco. PX 6.

On August 12, 2014, Petitioner returned to Dr. Bhalala and complained of severe mid-back pain. Petitioner related he was scheduled to undergo a prostate biopsy the following day. The doctor refilled his medications, including Norco, and directed him to return in four weeks. PX 6.

On August 28, 2014, Petitioner returned to Dr. Bhalala and complained of severe lower back pain. The doctor noted that Petitioner had recently been diagnosed with adenocarcinoma of the prostate. The doctor refilled Petitioner's medications and directed him to return in four weeks. PX 6.

On October 2, 2014, Petitioner returned to Dr. Bhalala and complained of severe lower back pain. The doctor noted that Petitioner was scheduled to undergo prostate surgery on

November 19, 2014. He ordered pre-operative laboratory studies and refilled various medications, including Norco. PX 6.

On December 29, 2014, Petitioner returned to Dr. Bhalala and complained of lower back pain. The doctor noted that Petitioner had recently undergone surgery for prostate cancer and had experienced low back pain postoperatively, after he resumed exercising.

On examination, Dr. Bhalala noted paraspinal tenderness, a normal gait and negative straight leg raising bilaterally. He continued the Norco and directed Petitioner to return in four weeks. PX 6.

Petitioner returned to Dr. Bhalala on two occasions thereafter. On January 27, 2015, the doctor noted that Petitioner complained of "back pain radiating up to his neck area" and asked to be referred to a chiropractor. The doctor continued the Norco and prescribed an ultrasound of both sides of the sacroiliac joint. On April 9, 2015, the doctor noted a complaint of worsening lower back pain. The doctor continued the Norco and directed Petitioner to start Mobic. PX 6.

On February 10, 2015, Dr. Gross testified on behalf of Petitioner by way of evidence deposition. Dr. Gross testified he devotes about 5 to 10% of his practice to performing disability evaluations in workers' compensation cases. He devotes the rest of his practice to practicing emergency medicine and hospitalist work, primarily in Iowa. PX 3 at 6.

Dr. Gross testified he examined Petitioner on February 27, 2014. His examination findings are outlined in his report. [See above for a summary of this report, PX 2.]

Dr. Gross testified he reached the following diagnoses: 1) herniated disc syndrome; 2) residuals of a back injury; 3) pre-existing lumbar spine arthritis; 4) residuals of a soft tissue and ligament injury of the left shoulder; 5) rotator cuff tear of the left shoulder, in a post-operative state; 6) labral tear of the left shoulder, in a post-operative state; 7) biceps tendinitis, in a post-operative state; 8) pre-existing cervical spine arthritis; 9) resolved right shoulder strain; and 10) resolved right forearm strain. PX 3 at 15.

Dr. Gross testified he reviewed various treatment records, along with the reports of Drs. Kolavo and Aribindi, in connection with his examination. PX 3 at 16. He also reviewed the lumbar spine, cervical spine and left shoulder MRI reports. PX 3 at 17.

Dr. Gross opined that Petitioner injured his low back and later injured his neck and shoulders in the course of his employment. He also opined that Petitioner's "condition of ill-being is causally related to his work." PX 3 at 18. He further opined that all of the treatment Petitioner underwent was related to his work injuries. PX 3 at 18.

After reviewing a group of medical bills totaling approximately $117,500 (PX 1), Dr. Gross testified that the bills relate to Petitioner's work injuries. It was reasonable and

necessary for Petitioner to undergo a chest X-ray and EKG prior to his left shoulder surgery based on his age, 58. PX 3 at 19. Petitioner's Emergency Room visit of May 2013 is related to his back injury. The doctors at the Emergency Room originally suspected a kidney stone but ruled that out via a CT scan of the abdomen and pelvis. Hence, the charges are related to the back injury. PX 3 at 21. The charges outlined in PX 1 appear to be reasonable and customary for the locale in which the treatment was rendered. PX 3 at 22. The time that Petitioner lost from work, following the left shoulder surgery, was related to the shoulder injury. PX 3 at 22.

Dr. Gross testified that, with respect to the lower back, Petitioner exhibited abnormalities, including some limitation of motion, positive straight leg raising and lower extremity atrophy, consistent with his injury. Petitioner's complaints of continued pain with lifting are consistent with that injury. Petitioner will continue to experience these complaints, based on the basic nature of his job. PX 3 at 23. With respect to the left shoulder, Petitioner has some limitation of motion, some weakness and pain with rotator cuff testing, some atrophy and some contracture with active abduction. Petitioner will likely experience some weakness and pain with use of the left shoulder in the future. His right shoulder seems to have healed relatively well. Petitioner did not complain of his right shoulder or neck at the time of examination. PX 3 at 24-25.

Dr. Gross testified he performed his AMA impairment rating in accordance with the Guides to the Evaluation of Permanent Impairment, Sixth Edition. Dr. Gross also testified that, since Petitioner was still undergoing left shoulder therapy at the time of his examination, "one couldn't rule out the possibility of some modest improvement to the shoulder." PX 3 at 26. In performing the shoulder rating, he started with what is referred to as the "diagnosis-based impairment." He used both a rotator cuff injury and a SLAP lesion as diagnoses with respect to the left shoulder. He also considered the "non-key modifiers," including the functional history, physical examination and the clinical studies. Petitioner's shoulder injury falls into "Class 1" and would typically have a grade modifier of one but, the injury was "a little bit more severe in each of the grade modifiers." Ultimately, he reached a regional impairment rating of 4% of the upper extremity, which translates to a 2% whole person impairment. PX 3 at 27. He used the same process in rating the back impairment. The default severity grade was C and the class of injury was 1 but, because all three non-key modifiers came out to a 2, that advanced the severity grade to D, which, based on the table for low back impairment, translates to 8% whole body impairment. The final combined rating, including the shoulder and back, was 10 percent of the whole body. PX 3 at 28.

Dr. Gross opined that Petitioner may experience shoulder and low back flare-ups in the future, based on the nature of his job, and will require occasional medication. PX 3 at 28.

Under cross-examination, Dr. Gross testified that Petitioner is left-handed. In general, it would not be unusual for a left-handed individual to experience degeneration of his dominant arm at a faster pace. PX 3 at 30. He does not know whether he saw the MRI films or just the reports. PX 3 at 30. He conceded he did not review any left shoulder MRI performed in 2010. In part, he premised his shoulder-related opinions on the fact that Petitioner became much

more symptomatic after the injury. That suggests that, at the very least, the left shoulder injury aggravated whatever might have been present in the shoulder in 2010. PX 3 at 31. Petitioner initially complained of his right shoulder, not his left. He saw no medical record reflecting that Petitioner reported experiencing pain in his left shoulder on March 1, 2013. PX 3 at 32. The left shoulder injury resulted from lifting patients. PX 3 at 32. Petitioner told him that, because he was subject to restrictions when he returned to work following his back injury, he was not able to use his back as he had previously and resorted to using his arms much more. PX 3 at 33. Just because a 2010 left shoulder MRI showed a SLAP tear, you would not necessarily expect Petitioner's first shoulder complaints to have been left- rather than right-sided. PX 3 at 33. Petitioner may have unconsciously been protecting his left shoulder since he had experienced problems with that shoulder in the past. PX 3 at 34. In general, a previously injured shoulder would be more susceptible to injury. PX 3 at 34. Petitioner's shoulder diagnoses could have been treated via injections. PX 3 at 35. He does not recall seeing Dr. Summerville's records. PX 3 at 35-36. After reviewing Dr. Summerville's causation-related report, he testified he agreed with the doctor's conclusion that the SLAP tear was directly caused or aggravated by work. He is not sure why Dr. Summerville differentiated between the SLAP tear and the rotator cuff tear. The history Petitioner provided to Dr. Summerville would suggest that he gradually aggravated the rotator cuff over time, while working. PX 3 at 37.

Dr. Gross testified that Petitioner did not tell him how often he lifts patients. However, as an ER physician, he is familiar with the duties performed by CT technicians. He has seen technicians use slide boards to transfer patients but "you still have to move the weight of the patient." The weight does not change. It's simply that the slide board reduces the friction associated with conventional patient transfers. PX 3 at 38. Slide boards have become "ubiquitous" at hospitals. PX 3 at 38.

Dr. Gross opined that Petitioner can continue working but will have to work around his physical limitations. PX 3 at 39. He has assisted with, but never independently performed, the kind of shoulder surgery Petitioner underwent. PX 3 at 40. He does not perform shoulder injections. He leaves this to orthopedists. PX 3 at 40.

On redirect, Dr. Gross testified that shoulder injections sometimes provide only temporary relief. Additionally, three is the limit for such injections, although he is not sure that this limit has been scientifically examined. PX 3 at 41. Persistent shoulder complaints following injections could be a strong indication of the need for surgery. PX 3 at 42.

On April 24, 2015, Dr. Aribindi testified on behalf of Respondent by way of evidence deposition. Dr. Aribindi testified he originally obtained board certification in orthopedic surgery in 2000. He was recertified in 2010. PX 4/RX 1 at 5. His CV (Aribindi Dep Exh 1) shows he underwent fellowship training at Rush Presbyterian/Central DuPage Hospital and has co-authored several articles.

Dr. Aribindi testified he devotes about 50% of his practice to hip and knee problems, 20% to shoulder problems and the balance to general orthopedic issues. PX 4/RX 1 at 5. He is the president of the medical staff at South Suburban Hospital. PX 4/RX 1 at 6.

Dr. Aribindi testified he examined Petitioner on May 6, 2013. Petitioner told him he injured his lower back on September 15, 2012 while transferring a patient. Petitioner indicated he had undergone an epidural steroid injection by Dr. Lanoff on January 29, 2013 and that his back was "doing well." PX 4/RX 1 at 10. Petitioner denied any back or radicular pain at the time of the examination. PX 4/RX 1 at 10.

Dr. Aribindi testified that Petitioner complained of left shoulder and right forearm/elbow pain which he attributed to work. Petitioner denied any specific injury involving these body parts. Petitioner also indicated he had been diagnosed with a SLAP tear in 2010 and had undergone two left shoulder injections at that time. PX 4/RX 1 at 11.

Dr. Aribindi testified that, when he examined Petitioner's left shoulder on May 6, 2013, he noted a complaint of pain with forward elevation and abduction, no AC joint tenderness and a positive Hawkins impingement sign. He also noted that Petitioner denied any neck or right shoulder pain. Petitioner described himself as left-handed. PX 4/RX 1 at 11. Petitioner told him he worked as a CT technician and regularly transferred patients. He noted no abnormalities on examination of Petitioner's right shoulder, right elbow, right forearm and right wrist. On lumbar spine examination, he noted negative straight leg raising bilaterally. PX 4/RX 1 at 12-13. He described Petitioner's gait as normal. PX 4/RX 1 at 12.

Dr. Aribindi testified that, at the time of his examination, he reviewed various treatment records, the lumbar spine MRI report, two injury reports, with the second referencing a date of accident of February 27, 2013, Dr. Lanoff's note, Dr. Kolavo's report and various therapy records. PX 4/RX 1 at 14-16.

Dr. Aribindi testified that, after examining Petitioner and reviewing the documents enumerated above, he assessed Petitioner as having "much improved or resolved lower back pain," left shoulder pain with tendonitis and impingement symptoms and some right elbow pain.

Dr. Aribindi opined that the lower back pain "can be related to" the work accident involving the patient transfer. He did not view the left shoulder or right elbow pain as work-related. PX 4/RX 1 at 16-17. Petitioner had a prior history of left shoulder pain and did not report any significant injury to his left shoulder or right elbow "at the time of injury." PX 4/RX 1 at 18. With respect to the lower back, he recommended low-impact aerobic conditioning and observation. He found Petitioner to be at maximum medical improvement with respect to his back. With respect to the left shoulder, he recommended a repeat steroid injection and a home exercise program. He felt that Petitioner would be able to resume working following the injection. He did not relate the need for the injection to work. PX 4/RX 1 at 18.

Under cross-examination, Dr. Aribindi testified that no one has provided him with an update as to Petitioner's post-examination status. PX 4/RX 1 at 19. Before the deposition, he never saw Petitioner's counsel's letter (PX 6). He was not aware of this letter at the time of his examination. PX 4/RX 1 at 20. No one, including Petitioner, told him he claimed to have injured both shoulders after he returned to work following his back injury. PX 4/RX 1 at 21. Nor did Petitioner or anyone else tell him Petitioner developed pain due to repetitive work activities after resuming work. PX 4/RX 1 at 21-22. It is "maybe" possible that Petitioner anticipated he would already be aware of such circumstances, since Petitioner had filed an Application for shoulder injuries in advance of his examination. PX 4/RX 1 at 21-22. Petitioner provided someone with notice of these injuries but did not provide notice to him. PX 4/RX 1 at 22. Until the deposition, he was not aware that Petitioner had seen Dr. Bhalala for both shoulders shortly before his examination. He does not know what history Petitioner provided to Dr. Bhalala. Assuming Dr. Bhalala did evaluate Petitioner's shoulders, he would have liked to review the doctor's note before he examined Petitioner. PX 4/RX 1 at 23. Until the deposition, he was not aware that Dr. Kolavo re-examined Petitioner four days before his own examination. PX 3. Now that he has reviewed Dr. Kolavo's re-examination report, which indicates Petitioner reported noticing shoulder symptoms while performing work conditioning, he believes it is "quite possible" that Petitioner aggravated his left or right shoulder in May 2013, shortly before his own examination of May 6, 2013. PX 4/RX 1 at 24-25. He had no further involvement with Petitioner's claims after he examined Petitioner. PX 4/RX 1 at 25. He was not previously aware that Petitioner went on to have left shoulder surgery. PX 4/RX 1 at 25. Since he has not reviewed the records or testimony of Dr. Bahala, he is in no position to say that Dr. Bahala's opinions are wrong. PX 4/RX 1 at 26.

On redirect, Dr. Aribindi testified that, on May 6, 2013, he asked Petitioner whether he sustained a work injury involving his left shoulder. Petitioner denied sustaining any specific injury to his left shoulder or right forearm. Petitioner had the opportunity to relay any such injury to him. PX 4/RX 1 at 27. The post-examination records that Petitioner's counsel referred to do not prompt him to change his causation opinion concerning the left shoulder or right forearm. PX 4/RX 1 at 28.

Under re-cross, Dr. Aribindi testified that none of the questions he was asked on redirect prompt him to change any of the testimony he gave under cross-examination. PX 4/RX 1 at 28-29.

On May 5, 2015, Petitioner filed a 19(b) petition and a petition for penalties and fees. PX 11. Respondent filed a response to the petition for penalties and fees on May 28, 2015. RX 2.

Petitioner testified his left shoulder is now "pretty good" but it is still sore and weaker than his other shoulder. He does not go to the gym or lift weights as frequently as he did in the past. He is able to perform his job, with assistance. He experiences a "twinge" in his left shoulder with certain movements. He is not taking any prescription medication for the shoulder.

Petitioner testified his low back causes problems for him at work. His job requires him to sit, stand and lift. His back sometimes gets stiff and he sometimes experiences sharp pain down his right leg. When this happens, he calls his primary care physician and obtains a prescription for pain medication. He continues to take Norco on a regular basis. Each month, he fills a prescription for sixty Norco tablets. He no longer jogs. He has tried to jog but, on those occasions, experienced severe low back pain and numbness in his right thigh. He does not always have access to assistance at work. On those workdays when he has an assistant helping him, he feels better than when he works alone.

Petitioner testified he has been undergoing treatment for prostate cancer since September 2012. The temporary total disability benefits he claims have to do with his shoulder, not his prostate cancer.

Under cross-examination, Petitioner testified that, on March 1, 2013, he discussed his shoulder with Dr. Gutman of Respondent's employee health department and with two supervisors, including Bill Soyko and Roland B_____. He completed a written accident report concerning his low back injury (RX 7) but never completed such a report in connection with his claimed left shoulder injury. He denied having low back problems before the back-related accident. He did undergo left shoulder treatment in the past but that treatment consisted solely of two injections followed by resolution of symptoms. He is unable to point to one particular event or incident that caused his left shoulder pain. The left shoulder pain was of gradual onset. The treatment he underwent in the past involved his shoulder, not his biceps. No one reached a specific diagnosis concerning his left shoulder when he underwent treatment in the past. He submitted his left shoulder bills to his group carrier after workers' compensation denied them. His group carrier ended up paying the bills. He performs the same job he performed before the accidents and receives the same salary. He is able to perform his duties, with assistance. If he happens to be working alone, and needs to move a patient, he waits for help. He has "taken a hit," confidence-wise, in terms of using his shoulder.

No witnesses testified on behalf of Respondent. In addition to the exhibits previously summarized, Respondent offered into evidence a print-out of various medical and temporary total disability payments it made in the back-related case. RX 8.

[CONT'D]

Jerome Mathews v. North Shore University Health System
12 WC 39479 and 13 WC 11261 (consolidated)

Arbitrator's Credibility Assessment

As noted below, Petitioner's testimony that he began experiencing left arm pain on March 1, 2013, after lifting patients for twelve hours, is not supported by his medical records.

Arbitrator's Conclusions of Law Relative to 13 WC 11261

Did Petitioner establish a left shoulder injury secondary to repetitive trauma manifesting on March 1, 2013? If so, did Petitioner establish causation as to the need for the left shoulder surgery performed by Dr. Koh and as to his claimed current left shoulder condition of ill-being?

Petitioner alleges a left shoulder condition of ill-being manifesting on March 1, 2013. At the hearing, Petitioner testified that, as of that date, he had been back to work as a CT technician, following his previous low back injury, for about three weeks. Petitioner also testified he developed pain in his left biceps and forearm on that date after moving patients for about twelve hours.

Petitioner's very specific testimony concerning the onset of his left arm symptoms is generally not supported by his medical records. None of the records in evidence reflect that Petitioner experienced an onset of left arm pain after repetitively lifting patients on March 1, 2013, as Dr. Gross acknowledged at his deposition. When Petitioner saw Dr. Dewan on March 12, 2013, the doctor noted that Petitioner had returned to work following his lumbar disc herniation and "has noticed significant neck and right arm pain with numbness and tingling in a non-dermatomal distribution." The doctor's note contains no mention of work or the left arm. PX 10. On April 25, 2013, Dr. Bhalala noted complaints relative to both shoulders. She did not comment on the etiology of these complaints. She ordered a left shoulder MRI and referred Petitioner to Dr. Summerville. When Dr. Kolavo re-examined Petitioner, on May 3, 2013, he indicated that Petitioner reported developing pain in both shoulders, right before left, "during work conditioning." Petitioner did not testify to any problems developing during work conditioning. Dr. Kolavo noted abnormalities on examination, but indicated he found those abnormalities in Petitioner's right shoulder. RX 4. On May 14, 2013, Dr. Summerville indicated that Petitioner had been experiencing left shoulder pain for about three months and felt this pain "may have been work related." The note offers no additional insight as to why Petitioner attributed his left shoulder pain to work. Dr. Summerville's records contain a handwritten history form apparently completed and signed by Petitioner on May 14, 2013. On that form, Petitioner complained of left shoulder pain secondary to a work injury of February 10, 2013. The work injury is not further described. When Dr. Koh first saw Petitioner, on August 27, 2013, he noted an eight-month history of left shoulder pain. He did not indicate that Petitioner attributed this pain to work.

In short, the record contains contradictory histories concerning the onset and nature of Petitioner's shoulder complaints.

Complicating this scenario is the fact that Petitioner has a past history of left shoulder problems, with a left shoulder MRI performed in January 2010 demonstrating a SLAP tear and a large, partial-thickness tear of the distal supraspinatus tendon. The left shoulder MR arthrogram performed on July 24, 2013, several months after the alleged manifestation date of March 1, 2013, showed essentially the same findings.

Drs. Summerville and Gross rendered causation opinions on behalf of Petitioner but neither of these physicians expressed any awareness of the January 2010 left shoulder MRI results. Dr. Gross testified that, despite having not reviewed the MRI, he was able to say that the work accident aggravated an underlying left shoulder condition but his view of "the accident" was that Petitioner relied on his shoulders due to his lower back condition. Dr. Koh, who ultimately operated on Petitioner's left shoulder, did not testify or otherwise render any opinion linking the injury or the need for the surgery to repetitive trauma. Dr. Aribindi, one of Respondent's examiners, admitted under cross-examination that Petitioner could possibly have aggravated his left or right shoulder, based on his review of Petitioner's counsel's letter of March 14, 2013 and the Application, but, like Drs. Summerville and Gross, there is no indication he ever reviewed the January 2010 left shoulder MRI. Moreover, he stated several times that Petitioner never related any shoulder injury, whether specific or repetitive in nature, to him.

Having considered the widely varying histories in the treatment records, and having found that the causation opinions lacked adequate foundation, the Arbitrator finds that Petitioner failed to establish both accident and causal connection in 13 WC 11261. The Arbitrator views the remaining disputed issues as moot and makes no findings as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ 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

Nicholas Thuer,

Petitioner,

16IWCC0253

vs. NO: 14 WC 42341

Olin Winchester,

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, medical expenses, 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. 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 20, 2015, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 13 2016
KWL/vf
O-4/4/16
42

Ruth W. White

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0253

THUER, NICHOLAS
Employee/Petitioner

Case# **14WC042341**

OLIN WINCHESTER
Employer/Respondent

On 8/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.24% 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 ADWB LLC
JOHN WINTERSCHEIDT
219 PIASA ST
ALTON, IL 62002

0299 KEEFE & DePAULI PC
MICHAEL KEEFE
#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
19(b)

16IWCC0253

Nicholas Thuer
Employee/Petitioner

v.

Olin Winchester
Employer/Respondent

Case # 14 WC 042341

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 **Collinsville**, on **June 25, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0253

FINDINGS

On the date of accident, **11/26/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**51,410.32**; the average weekly wage was $**988.66**.

On the date of accident, Petitioner was **47** 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 $**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

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $108.00 to Dr. Craig Harms, M.D., $1,985.00 to Alton Memorial Hospital, $2,676.00 to Dr. Bruce Vest, M.D., and $105.00 to Petitioner for out-of-pocket medical expenses, 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.

Signature of Arbitrator

8/14/15
Date

ICArbDec19(b)

AUG 20 2015

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION 19 (b) DECISION

NICHOLAS THUER,
Employee/Petitioner,

v.

OLIN WINCHESTER,
Employer/Respondent

16IWCC0253

Case # 14 WC 042341

MEMORANDUM OF 19 (b) DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner is forty-eight-years-old, right hand dominant, and has worked in Respondent's ammunition manufacturing factory since March 1988. Since about 2008 or 2009, he has held the jobs of Chief Stores Checker and Chief Stock Clerk, which he was still performing for Respondent as of the date of Hearing. Petitioner, an insulin-dependant diabetic, claims that his bilateral carpal tunnel syndrome is causally related to his work duties and Respondent denies this claim.

Petitioner works eight hours a day, five days a week, and described his jobs as requiring constant, repetitive, forceful flexion and extension of his wrists for about six hours a day, on average. Petitioner's former supervisor, Carlson Langston testified on behalf of Respondent that Petitioner is honest, a good employee and a good worker.

Three Job Descriptions, created by Respondent, were entered in evidence by Petitioner. The first is a March 3, 2014 Physical Demands Analysis for the job of Chief Stores Checker. The second is an October 23, 2012 Physical Demands Analysis for the job of Chief Stock Clerk. Both Petitioner and supervisor Langston testified that these Physical Demands' Analysis' accurately reflect the job duties of Chief Stores Checker and Chief Stock

Clerk. These Physical Demands Analysis' were provided to Petitioner's treating, orthopedic surgeon, Dr. Bruce Vest.

The third job description entered in evidence by Petitioner is a Physical Demands Analysis dated May 6, 2010 for the Chief Stock Clerk job that Respondent's attorney provided to its Section 12 expert, Dr. Mitchell Rotman in conjunction with his May 18, 2015 evaluation of Petitioner. Petitioner testified that the May 6, 2010 Physical Demands Analysis does not completely list his job duties. Supervisor Langston testified that the October 23, 2012 Physical Demands Analysis for the job of Chief Stock Clerk is more "inclusive" than the May 6, 2010 Physical Demands Analysis provided to Dr. Rotman.

Among other tasks, the October 23, 2012 and March 3, 2014 Physical Demands Analysis' list job duties of handling 60 to 100 pound powder kegs 600 to 800 times a shift. These kegs are moved on a concrete surface with a two-wheel dolly. The jobs require scanning labels, cartons, tubs and barrels of gunpowder with a hand held scanner 26 to 136 times a shift. Overhead tractor-trailer doors are required to be pulled 6 to 10 times a shift. Metal barrels weighing 100 to 150 pounds each, described as "TNR barrels," are required to be moved off of trucks with dollies up to 20 times a shift and rolled onto metal skids 18 to 20 times a shift. Petitioner drives a forklift, that he described as quite vibratory, 10 to 20 times a shift which requires the use of both hands. When used, Petitioner operates a hand-held, spring-loaded, industrial stapler in alternating hands, 230 to 276 times per shift to staple labels onto blocks of lead. [While a "slap hammer" style staple gun and an electric staple gun were available for use, Petitioner only used the spring-loaded industrial stapler from 2012 through 2014]. The job duties also include handwriting orders and computer data entry as well as unloading and stacking boxes of materials from trucks onto pallets throughout the day. Petitioner's description of his present job duties since 2008 or 2009 are reflected by Respondent's March 3, 2014 Physical Demands Analysis' for its job titled Chief Stores Checker and the October 23, 2012 Physical Demands Analysis for its job of Chief Stock Clerk.

Petitioner testified that he uses the spring-loaded industrial stapler, every other week, or drives a forklift "most of the time."

Respondent entered two job videos into evidence that it provided to its Section 12 examining physician, Dr. Rotman. The first video, titled "Storeroom Clerk" is 20 minutes, 5 seconds long and does not depict Petitioner. Petitioner testified that the video does not depict the department in which he has worked since 2008 or 2009.

The second job video provided to Dr. Rotman and entered in evidence by Respondent is 21 minutes 58 seconds long and is titled, "Chief Stock Clerk" and does depict Petitioner in a portion of the film. Petitioner testified that while it accurately depicts some of his job duties, it does not show them all. The video shows an employee handwriting paperwork, entering data into a computer, tearing and scanning labels, operating the "hammer style" stapler to affix labels onto blocks of lead, using a large screwdriver to pry open a large metal container, operating a forklift, using a hand-held staple gun to affix labels to lead blocks, and replacing a propane tank on a forklift.

In about September 2014, Petitioner noticed numbness and tingling in his hands, with his dominant right hand worse than his left. Petitioner's condition did not get better with time and his symptoms were keeping him awake at night. Therefore, he reported to Respondent's medical department on October 29, 2014 with complaints of pain from his right fingertips to his elbow that he believed were the result of stapling tags to blocks of lead. Petitioner was told to take Aleve and to wear braces when performing repetitive motions

Petitioner then sought treatment with his family physician, Dr. Craig Harms on November 12, 2014 with complaints of numbness in his right hand. Dr. Harms recorded that Petitioner's job requires repetitive use of his hands and that his complaints of tingling and numbness, pain into the volar surface of the right wrist and loss of grip strength, began one month earlier. Dr. Harms' examination suggested carpal tunnel syndrome, so he ordered bilateral nerve conduction studies.

Petitioner underwent the nerve conduction studies on November 26, 2014 at Alton Memorial Hospital. The tests revealed moderate sensorimotor entrapment neuropathy at the flexor retinaculum, or carpal tunnel syndrome, with the right extremity being worse

than the left. As a result of these test results, Dr. Harms referred Petitioner to board certified, orthopedic surgeon, Dr. Bruce Vest.

Petitioner initially saw Dr. Vest on December 15, 2014 when a history of Petitioner's job duties of driving a forklift and using a staple gun were recorded. Petitioner provided Dr. Vest with copies of the March 3, 2014 Physical Demands Analysis for the job of Chief Stores Checker and the October 23, 2012 Physical Demands Analysis for the job of Chief Stock Clerk.

Petitioner related his complaints of bilateral hand and wrist pain to Dr. Vest. Dr. Vest noted that Petitioner is diabetic, and his physical examination was consistent with bilateral carpal tunnel syndrome. Dr. Vest recommended bilateral carpal tunnel release surgeries, but allowed Petitioner to continue working until he undergoes the procedures.

Pursuant to Section 12 of the Act, Respondent had Petitioner examined by board certified, orthopedic surgeon, Dr. Mitchell Rotman on May 18, 2015. Respondent's counsel provided Dr. Rotman with the May 6, 2010 Physical Demands Analysis for the Chief Stock Clerk job, medical records and the two job videos referenced above. Dr. Rotman diagnosed bilateral carpal tunnel syndrome "and maybe a little irritability from his cubital tunnel in his elbow" and agreed with Dr. Vest that Petitioner requires bilateral carpal tunnel release surgeries. Dr. Rotman testified that Petitioner's carpal tunnel syndrome is not causally related to his employment duties, but rather a consequence of his diabetes.

Dr. Rotman believed that the outdated and incomplete May 6, 2010 Physical Demands Analysis for the Chief Stock Clerk job accurately reflected Petitioner's work duties, but agreed that if Petitioner used the staple gun four hours a day, then this activity could be an aggravating factor in the development of carpal tunnel syndrome.

Petitioner last saw Dr. Vest on February 23, 2015 at which time Dr. Vest continued to recommend surgery. While Dr. Vest acknowledged that individuals with diabetes can be more prone to develop carpal tunnel syndrome, he testified that the duties described in the March 3, 2014 Physical Demands Analysis for the job of Chief Stores Checker and the October 23, 2012 Physical Demands Analysis for the job of Chief Stock Clerk can cause

carpal tunnel syndrome. Dr. Vest testified that Petitioner's use of the stapler and the griping activities associated with driving the forklift can aggravate the inflammatory conditions of the flexor tenosynovium that causes carpal tunnel syndrome.

As a result of the medical treatment Petitioner received for his bilateral carpal tunnel syndrome, he has incurred medical bills in the amount of $4,769.00. Of that amount, $2,012.45 was paid by Petitioner's wife's personal medical insurance, Petitioner personally paid $105.00 and a balance of $152.71 remains outstanding.

At Hearing, Petitioner testified that he has numbness and tingling in his hands and that the takes Ambien to sleep at night because of the numbness. He has found himself dropping objects and has lost grip strength to the point that he requires assistance to remove caps from bottles of soda. While he continues to perform his regular job duties for Respondent, Petitioner testified that his condition is becoming worse and that he would like to have the surgeries recommended by Dr. Vest.

CONCLUSIONS OF LAW

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

Petitioner's credible testimony regarding his job duties for Respondent is reflected by Respondent's Physical Demands Analysis dated March 3, 2014 of its job of Chief Stores Checker and Respondent's October 23, 2012 Physical Demands Analysis of its Chief Stock Clerk job. Petitioner testified that these duties required repetitive, forceful twisting, bending and extending of his wrists and elbows.

In addition to the duties described in the Physical Demands Analysis', Petitioner testified that he used a spring-loaded, industrial stapler every other week and drove a forklift most of the time. He used the spring-loaded stapler in alternating hands, 230 to 276 times per shift to staple labels onto blocks of lead. He drove a forklift, that he described as quite vibratory, 10 to 20 times a shift, requiring the use of both hands.

Upon review of the Physical Demands Analysis' and considering Petitioner's testimony, I find that Petitioner's job duties for Respondent were repetitively traumatic, and as such, he has proven that he sustained accidental injuries that arose out of and in the course of his employment by Respondent.

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

Both treating, board certified orthopedic surgeon, Dr. Vest and Section 12 examining, board certified orthopedic surgeon, Dr. Rotman agree that Petitioner has bilateral carpal tunnel syndrome and is in need of surgery to address the conditions. They differ however on the etiology of Petitioner's condition.

Treating surgeon, Dr. Vest was provided with and reviewed copies of the March 3, 2014 Physical Demands Analysis for the job of Chief Stores Checker and the October 23, 2012 Physical Demands Analysis for the job of Chief Stock Clerk that both Petitioner and his supervisor, Carlson Langston testified accurately reflected the duties associated with those jobs. He also discussed Petitioner's job duties with him in detail, as well as Petitioner's diabetic condition. Dr. Vest testified that the job duties described in the Physical Demands Analysis' could cause carpal tunnel syndrome. He specifically testified that the use of the spring-loaded, industrial stapler and the gripping activities associated with driving the forklift can aggravate the inflammatory conditions of the flexor tenosynovium that causes carpal tunnel syndrome.

Respondent's Section 12 examiner, Dr. Rotman was provided with only the May 6, 2010 Physical Demands Analysis for the Chief Stock Clerk job, that Petitioner testified does not completely list his job duties. Supervisor Langston testified that the October 23, 2012 Physical Demands Analysis is more "inclusive" than the one provided to Dr. Rotman.

Respondent also provided Dr. Rotman with a 20 minute, 5 second DVD, titled "Storeroom Clerk" that does not depict Petitioner. Petitioner testified that the video does not even depict the department in which he has worked since 2008 or 2009. The second job video provided to Dr. Rotman is 21 minutes 58 seconds long and is titled, "Chief Stock Clerk" and does depict Petitioner in a portion of the film. Petitioner testified that while it

accurately depicts some of his job duties, it does not show them all. The video does reflect an employee operating the "hammer style" stapler, which Petitioner testified that he did not use, and depicts an employee operating a forklift.

With this information available to him Dr. Rotman testified that Petitioner's diabetes caused Petitioner's bilateral carpal tunnel syndrome. However, Dr. Rotman did testify that if Petitioner used the staple gun four hours a day, then this activity could be an aggravating factor in the development of carpal tunnel syndrome.

In light of the incomplete and inaccurate information provided to Dr. Rotman, coupled with his agreement that extensive use of the stapler could be a causative factor in the development of carpal tunnel syndrome, I find the testimony of Dr. Vest more persuasive than that of Dr. Rotman. After considering all of the evidence, I find that Petitioner's bilateral carpal syndrome is causally related to Petitioner's repetitively traumatic job duties for 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?

Dr. Vest testified to the reasonableness and necessity of the medical treatment he provided Petitioner for his bilateral carpal tunnel syndrome. Likewise, there is no evidence of unreasonable or excessive treatment found in the record. Therefore, Respondent is hereby ordered to pay Petitioner $105.00 for out-of-pocket medical expenses he has incurred for treatment of his work related conditions. Respondent is also ordered to directly pay the providers listed in Respondent's Exhibit 9 for the medical expenses listed therein, pursuant to the Act's Medical Fee Schedule. As the amounts paid by insurance, itemized in Petitioner's Exhibit 9, were paid by Petitioner's wife's medical insurance, Respondent is not entitled to a Section 8(j) credit for those payments.

Issue K. Is Petitioner entitled to any prospective medical care?

As both treating, board certified orthopedic surgeon, Dr. Vest and Section 12 examining, board certified orthopedic surgeon, Dr. Rotman agree that Petitioner is in need

of surgery to address his bilateral carpal tunnel syndrome, Respondent is hereby ordered to authorize and pay for Dr. Vest's recommended surgery and treatment of Petitioner's bilateral carpal tunnel syndrome.

Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ 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

16IWCC0254

John Baker,
Petitioner,
vs.

NO: 10 WC 48511

State of Illinois/Shawnee Correctional Center,
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, 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 July 7, 2015, is hereby affirmed and adopted.

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

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

DATED: APR 13 2016
KWL/vf
O-4/4/16
42

Ruth W. White

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0254

BAKER, JOHN
Employee/Petitioner

Case# 10WC048511

ST OF IL/SHAWNEE CORRECTIONAL CENTER
Employer/Respondent

On 7/7/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0558 ASSISTANT ATTORNEY GENERAL
FARRAH L HAGAN
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

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

JUL 7 = 2015

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0254

John Baker
Employee/Petitioner

Case # 10 WC 48511

v.

Consolidated cases: N/A

State of Illinois/Shawnee 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 by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Mt. Vernon, IL**, on **May 6, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **December 13, 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.

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

In the year preceding the injury, Petitioner earned $**55,956.00**; the average weekly wage was $**1,076.08**.

On the date of accident, Petitioner was **46** years of age, *married* with **1** dependent child.

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

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

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

ORDER

Petitioner failed to prove he sustained an accident on December 13, 2010 that arose out of and in the course of his employment with Respondent or that his condition of ill-being in his elbows is causally connected to his alleged accident with Respondent. Petitioner's claim 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.

Signature of Arbitrator

July 1, 2015
Date

ICArbDec19(b)

JUL 7 - 2015

FINDINGS OF FACT and CONCLUSIONS OF LAW

Petitioner alleges repetitive trauma injuries to his right and left hands and right and left arms/elbow with an accident date of December 13, 2010. (AX 10) At the time of arbitration, Petitioner was proceeding under a Section 19(b) Petition. The disputed issues were accident, notice, causal connection, medical expenses, and prospective medical care. Testifying at the hearing were Petitioner and Jeffery Dennison, Respondent's representative throughout the proceeding.

With regard to issues (C) Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent? and (F) Is Petitioner's current condition of ill-being causally related to the injury the Arbitrator renders the following findings of fact and conclusions of law:

Findings of Fact

Petitioner's medical records from his primary care physician were entered into evidence as Respondent's Exhibit #11. On September 14, 2010, Petitioner presented to his primary care physician complaining of shortness of breath at times. Petitioner was noted to be 222 lbs. Petitioner was assessed with hypertension and dyspnea. Notably, Petitioner did not complain of any symptoms in his hands or arms. (RX 11) Indeed, Petitioner's medical records with his primary care physician date from 2002 through 2013 and there are no references to any hand or arm complaints contained therein. (RX 11)

Petitioner sought care with Dr. David Brown on December 13, 2010. (PX3, 12/13/10). At the time of the initial visit, it was noted that Petitioner's "Case Manager" was Petitioner's attorney. Petitioner presented for "evaluation and treatment for a problem with both his upper extremities." Petitioner gave a history of having worked for Respondent since 2000 "eight hours a day, forty hours a week. His job entails repeatedly locking and unlocking doors through the day, up to two hundred times, with keys in an eight hour shift. He'll also grip, pull and push doors repeatedly throughout the day. He'll bar rap." Petitioner gave a "five month history of numbness and tingling in both his hands, mainly in his little and ring fingers." He could recall no specific traumatic injury. When physical examination showed a mildly positive Tinel's sign over the ulnar nerve at the right and left cubital tunnels, Dr. Brown referred Petitioner for an EMG and nerve conduction study. He suspected carpal or cubital tunnel syndrome. Petitioner was given bilateral wrist splints to wear at night, told to sleep with his elbows in an extended position and further told to take a nonsteroidal anti-inflammatory medicine. No work restrictions were imposed. (PX 3)

The diagnostic study was done on the same day. (PX4, 12/13/10). Petitioner presented to Dr. Daniel Phillips at Neurological & Electrodiagnostic Institute, Inc. of Saint Louis on a referral from Dr. Brown for electrical diagnostic studies to evaluate bilateral upper extremity pain and numbness. Petitioner completed a "Patient Questionnaire/Halth History" document. He reported that his symptoms were numbness in both hands. He reported that his symptoms began in approximately August. He noted that the onset of his symptoms was gradual. Petitioner described his symptoms as occurring due to overuse. Petitioner noted that since onset, his symptoms were getting worse. He

denied having had any similar symptoms in the past. Petitioner reported the nature of his symptoms to be sharp, aching, throbbing, and occasional. He noted that this symptoms wake him at night while lying still and when changing positions. Petitioner noted that repetitive activities such as keying doors aggravated his symptoms. Petitioner reported that nothing relieved his symptoms. Petitioner noted his hobbies to be golf and hunting. Petitioner rated his pain at work to be a 8. He rated his pain on average to be a 4. Petitioner was noted to be 46 years old, right handed, and described a five-month history of gradually progressive bilateral sharp/throbbing/aching hand and elbow pain with intermittent numbness preferentially involving the fourth and fifth fingers. Cervical radicular pain was not described. Physical examination of bilateral upper extremities revealed the cervical range of motion was intact without neural foraminal findings. Adson's maneuvers were negative. There were positive Tinel signs at the cubital tunnels. There was no tenderness over the radial tunnels or pronators. There was no tenderness over the lateral epicondyles. There were negative Tinel or Phalen signs at the carpal tunnels. Motor testing appeared unremarkable. Pinprick was present. Reflexes were symmetrically normal at the brachialradalii, biceps and triceps. Tone was normal. There was no ataxia. There was no swelling. The skin was unremarkable. Inspection of the digits was unremarkable. The radial pulses were palpable. The nerve conduction studies revealed mild demyelinative ulnar neuropathy across the right elbow and more moderate demyelinative ulnar neuropathy across the left elbow based upon comparative values. The study was not impressive for carpal tunnel syndrome. (PX 3, PX 4)

Dr. Brown recommended conservative measures of care through splinting and non-steroidal anti-inflammatory medication. (PX3, 12/13/10).

On December 15, 2010 Petitioner signed his Application for Adjustment of Claim herein alleging repetitive trauma injuries to his hands and arms/elbows. (AX 2)

Petitioner reported his condition to Respondent and Respondent's Supervisor's Report of Injury indicates that notice was received on December 28, 2010. (RX3).

On December 28, 2010, a Supervisor's Report of Injury was completed. It indicated that on December 28, 2010, Petitioner orally told his supervisor that he was diagnosed with cubital tunnel syndrome from repetitive motion of turning keys and pulling doors. The description of the injury was noted to be cubital tunnel syndrome in both elbows. (RX 3)

On December 28, 2010 a "CMS Demands of the Job" was completed for Petitioner by his supervisor. The supervisor noted that Petitioner's demands of the job included use of hands for gross manipulation 0-2 hours per day and use of hands for fine manipulation 0-2 hours per day. (RX 4)

Petitioner completed a "Workers' Compensation Employee's Notice of Injury" indicating that on December 13, 2010, he was injured due to turning keys, pulling doors, and bar rapping (Pontiac). Petitioner detailed how the injury occurred as: turning numerous keys, pulling numerous doors and bar rapping while employed at Pontiac CC. Petitioner described his injury as cubital tunnel syndrome. He reported that he sought medical attention with Dr. David Brown in St. Louis, Missouri. (RX 2)

On January 24, 2011, Petitioner returned to Dr. Brown. He felt the splints had helped 10%. He continued to have numbness and tingling in both his hands. Examination revealed a positive Tinel's sign over the ulnar nerve at the right and left cubital tunnels. Direct compression test induced some discomfort over the right and left cubital tunnels. Elbow flexion test was negative bilaterally. Dr.

Brown assessed Petitioner with bilateral cubital tunnel syndrome. He recommended that Petitioner continue to wear his elbow splints over both elbows at night and take a nonsteroidal anti-inflammatory medication. He was to return in 2 months for a re-evaluation. Petitioner was returned to work full duty, no restrictions. (PX 3)

On March 21, 2011, Petitioner returned to Dr. Brown. He explained that he had no improvement in his symptoms. He continued to have numbness and tingling in both hands, mainly in his little and ring fingers. He was having trouble sleeping with the elbow braces. Physical examination revealed a positive Tinel's sign over the ulnar nerve at the right and left cubital tunnels. Direct compression test induced some discomfort and paresthesias over the ulnar nerve at the right and left cubital tunnels. Elbow flexion test was negative bilaterally. There was no intrinsic muscle atrophy. Dr. Brown assessed Petitioner with persistent, bilateral cubital tunnel syndrome that had failed to respond to conservative treatment. Petitioner had these symptoms now for the past 8 months. He had over three months of conservative treatment with no improvement in his symptoms. Petitioner's nerve conduction studies were positive for bilateral cubital tunnel syndrome. Petitioner was a candidate for surgical intervention. Dr. Brown explained to Petitioner that if it was authorized by his employer, he would be happy to proceed. If it was not authorized, Petitioner's other option was to go through his private insurance. Dr. Brown noted that unfortunately, he did not take private insurance and if Petitioner goes through his private insurance Dr. Brown explained to Petitioner he'd be happy to refer him to a qualified hand surgeon who takes his private insurance. In the meantime, Dr. Brown recommended that Petitioner continue to sleep with his elbow splints at night and take his nonsteroidal anti-inflammatory medication. Petitioner was returned to work full duty, no restrictions. (PX 3)

On November 1, 2011, Petitioner returned to Dr. Phillips at Neurological & Electrodiagnostic Institute, Inc. of Saint Louis on a request from Dr. Paletta for repeat bilateral upper extremity electrical diagnostic studies. Petitioner completed a "Patient Questionnaire/Health History". He reported his symptoms to be numbness, tingling feeling in hands. He reported that his symptoms began in 2010 with a gradual onset. Petitioner described his hobbies as fishing, golfing, hunting and softball. Dr. Phillips noted that in addition to the upper extremity pain and numbness previously described, Petitioner had also been experiencing neck pain with intermittent global hand numbness. His left upper extremity was more involved. Petitioner was 5'10", 225 lbs. Examination of bilateral upper extremities revealed left Spurling's maneuver radiated to the fourth and fifth fingers and right Spurling's maneuver to the thumb. Adson's maneuvers were negative. There were mildly positive Tinel signs at the cubital tunnels. There was no tenderness over the lateral epicondyles. There was no tenderness over the radial tunnels or pronators. There were negative Tinel and Phalen signs at the carpal tunnels and canal of Guyon. There was 4+ left external shoulder rotation. There was decreased pinprick over the left thumb, index, and ring fingers and the right thumb and middle finger. Reflexers were symmetrically at the brachialradialii, 1+ at the biceps and 2+ at the triceps. Reflexes were 2+ at knees and ankles. Tone was normal. There was no ataxia. There was no swelling. The skin was unremarkable. Insepction of the digits was unremarkable. The radial pulses were palpable. The nerve conduction study findings were noted to be virtually identical to those previously reported. There was mild demyelinative right ulnar neuropathy based upon comparative values and more moderate demyelinative ulnar neuropathy across the left elbow. In addition, there was evidence for left C6 radiculopathy. Dr. Phillips noted that the study was not impressive for carpal tunnel syndrome. He indicated that because of this coupled with left upper extremity EMG, he recommended a cervical MRI. Dr. Phillips indicated that because of his recommendations, he did not put Petitioner through a right upper extremity EMG. (PX 4)

On December 20, 2012, Petitioner presented to Dr. Anthony Sudekum at Missouri Hand Center for a Section 12 examination for evaluation of his bilateral upper extremities. Petitioner complained of bilateral medial and lateral elbow pain; intermittent numbness and tingling of the bilateral ring and little fingers, primarily upon awakening in the early mornings; and occasional numbness and tingling of the his bilateral thumb, index, and middle fingers as well as decreased grip strength. Past medical history included Hypertension. Hobbies included fishing, golf, hunting, and softball. Physical examination revealed Petitioner to be 5'11"; weighing 228 lbs, which equated to a BMI of 38.1, which placed him in the "obese" category. Petitioner had full, normal range of motion of the bilateral elbows, forearms, wrists, thumbs, and fingers. Subjective sensation was slightly reduced generally throughout both upper extremities. Grip and pinch strength were normal bilaterally. There was no evidence of muscle atrophy. Spurling's tests were positive bilaterally, left greater than right. Wrist Tinel's and Phalen's were negative bilaterally. Right elbow Tinel's was positive. Left elbow Tinel's and bilateral elbow Phalen's were negative. Dr. Sudekum noted that bilateral upper extremity nerve conduction studies were performed that evaluated the ulnar nerves at the elbows and wrists. All of the electrodiagnostic values measured including the distal motor and sensory latencies, amplitudes, and F-waves for both right and left ulnar nerves were well within normal limits. The studies revealed no evidence of ulnar neuropathy or cubital tunnel syndrome on either side. Petitioner told Dr. Sudekum his work history, including the fact that Petitioner had worked for the Illinois Department of Corrections for 13 years. Dr. Sudekum was informed that from September 200-December 2009, Petitioner was employed as a correctional officer at Pontiac Correctional Center. Dr. Sudekum knew that Petitioner worked the 2nd shift from 3pm-11pm, Wednesday through Sunday. Petitioner told Dr. Sudekum about his job duties while at Pontiac including the fact that intermittent bar rapping was performed at Pontiac until 2004 and after that bar rapping was eliminated. Dr. Sudekum agreed with Dr. Phillips' recommendation for a cervical MRI. Dr. Sudekum noted that Petitioner had only mild intermittent nocturnal ulnar nerve symptoms, and had no objective evidence of ulnar neuropathy or cubital tunnel syndrome on either side. Dr. Sudekum did not feel that Petitioner's cubital tunnel surgery would be necessary or appropriate. Dr. Sudekum did not feel that Petitioner's past or current job activities as a correctional officer at Pontiac Correctional Center and/or Shawnee Correctional Center served to cause or aggravate cervical radiculopathy, cubital tunnel syndrome or Petitioner's constellation of subjective upper extremity complaints. (RX 13)

Dr. Sudekum testified by way of deposition on April 1, 2013. (RX14). Dr. Sudekum testified that he charged $3,500.00 for his independent medical examination, $910.00 for his NeuroMetrix test, and $2,000.00 per hour for his deposition; bringing his total charges to approximately $8,000.00, assuming the deposition did not go beyond 2 hours. *Id.* at 43-45.

Dr. Sudekum testified that Petitioner reported to him during the December 20th 2012 IME visit that his symptoms began approximately 4 years prior, while Dr. Brown's notes indicate a 5 month history of symptoms. *Id.* at 15, 16. Dr. Sudekum felt that the two electrodiagnostic studies were markedly different based on an incidental finding of cervical radiculopathy on the second study, which was not present during the first studies or when Petitioner's symptoms worsened. (RX14, p.25, 16). Although his own physical examination contained positive findings for cubital tunnel syndrome bilaterally and two full traditional nerve conduction velocity tests with EMG were positive for bilateral cubital tunnel syndrome; based on his NeuroMetrix study and an incidental cervical finding, Dr. Sudekum stated that Petitioner "does not have any objective evidence of ulnar neuropathy or cubital tunnel syndrome currently" and attributed Petitioner's ulnar peripheral neuropathy to cervical

radiculopathy and potential predisposing risk factors. *Id.* at 32. Dr. Sudekum admitted that his own NeuroMetrix study did not include an EMG. *Id.* at 30.

Dr. Sudekum testified that at the time he saw Petitioner, Petitioner did not have cubital tunnel syndrome. However, assuming that Dr. Brown's diagnoses of bilateral cubital tunnel syndrome was correct, he did not feel that Petitioner's job duties as a correctional officer at Pontiac Correctional Center or at Shawnee Correctional Center caused or aggravated that condition. Dr. Sudekum explained that he did not feel that the job activities would rise to the level of causation in terms of type of work that was performed as causing that type of pathology and there was nothing in those jobs that he felt would result in the development of any pathology if those jobs were performed in the way that he understands them. Dr. Sudekum noted that the medical records from Dr. Brown and Dr. Phillips indicated that Petitioner's symptoms of cubital tunnel syndrome did not develop until July or August of 2010. Dr. Sudekum did not believe that there would have been a delayed response in the development of the condition and his job duties at Pontiac Correctional Center since he stopped working there in December of 2009. (RX 14)

On cross-examination, Dr. Sudekum testified that he has made approximately $710,000.00 performing medical-legal work for the State of Illinois over the past 2.5 years, and has never evaluated or treated a claimant in a case in which the State of Illinois was the Respondent. *Id.* at 63, 72, 73. Dr. Sudekum admitted that the NeuroMetrix test was performed by his nurse, who is not certified to perform electrodiagnostic testing. *Id.* at 46, 47. Rather, she took a "tutorial" done online in part and in person with the guidance of a NeuroMetrix sales representative. *Id.* at 46, 47.

Dr. Sudekum denied that the NeuroMetrix test was inferior to traditional full nerve conduction study. *Id.* at 56, 57. The raw data for the NeuroMetrix procedure was offered and attached to the deposition as Petitioner's Deposition Exhibit 1. *Id.* at 49, 50. When asked to testify concerning latency as it applied to repetitive trauma, he gave cryptic, indirect answers lending to a conclusion that he does not believe in the existence of same. *Id.* at 65, 66. He testified that Petitioner's hobbies were potential risk factors for compression neuropathy without knowing how often he engaged in these activities; yet, he did not give any consideration to Petitioner's job duties. *Id.* at 67, 68. When asked how he could deem Petitioner's hobbies potential factors without knowing how often Petitioner engaged in these activities, he stated, "Well, I qualified that statement by saying depending on the amount of that activity that he performs . . .. but depending if he played softball every day and was, you know, hitting balls a hundred times a day, that could potentially be an activity with a vibration associated with that that could potentially cause that problem." *Id.* at 67, 68. He subsequently acknowledged that Petitioner works full-time, 5 days per week. *Id.* at 68.

Petitioner's treating physician, Dr. Brown, testified by way of deposition taken on November 10, 2014. (PX6). Dr. Brown testified that he is a board certified upper extremity specialist, licensed to practice in 3 states, who trained under Dr. Green, the senior editor of the standard textbook Green's Operative Hand Surgery often referred to as the "bible" of hand surgery, and Dr. Mackinnon, head of plastic surgery at Washington University and a world-renowned expert on peripheral nerve injuries. *Id.* at 4-7. He testified that he is primarily a treating physician, but sees patients that have been referred to him by both employers, insurance companies and claimant attorneys in Illinois and Missouri. *Id.* at 7, 8. He even testified to performing examinations and testifying on behalf of Respondent in cases in which counsel for Petitioner was the attorney. *Id.* at 9, 10. He stated that there have been many cases in which he has found that he did not believe that the claimant's condition was work-related. *Id.* at 144,

145. He also lectures before medical groups, legal entities, and private/public bodies and administrative agencies on workplace injuries in the upper extremities, and has produced numerous peer-reviewed articles. *Id.* at 10.

Dr. Brown testified that occupational tasks that involve repetitive or prolonged elbow flexion, repeated elbow motion, forceful turning of the wrist (supination and pronation), forceful flexion of the wrist, vibration exposure, pressure on the nerve from leaning on the elbow and forceful forearm use that requires turning and rotation of the forearm are all associated with cubital tunnel syndrome. *Id.* at 12, 13. He explained that forceful flexion of the wrist causes the flexor carpi ulnaris muscle to contract and squeeze the ulnar nerve that runs through the two split heads of the flexor carpi ulnaris muscle that extends from the wrist and attaches to the elbow. *Id.* at 13, 14. During an ulnar nerve release, the fascia of the nerve that runs between the flexor carpi ulnaris muscle is released and takes pressure off of the nerve. *Id.* at 14.

Dr. Brown testified that Petitioner's nerve conduction studies were performed by a board certified neurologist who limits his practice to electrical diagnostic medicine and has one of the few accredited laboratories in the country and is considered a leading expert in electrical diagnostic studies in the community. *Id.* at 19. Dr. Brown testified that he personally reviewed the raw data from Dr. Phillips' nerve studies and fully agreed with Dr. Phillips' that the studies confirmed a diagnosis of bilateral cubital tunnel syndrome. *Id.* at 20, 21, 28, 29. Dr. Brown also noted that Petitioner's symptoms and his findings on physical examination were classic for bilateral cubital tunnel syndrome. *Id.* at 28. Dr. Brown testified that his review of Petitioner's second nerve conduction study and EMG showed values equivalent to but slightly worse than those in Petitioner's initial study. *Id.* at 37, 38.

Dr. Brown testified that the incidental finding of C6 radiculopathy was relevant to Petitioner's median nerve rather than the ulnar nerve of the cubital tunnel, and that it was anatomically impossible for the C6 level to cause cubital tunnel symptoms. *Id.* at 38, 39.

Dr. Brown testified that unlocking and locking 200 cell doors a day and gripping and forcefully pulling on 200 cell doors a day across a decade would place an abnormal load and force across the upper extremities and at the very least aggravate cubital tunnel syndrome. *Id.* at 29, 30. He testified, however, that there is no "bright line" threshold or time period that an individual has to be exposed for their job to be considered an aggravating factor, and that he evaluates patients on a case-by-case basis. *Id.* at 32.

Dr. Brown testified that the concept of a latency period, the lapse of time between exposure and manifestation of symptoms, is a key concept of repetitive trauma injuries. *Id.* at 32, 33. He stated that during the performance of provocative job duties, a patient is "accumulating microtrauma from the repetitive activities they're performing, and at some point, as that microtrauma accumulates, they reach a threshold and become symptomatic." *Id* at 33, 34. Dr. Brown testified that Petitioner's only identifiable non-occupational risk factor for compression neuropathy was his age; he stated that high blood pressure was not been found to be a risk factor for cubital tunnel syndrome. *Id.* at 34, 35.

Dr. Brown testified that about a week or so before the deposition he was provided with additional information from Petitioner's attorney. This included a work history timeline and job description of Petitioner's job duties, which showed that Petitioner worked at Pontiac Correctional Center, one of Respondent's oldest facilities, up until November of 2009. *Id.* at 41. Dr. Brown noted

that Petitioner worked two galleries, each consisting of 52 cells, in a facility very similar to Menard. *Id.* at 41, 42. He noted that the doors at Pontiac Correctional Center were heavy sliding doors with feeding hatches, and that Petitioner disengaged 192 prison locks for a feed alone. *Id.* at 41, 42. Petitioner also had to disengage prison locks to pass out laundry and cuff and uncuff inmates. *Id.* at 41, 42. Dr. Brown further noted that Petitioner had to perform wing checks on his two assigned galleries, which involved pulling on 104 doors to verify the inmates were secured. *Id.* at 42. Dr. Brown concluded that Petitioner had a "very hand-intensive" station for the first 9 years of his career with Respondent. *Id.* at 42.

With regard to Petitioner's employment at Shawnee Correctional Center, Dr. Brown reviewed Respondent's Job Site Analysis, DVD, and the deposition testimony of the analyst which generated the materials and concluded that the Respondent's evidence on its own did not contain enough information to render an opinion as to causation. *Id.* at 43-45. He testified, however, that with the information provided to him by Petitioner, he was able to garner a "clear understanding" of the position. *Id.* at 43, 44. He also noted that the DVD cut away when a Correctional Officer was unable to open one of the sliding doors. *Id.* at 45. He also noted that bar rapping was conducted at Pontiac Correctional Center. *Id.* at 47, 48. Based upon his review of all of the evidence, Dr. Brown concluded the information was "supportive of a relationship between [Petitioner's] upper extremity conditions and his work as a Correctional Officer" at Pontiac Correctional Center and Shawnee Correctional Center. *Id.* at 47-49. Dr. Brown testified that Petitioner's work at Pontiac for 9 out of 10 years was "key" in his causation analysis. (*Id.* At 48) Dr. Brown testified that unless Petitioner's hobbies were done frequently or as a profession rather than recreation, they would not be an important factor in the development of his bilateral cubital tunnel syndrome. *Id.* at 112, 113. Nevertheless, Dr. Brown stated that any potential contributory factors would not rule out or diminish the fact that Petitioner's employment was also an aggravating factor in the development of Petitioner's condition of ill-being. *Id.* at 114, 115.

Dr. Brown further noted that it is common for monodextrous patients to have symptoms in both extremities, and that the dominance of the extremity is not always associated with the severity of the condition on electrodiagnostic studies. *Id.* at 131. In Petitioner's case, for example, his studies show greater neuropathy in his left elbow; however, even his clinical examination during his visit with Dr. Sudekum showed greater symptomatology in his right, dominant elbow. (PX4; RX13).

Dr. Brown reviewed Dr. Sudekum's report and noted that it was unduly lengthy, that a very large percentage of it had nothing to do with Petitioner or his condition, and that the excess irrelevant information was duplicative of many of his other reports. (PX6, p.49, 50). Dr. Brown also testified that Dr. Sudekum omitted positive findings during both his [Dr. Brown's] and Dr. Phillips' physical examinations. *Id.* at 50, 51.

Dr. Brown testified that Dr. Sudekum's NeuroMetrix test was an entirely different, substandard test for performing an electrodiagnostic evaluation which did not even measure ulnar nerve conduction across the elbow. *Id.* at 53, 54. Dr. Brown noted that Dr. Sudekum does not even mention ulnar motor conduction in his report because the device which he used was not even capable of measuring same. *Id.* at 53, 54. Dr. Brown testified, though, that an ulnar motor conduction measurement is crucial to diagnosing cubital tunnel syndrome. *Id.* at 54.

Dr. Brown testified that a NeuroMetrix test is a substandard test and can only detect distal conduction at the wrist. *Id.* at 55, 56. Thus, it would only be able to detect cubital tunnel syndrome in cases where the condition was so severe that it created slowing of the distal latencies that could be

registered at the wrist and as far as the fingertips. *Id.* at 55, 56. Cubital tunnel syndrome, however, is a condition that originates with slowing of the ulnar conduction across the elbow. *Id.* at 55-57. Dr. Brown personally reviewed the raw data offered as Petitioner's Exhibit 1 in Dr. Sudekum's deposition and confirmed that all the measurements presented were distal velocities. *Id.* at 66, 67. Dr. Brown later stated that Dr. Sudekum's test "never would have been positive because it doesn't measure the appropriate measurement to diagnose cubital tunnel syndrome," that any suggestion that Petitioner's diagnosis was questionable was a "mischaracterization of the evidence," that "there's no question about the diagnosis in this case," because "everything" supports the diagnosis of bilateral cubital tunnel syndrome. *Id.* at 78.

Dr. Brown noted that the longer patients experience symptoms without any type of intervention, the poorer their prognosis for resolution of the condition becomes. *Id.* at 30, 31. Initially, nerve compression results in "demyelinating" nerve injury which results in recoverable loss of the outer nerve sheath; but with prolonged compression of a nerve, the axons within the nerve begin "dying off" and create an axonal-type nerve injury, which is irreversible when too many axons are lost. *Id.* at 80, 81. Based on the duration of Petitioner's condition which proved refractory to conservative care, Dr. Brown recommended surgery, and he again offered medical literature to support his course of action which was attached to the deposition as Petitioner's Exhibits 13 through 15. *Id.* at 81-83. He testified that he wishes to re-examine Petitioner and repeat the nerve conduction study to evaluate Petitioner's nerve. *Id.* at 84.

While Dr. Brown testified to a causation opinion in favor of Petitioner for bilateral cubital tunnel syndrome, he based his causation opinion on Petitioner opening 200 cell doors a day and forcefully pulling on 200 cell doors a day over 10 years. Dr. Brown conceded on cross-examination that he had not reviewed any medical records from Petitioner's primary care physician. Dr. Brown further testified that it was only after he received supplemental information from Petitioner's attorney that he learned that Petitioner had been employed at Pontiac Correctional Center from September 21, 2001, to November 30, 2009. However, even then his opinion on causation would not change. Dr. Brown testified that Petitioner's age was a risk factor for cubital tunnel syndrome. Dr. Brown testified that if Petitioner was obese, it would also be a risk factor for cubital tunnel syndrome. Dr. Brown testified that Petitioner did not contact him to get a referral to another hand surgeon who took insurance or to pay Dr. Brown directly without insurance. Dr. Brown testified that he did not make a referral in this case to anyone other than the first nerve conduction study in December 2010. Dr. Brown also testified that he had not been to Pontiac Correctional Center or Shawnee Correctional Center; did not know the different job assignments that Petitioner had at either facility; did not know if Petitioner held any assignment as a correctional officer at either facility which did not involve using multiple keys per day or pulling on doors; was not aware of any leaves of absences; did not know the shift that Petitioner worked at Pontiac Correctional Center; did not know the days of the week that Petitioner worked at either facility; did not know the number of Folger Adams keys versus regular keys Petitioner was turning; how often Petitioner used handcuffs at either facility; and did not know the amount of overtime Petitioner worked. He acknowledged that Petitioner talked more about his job at Pontiac in the "additional information" he had reviewed.

Dr. Brown acknowledged that he has seen hundreds of correctional officers from different facilities at the request of Petitioner's attorney. (*Id.* at 129) He could not explain why Petitioner's cubital tunnel syndrome was mild on the right (Petitioner's dominant side) and moderate on the left. (*Id.* at 131) He acknowledged not reviewing any records from Dr. Paletta nor was he aware Dr. Paletta

had referred Petitioner to Dr. Phillips in November of 2011. (*Id.* at 133)

At the arbitration hearing, Petitioner testified he was a 46-year-old Correctional Officer at Shawnee Correctional Center when he was diagnosed with bilateral cubital tunnel syndrome. Petitioner testified that he began his career with the State of Illinois on September 25, 2000, as a Correctional Officer at Pontiac Correctional Center, and worked in that capacity until December 1, 2009. According to Petitioner, Pontiac Correctional Center is the State of Illinois' second oldest prison and is a "run down" maximum security facility.

Petitioner testified that he spent the majority of his time at Pontiac Correctional Center as a "cell house" or Gallery Officer. In the cell house, he performed bar rapping and stated that he felt vibration and tingling in his arms and hands while doing so. The doors at Pontiac Correctional Center are large metal sliding doors made of steel and without hinges. The doors had not one but two locks, one of which was referred to as a "deadlock", opened by a Folger Adams key. Petitioner testified that opening these locks required force and he described the effort necessary to open these doors. They were hard to open and didn't always work.

Petitioner testified that turning the lock activates and moves a horizontal steel bar with "doglegs" on the bottom of it, which in turn opens the actual lock. He stated that on occasion it required two hands to turn the locks. Petitioner testified that there was no locksmith available on his 3pm to 11pm shift to assist when a lock malfunctioned. Petitioner estimated that he turned thousands and thousands of keys and opened numerous doors during his 9 years at Pontiac Correctional Center.

Petitioner completed a handwritten job description of his job duties at Pontiac, which revealed that he worked 2 galleries. (PX8). He summarized his duties and the difficulties encountered in the performance of same as follows:

> While I was employed at Pontiac Correctional Center, my job duties included working two galleries per night, this consisted of but not limited to, doing my thirty minute checks on each gallery, every time you walk on a gallery you must unlock the lock from the gate and then after you enter the gallery you must lock it back. At times for feeds, you have at least forty eight cells on each gallery, which means you must first open a lock on the feed hatch and then put the tray in the feed hatch which is above most officers heads, you then have to push the tray in and turn your arm while it is in the feed hatch and push the tray into the cell where the inmate can get the tray. You do this for every cell on both of your galleries, and then lock the locks back. You then have to reverse the procedure to get the trays out of the feed hatch, so you will open at least one hundred and ninety two locks on every feed.
>
> On days that you have to pick up or pass out laundry, you do your normal feeds and then you have to repeat the process to get the laundry in or out of the feed hatch, they do not want you opening the cuff hatch to get laundry out because the inmates put their hands through the hatch and do not let you close the hatch.

> Any time an inmate is to leave his cell, you must open the cuff hatch, apply the restrains and then with a folger-adams key, unlock the door and try to slide the door open while holding the key in the unlock position, the doors slide open and they are very heavy and most of them have been jammed at some time, and stick so they are very hard to open or close, there have been many time when it takes two officers to open a door to remove an inmate from his cell. (PX8).

Petitioner testified that Pontiac Correctional Center was on lockdown "pretty much all the time" during his tenure, "because it is such a violent prison." He also testified that there were no inmate workers. During lockdown, all inmate services and interactions were conducted through chuckholes. Mail delivery, food delivery, laundry delivery, ice passes, cuffing and uncuffing, and even telephone calls were all done through the chuckholes. Petitioner testified that inmates often resisted being cuffed.

Petitioner testified that he performed "shakedowns," which required him to take the inmate out of the cell, lock him to the bar outside of the cell, and thoroughly search every place in the cell for contraband. Petitioner testified that he searched the food hatch, property box, in and around the toilets and sinks, and under the bed and mattress, which required lifting. Petitioner testified that while performing his job duties at Pontiac he began to notice numbness and tingling in his arms and hands; however, he didn't see a doctor for it at that time because he was trying to transfer back closer to home and believing he kind of know how the State worked on some of these things, he didn't want to do anything at all to hurt his chances of transferring to get back to his family.

After December 1, 2009, Petitioner transferred to Shawnee Correctional Center. Petitioner testified that Shawnee Correctional Center is in better shape than Pontiac C.C. From 2009 until Petitioner filed his claim in 2010, he worked as a gym officer. He testified that he begins his day by performing a count just like the wing officers. He testified that he manually keys and opens every cell door and gives call passes. After reviewing everyone's activity sheet and making sure they have no activity restrictions, he organizes the inmate in a line, escorts the line to the gym area, opens the gym gate to let them in and closes the gym gate. The gym gate opened with a Folger Adams key and opening the gate with ease was "hit and miss."). Petitioner also testified that at that time, he would have to go collect the inmate workers that would be using the toxic materials, open the toxics door, count all of the toxics to make sure that nothing was missing, distribute any necessary supplies and close the door. Petitioner did the same thing for gym basketballs.

Petitioner testified that he had been given an opportunity to review the job site analysis (JSA), post descriptions, depositions and DVDs regarding the job duties of a correctional officer at Shawnee C.C. and did not believe they showed the frequency, pace, or intensity with which he worked. Petitioner testified that he uses "some" folger adams keys at Shawnee, primarily to open the gym gate.

Petitioner testified that there was a mistake in Dr. Brown's records as the doctor's notes incorrectly stated he had been working at Shawnee since September 25, 2000. That was when he began at Pontiac. Petitioner started at Shawnee in December of 2009. Petitioner also testified about his examination with Dr. Sudekum. Petitioner would like to have the surgery discussed with Dr. Brown. He believes his symptoms are worse now.

On cross-examination Petitioner acknowledged that he filled out paperwork at Dr. Brown's office indicating he first noticed his symptoms in August of 2010 (approximately). He further acknowledged that he definitely had the symptoms in Pontiac, too. He did not recall telling Dr. Brown he had been having symptoms since working at Pontiac for several years. He could provide no reason as to why he didn't tell the doctor that but certainly his symptoms did not begin in August of 2010. He also could not explain why he didn't tell Dr. Phillips about his symptoms going back to Pontiac. Petitioner recalled seeing Dr. Paletta but did not know why a copy of the visit wasn't in the records. He acknowledged the visit was for his arms and hands and that he recommended oral steroids and slings. He couldn't recall if Dr. Paletta had recommended any surgery. Petitioner denied any problems with his cervical spine. He did think he mentioned something about some neck pain to Dr. Phillips.

Petitioner also acknowledged that he had a work injury to his knee in September of 2009 and was off work for three to four weeks. Petitioner also acknowledged that the job duties he described to Dr. Brown when they first met in 2010 were his job duties at Pontiac and not at Shawnee. He could not recall if he ever told Dr. Brown he was a gym officer at Shawnee. Petitioner testified that the 5 month period to which Dr. Brown and Dr. Phillips referred was when his symptoms began to noticeably worsen rather than when his symptoms began.

Petitioner testified that he does not suffer from gout, hypothyroidism, rheumatoid arthritis or diabetes, and Petitioner's blood pressure is controlled by medication. Petitioner does not have and has not recently had any hobbies that involve vibration; although he candidly testified to riding a dirt bike "years ago, years and years ago." Petitioner testified that he hunts and or fishes for approximately 15 days out of the year and golfs for 2 to 3 days per year.

Jeffery Dennison is currently serving as a temporary superintendent of a satellite facility of Shawnee Correctional Center in Hardin County. Mr. Dennison testified that he heard all of Petitioner's testimony and stated there were no discrepancies in Petitioner's testimony with regard to Shawnee Correctional Center. He also testified that Petitioner was a "very good correctional officer." He did not, however, have any knowledge of Petitioner's job duties at Pontiac Correctional Center.

The Arbitrator has reviewed Petitioner's Work History Timeline/Job Description (PX 7), Corvel's 12/17/10 Job Analysis for Correctional Officers (PX 9), the "Shawnee Correctional Center" post description(PX 10), Melanie Welch's deposition taken in an unrelated case (PX 11), the DVD regarding Shawnee Correctional Center (PX 12) and R.X. 1 – 8.

Conclusions of Law

It is axiomatic that in a repetitive trauma case the unique facts of each case must closely analyzed, scrutinized, and considered. The Arbitrator has done so herein and concludes that Petitioner has failed to prove he sustained an accident on December 13, 2010 that arose out of and in the course of his employment or that his current condition of ill-being in his elbows is causally connected to his accident.

According to the medical records Petitioner first presented for treatment for his upper extremities on December 13, 2010, at which time he provided a history of a "five month history of numbness and tingling in both his hands, mainly in his little and ring finger." (PX 3) In his

questionnaire for Dr. Brown Petitioner stated he first noticed symptoms in August of 2010. (PX 3) He provided the same history to Dr. Phillips at the time of his electrical studies in both 2010 and 2011.

In sharp contrast, Petitioner testified at arbitration that he began noticing symptoms of numbness and tingling while working at Pontiac Correctional Center between 2000 and December 1, 2009. However, he didn't see a doctor during that time presumably because he didn't want to "rock the boat" and interfere with his goal of being transferred to a facility closer to his home. The Arbitrator does not find that testimony credible. There is no objective corroboration for Petitioner's testimony that he had symptoms back in his Pontiac days. Further, if she is to believe from his testimony that he didn't want to interfere with his chance for relocation as he knew how the system "worked," why did he nonetheless report and treat for a work-related knee injury in July/September of 2009? Furthermore, if he was having problems while working at Pontiac C.C. why didn't he, at least, seek any medical treatment from his primary care physician? Respondent would not necessarily have been aware of that. Petitioner's family doctor's records are devoid of any upper extremity complaints or concerns. Finally, if indeed, Petitioner was experiencing problems with numbness and tingling going back to his Pontiac Correction days why didn't he include that history when he saw Dr. Brown and Dr. Phillips?

In a repetitive trauma case, the issues of accident and causal connection generally rest upon the opinions and testimony of expert medical physicians and it is Petitioner's burden of proving both accident and causal connection. Petitioner herein has relied upon the testimony of Dr. Brown; however, the Arbitrator is not persuaded by Dr. Brown in this instance. Petitioner's presenting history to Dr. Brown was simply inaccurate. The time period was wrong, the job duties described pertained to that of a correctional officer at Pontiac (Petitioner so acknowledged during trial) and Dr. Brown had no real knowledge about Petitioner's job duties as a "gym officer" at Shawnee. If one closely looks at Petitioner's Notice of Injury form one will also see that Petitioner made absolutely no reference to his job duties at Shawnee when he completed the report. Instead, he clearly associated his elbow condition with his work duties at Pontiac.

In his deposition Dr. Brown focused a great deal of time, and placed a great deal of significance, on Petitioner's ten year exposure to activities (biomechanical forces) as being responsible for Petitioner's elbow condition. Even when provided with information by Petitioner's attorney that indicated to him that the history was wrong, his causation opinion remained unchanged. However, on cross-examination Dr. Brown's testimony shows he knew little, if anything, about Petitioner's job as a gym officer for Shawnee Correctional Center. He acknowledged that the "additional information" supplied to him, including the information specifically drafted by Petitioner, focused on Petitioner's work at Pontiac, rather than Shawnee. Dr. Brown simply didn't have an accurate understanding of Petitioner's work history and duties to render his opinion persuasive and sound.

Dr. Brown also acknowledged that Petitioner has never been taken off work as a result of his elbow condition. Thus, Petitioner has continued to work throughout the pendency of this claim and he underwent a second set of electrodiagnostic studies in 2011 that revealed no real change in his ulnar nerves. One may reasonably infer that Petitioner's ongoing work duties do not seem to be worsening Petitioner's condition and, in turn, this may undermine whether his ongoing duties have any causal relationship to his elbow condition.

Also troubling to the Arbitrator was Petitioner's testimony that his elbows have continued to worsen and that he has been seen by another doctor, Dr. Paletta, who referred him to Dr. Phillips for

electrodiagnostic studies. Those studies showed no worsening of the condition. More troubling, Dr. Paletta's records are not in evidence despite Petitioner's testimony that he saw Dr. Paletta for his arms and hands. One may reasonably infer that those records must not be supportive of Petitioner's claim and, therefore, they weren't made a part of the record. At a minimum, they negate causal connection as Dr. Brown's opinions are not based upon any consideration of what has transpired since he last saw Petitioner in March of 2011. Even Dr. Brown acknowledged he would need to re-examine Petitioner before making any further treatment recommendations.

Petitioner's claim appears to rest upon the argument that Petitioner, despite initially experiencing symptoms while working at Pontiac Correction Center, transferred to another facility where his symptoms have persisted and ultimately "manifested themselves." The Arbitrator, however, questions whether Petitioner really did experience any symptoms while at Pontiac and, furthermore, even assuming Petitioner did, he failed to provide that history and details thereof to his doctor. Even Dr. Brown testified, that the claimant/patient is probably in the best position to describe what he/she does and how it has affected him/her. However, Petitioner did not do that herein. There is no objective evidence in this record corroborating Petitioner's testimony that he had symptoms while at Pontiac. There is no causation opinion proffered by Petitioner based upon a clear understanding of the onset of Petitioner's complaints or the duration, frequency, or details of Petitioner's jobs at Pontiac and, most especially, Shawnee. Even Petitioner's direct examination testimony in this case was primarily focused on his job duties at Pontiac with little discussion of what he did/does at Shawnee. Dr. Brown's understanding of what Petitioner did, and when, was anything but a slight oversight and undermined his opinions.

Petitioner's claim for compensation is denied and no benefits are awarded. All remaining issues are moot.

****

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

16IWCC0255

Mark Johns,
Petitioner,
vs.

NO: 10 WC 40569

Freeman United Coal Mining Company,
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 disease, permanent partial disability, evidentiary issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 28, 2015, is hereby affirmed and adopted.

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

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

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

DATED: APR 13 2016
KWL/vf
O-4/4/16
42

Ruth W. White

Michael J. Brennan

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0255

JOHNS, MARK
Employee/Petitioner

Case# 10WC040569

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

On 5/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 16IWCC0255

MARK JOHNS
Employee/Petitioner

Case # 10 WC 040569

v.

Consolidated cases: _____

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Disease, Sections 1(d)-(f), 6(c) and 19(d) of the Occupational Diseases Act

FINDINGS

On **June 29, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** sustain an 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's average weekly wage was **$1,051.00**.

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

Petitioner claims no medical.

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

Because Petitioner failed to prove that he suffers an occupational disease that arose out of or in the course of the exposures of his coal mine employment and that his current condition of ill-being is causally related to his employment, 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.

Arbitrator Molly Dearing

May 23, 2015
Date

MAY 28 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARK JOHNS
Employee/Petitioner

16IWCC0255

v.

Case #10 WC 040569

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of his work accident, Petitioner was fifty-five years of age and employed by Respondent as a coal miner. He was so employed for seventeen years and two months, all of which were spent working underground. Petitioner testified that he was regularly exposed to coal dust, rock dust, and diesel fumes for the duration of his coal mining career.

Petitioner began mining coal on July 26, 1979 in Respondent's Crown IV mine in Pittsburg, Illinois as a bottom laborer. In that position, he performed a variety of job tasks, including rebuilding stoppings, roof bolting, rock dusting, welding, and driving a shuttle car from the continuous miner to the belt to transfer the coal out of the mine. Petitioner testified he was continuously exposed to coal dust while driving the off-side buggy and he also operated a continuous miner at least once a week cutting coal from the face of the mine where there is a significant amount of dust. Petitioner worked at Respondent's Crown IV mine until May 15, 1987 when the mine closed. Petitioner testified that he initially noticed breathing difficulties while running and throwing a football on the beach on vacation in Daytona in 1985 when he became ill and short of breath. He coughed up large lumps of coal dust accompanied with sputum and his chest was painful for the remainder of the vacation. Petitioner testified that he began chewing tobacco in lieu of smoking at that time, but resumed smoking when the mine closed in 1987.

After the closure of Respondent's Crown IV mine, Petitioner worked at Prairie Farms loading milk crates in semi-trucks for one year and worked for seven years at Blue Cross/Blue Shield in the mailroom and microfilming claims. He also drove a 10-wheel truck before he resumed his mining career with Respondent in 2001 as a bottom laborer.

Petitioner testified that while employed by Respondent at its Crowne III mine, he built stoppings and cribs, which support the roof with timbers, and ran a buggy and a scoop. He also transferred supplies to various units in the mines, shoveled and cleaned the belts, and walked a lot of the returns alongside mining officials, an area in which Petitioner testified "all the bad dust goes." Petitioner testified that he was regularly exposed to coal and rock dust from 2001-2007 while working at the Crowne III mine. He stated that when he resumed work for Respondent in 2001, he again experienced shortness of breath, which remained the same until he separated from his employment with Respondent. Petitioner related his breathing difficulties to his weight at that time,

as he testified he weighed 387 pounds when the mine closed. He weighed 248 pounds at Arbitration.

Petitioner worked at Respondent's Crown III mine until June 29, 2007. On that date, his job classification was bottom laborer and he ran a shuttle car, which he testified exposed him to coal dust. The following day, Petitioner awoke and was unable to straighten or bend his knees. He testified that he was not physically able to return to his employment with Respondent due to his bilateral knee condition and he has not worked anywhere since that date. Petitioner voluntarily terminated his employment with Respondent effective June 15, 2008 and his termination notice reflects his last date of work as June 29, 2007. RX 7. On an Accident and Sickness Claim Group Insurance statement, Petitioner reported that he was unable to work beginning June 30, 2007 due to severe pain in his knees that radiated into his legs and hip, and swelling in both knees that rendered it difficult for him to walk or stand. RX 8. At that time, Petitioner testified that he began receiving accident and sickness benefits from the mine. In 2008, Petitioner applied for and received Social Security Disability.

Petitioner's Social Security Disability file was admitted into evidence. In applying for Social Security Disability, Petitioner stated that the illnesses, injuries or conditions that limited his ability to work included knee replacement, rheumatoid arthritis, problems with his left ankle, diabetes, and high blood pressure. He alleged that he became unable to work because of these conditions on July 1, 2007. Petitioner was awarded disability benefits dating back to July 1, 2007. The primary diagnosis for the determination of disability was osteoarthrosis and allied disorders. The secondary diagnosis was disorders of muscle, ligament and fascia. RX 3.

Petitioner testified that his breathing difficulties gradually improved after he left Respondent's employment at the coal mine in 2007, though he continues to have breathing difficulties with activity. He enjoys swimming, but he testified that he cannot hold his breath for prolonged periods of time, and vigorous activities cause him to become light-headed and short of breath. Petitioner testified that he can walk sixty feet, and ascend six or seven stairs before having to stop due to shortness of breath and his bilateral knee problem. Petitioner owns seven classic cars and he testified that he must intermittently sit down to catch his breath while washing them, whereas he used to be able to wax one and start on the other before taking a break. Petitioner testified that he lives a block and a half and from the aquatic pool in his community, and he oftentimes walks or bicycles there. He testified that he cannot ride his bicycle for long distances as he used to be able to do. Petitioner testified that he smokes a half of a pack of cigarettes per day and he has smoked since he was twenty-two years of age. Petitioner takes medication for diabetes and denied presently utilizing any breathing medications.

Dr. Dani Tazbaz evaluated Petitioner on February 4, 2009 and Dr. Tazbaz testified by way of evidence deposition on August 27, 2012. Dr. Tazbaz is board certified in internal medicine, pulmonary disease and critical care medicine. He testified that five to ten percent of his patient census involves the care and treatment of coal miners or former coal miners. Dr. Tazbaz underwent three years of training in pulmonary and critical care medicine under Dr. Robert Cohen, medical director of the black lung clinics of the nation, at Stroger Hospital in Chicago, where he performed coal workers' pneumoconiosis work for the U.S. Department of Labor. In that capacity, he testified that he gained specific experience in radiographic studies for occupational lung diseases and in performing pulmonary function testing on current and former coal mine employees. PX 1.

On February 4, 2009, Petitioner reported to Dr. Tazbaz a history of coughing greater than ten times per day and wheezing primarily with exertion. Petitioner reported that he had been prescribed an inhaler by Dr. Oestmann and Dr. Tazbaz recommended that he take Albuterol, a bronchodilator. Petitioner reported a history of smoking a pack of cigarettes per day, which Dr. Tazbaz testified can cause a cough and wheezing and is generally associated with chronic obstructive pulmonary disease. A physical examination of Petitioner's chest was normal and his pulmonary function testing revealed moderate reduction in FVC and FEV1 with normal FEV1/FVC ratio. Petitioner's lung volumes showed normal TLC with increased RV/TLC and his diffusion capacity was decreased. Dr. Tazbaz opined that Petitioner's spirometry testing failed to reveal any obstructive defect or restriction, though he noted that the reduction of diffusion capacity could be resultant from emphysema, interstitial lung disease, pulmonary vascular disease. Dr. Tazbaz testified that a low FVC and FEV1 with a normal ratio is indicative of a non-specific ventilatory defect that can be seen in patients who are obese or have a neurologic problem. PX 1.

In addition to conducting a physical examination, Dr. Tazbaz reviewed Petitioner's chest x-ray dated February 4, 2009 and he interpreted the same as revealing some calcified granulomas from an old infection. Dr. Douglas Fulk, a board certified radiologist also interpreted Petitioner's x-ray of February 4, 2009 as revealing small pulmonary nodular densities in the bilateral lungs probably due to prior granulomatous process. Dr. Tazbaz diagnosed Petitioner with cough that "could be due to his coal worker pneumoconiosis", granulomatous disease on x-ray, postnasal drip, depression, sleep apnea, smoking, and air trapping and decreased diffusion capacity on pulmonary function testing for which he prescribed Albuterol as needed. He testified that he neither diagnosed Petitioner with chronic bronchitis nor ruled it out. PX 1.

Dr. Tazbaz testified that coal workers' pneumoconiosis is generally considered to be an x-ray reading diagnosis. Dr. Tazbaz testified that pneumoconiosis is a tissue reaction to coal dust trapped in the lungs called scarring or fibrosis. He explained that the scarring or fibrosis is a different process from the halo of emphysema, though both conditions can be caused by exposure to coal dust and the area around the scarring can be an area of emphysema. The scarring and/or fibrosis of coal workers' pneumoconiosis is permanent and cannot perform the function or normal, healthy lung tissue. He explained that a coal miner with radiographically significant coal workers' pneumoconiosis may still have normal pulmonary function tests, normal blood gases, normal physical examinations of the chest, and no symptoms. Dr. Tazbaz testified that by definition, a coal miner with coal workers' pneumoconiosis will have impairment in the area of his lung at the site of the scarring regardless of whether it can be measured. He explained that coal workers' pneumoconiosis generally presents initially in the upper lung zones. In Petitioner's case, Dr. Tazbaz could not recall what type of opacities were present or where they were located in Petitioner's lungs. He testified that he formulates his own opinions concerning the presence of pulmonary processes, but would defer to a board certified radiologist and his interpretation of the films when rendering a formal opinion. Dr. Tazbaz testified that Petitioner never returned to see him, though he spoke to Petitioner on February 6, 2009 when Petitioner called him regarding the results of his chest x-ray and breathing tests. Petitioner refused Dr. Tazbaz's prescription of an inhaler at that time. PX 1.

Dr. Suhail Istanbouly evaluated Petitioner on November 4, 2013 and November 18, 2013. Dr. Istanbouly is a physician specializing in pulmonology and critical care medicine. He is board certified in internal medicine, pulmonary medicine and critical care medicine. Dr. Istanbouly has practiced in Southern Illinois for twelve and a half years. During that time, he has had occasion to

perform black lung examinations for the Department of Labor, as well as at the request of attorneys or others. Dr. Istanbouly regularly performs all of the duties of a pulmonologist, including interpreting x-rays, reading pulmonary function tests, performing physical examinations of the chest, and taking patient histories. PX 2.

During his examination of Petitioner on November 4, 2013, Petitioner denied being previously diagnosed with asthma or chronic obstructive pulmonary disease, and he further denied taking any breathing medication at the time of Dr. Istanbouly's examination. Petitioner reported post nasal drip as a triggering factor of his cough. Dr. Istanbouly testified that Petitioner was morbidly obese when he saw him. Petitioner also related a significant smoking history to Dr. Istanbouly, which Dr. Istanbouly testified can be associated with the development of an obstruction, as well as a cough, sputum and dyspnea on exertion. Dr. Istanbouly testified that he would expect a progression of Petitioner's symptomatology with continued smoking. PX 2, 8.

Dr. Istanbouly diagnosed Petitioner with coal workers' pneumoconiosis, chronic bronchitis, and chronic obstructive pulmonary disease causally related to his exposures as a coal miner. Dr. Istanbouly testified that Petitioner's September 11, 2012 chest x-ray revealed mild chronic interstitial changes, according to the radiologist's interpretation, which Dr. Istanbouly related to coal workers' pneumoconiosis. Dr. Istanbouly testified that the pulmonary function tests he performed showed severe non-specific ventilatory limitation and reflected severe lung damage for which he opined Petitioner's coal workers' pneumoconiosis was a contributing factor. Dr. Istanbouly testified that Petitioner has clinically significant pulmonary impairment as evidenced by his symptoms, complaints and physical findings. Dr. Istanbouly testified that Petitioner's chronic obstructive pulmonary disease and coal workers' pneumoconiosis contributed to his respiratory symptoms. Dr. Istanbouly concluded that Petitioner did not have the pulmonary capacity to perform the manual labor of a coal miner and that Petitioner is disabled because of his lung disease caused in part by his coal dust exposure. PX 2.

Dr. Istanbouly testified that further exposure to the environment of a coal mine would present a risk to his health in the form of an increased potential for progression of these conditions. Dr. Istanbouly testified that in a coal miner with both coal workers' pneumoconiosis and chronic obstructive pulmonary disease, the coal workers' pneumoconiosis would, at least in some measure, contribute to the chronic obstructive pulmonary disease. Dr. Istanbouly testified the scarring of coal workers' pneumoconiosis is permanent, and that an individual suffering from coal workers' pneumoconiosis, by definition, would have some impairment in the function of his lung regardless of whether it can be measured. Dr. Istanbouly explained that coal workers' pneumoconiosis is considered a granulomatous disease. He acknowledged that he was unable to distinguish nodules on a chest x-ray as being due to coal dust versus granuloma unrelated to coal dust by looking at the chest x-ray alone, and he was unable to ascertain the profusion of the films he reviewed, though he opined that Petitioner's pneumoconiosis was mild. PX 2.

Dr. Henry K. Smith, board certified radiologist and certified B-reader, interpreted Petitioner's chest x-ray dated January 14, 2008 as positive for pneumoconiosis with P/S opacities in all lung zones, profusion 1/1. Dr. Smith made an identical interpretation of Petitioner's chest x-rays of February 4, 2009 and February 12, 2010, and additionally noted small old granulomas in the lateral left upper lung. PX 4.

Dr. Michael Alexander, board certified radiologist and certified B-reader, interpreted Petitioner's chest x-ray dated January 14, 2008 as positive for pneumoconiosis with P/P opacities in all lung zones, profusion 1/2. Dr. Alexander noted small calcified granuloma in the left upper lung zone. He made an identical interpretation of Petitioner's chest x-ray dated February 12, 2010. PX 5.

At the request of Respondent, Dr. Cristopher A. Meyer interpreted Petitioner's chest films and testified by way of evidence deposition on September 30, 2011. Dr. Meyer has been board certified in radiology since 1992 and a B-reader since 1999. Dr. Meyer reviewed Petitioner's films of January 14, 2008, February 4, 2009, and February 12, 2010 and he testified that the films were of diagnostic quality. The films from 2008 and 2010 were quality 1 and he graded the chest x-ray from February 4, 2009 as quality 2 due to overexposure. Dr. Meyer noted that there was a single calcified granuloma in Petitioner's left upper zone, but testified that the films were otherwise normal. Dr. Meyer found no radiographic findings consistent with coal workers' pneumoconiosis. RX 1.

Dr. Meyer testified that manifestations of coal workers' pneumoconiosis are a body's ability to clear the coal dust depositions in the lungs. Dr. Meyer stated that there would be some change in the function of the lung at the site of the tissue reaction to coal dust regardless of whether it could be measured. He explained that the macule of coal workers' pneumoconiosis is a permanent abnormality and can progress even once the worker leaves the site of exposure, though he stated that it can improve with removing the workers from the exposure. Dr. Meyer testified that if an individual has coal workers' pneumoconiosis, then he likely that he had some level of the disease when he left the coal mine. Dr. Meyer testified that if a chest x-ray is read as abnormal ten years after a miner leaves the mine, the overwhelming probability is that he had some level of pneumoconiosis when he left the mine. RX 1.

At the request of Respondent, Dr. David Rosenberg reviewed Petitioner's medical records and films. Dr. Rosenberg is board certified in pulmonary disease, internal medicine and occupational medicine. Dr. Rosenberg did a fellowship at the National Institute of Health in Bethesda, Maryland after he graduated from medical school. Dr. Rosenberg has been a B-reader since July 2000. Dr. Rosenberg is a member of the American Thoracic Society, the American College of Chest Physicians and the American College of Occupational and Environmental Medicine. Dr. Rosenberg presently treats patients with coal workers' pneumoconiosis. RX 2.

Dr. Rosenberg interpreted Petitioner's chest x-rays of January 14, 2008, February 4, 2009, and February 12, 2010. He testified that all studies were considered 0/0 with the presence of granulomatous changes and he opined that the films did not reveal the presence of coal workers' pneumoconiosis. Dr. Rosenberg concurred with Dr. Tazbaz's opinion that Petitioner had a non-specific entry defect with air trapping, which he testified is consistent with and can be explained by Petitioner's significant history of tobacco use. Dr. Rosenberg testified that based upon Petitioner's spirometry testing, he did not have an obstruction. Dr. Rosenberg testified that a significant smoking history is generally associated with cough, sputum, shortness of breath, upper respiratory infections, and acute bronchitis. He testified that those symptoms are progressive in an individual that continues with the habit. RX 2.

Dr. Rosenberg testified that his review of the records and films revealed that Petitioner had a long smoking history throughout his adult life and had a history of massive obesity with diabetes, hypertension and various arthritic problems. His chest x-rays did not reveal micronodularity related

to past coal mine dust exposure, and his pulmonary function tests did not demonstrate any restriction. The pulmonary function tests revealed a symmetrical reduction of his FVC and FEV1 predominantly related to his obesity. He also had a component of obstructive lung disease with significant air trapping, increased RV/TLC, with a decreased diffusing capacity measurement. His chest x-ray also revealed hyperinflation. Dr. Rosenberg testified that Petitioner had some granulomatous changes on his chest x-ray related to a past granulomatous type infection unrelated to past coal mine dust exposure. Dr. Rosenberg testified that while Petitioner had a respiratory impairment, he was not disabled from a pulmonary perspective. Dr. Rosenberg testified that Petitioner's major physiologic abnormality is his restriction related to his obesity. He stated that Petitioner's emphysema is of a diffuse nature and, as such, is unrelated to past coal mine dust exposure. Dr. Rosenberg testified that any of Petitioner's continued bronchitis-type symptoms relate to his long and continued smoking history, and he explained that cough and sputum production related to past coal mine dust exposure would dissipate within months after the coal mine dust exposure had ceased. RX 2.

Dr. Rosenberg acknowledged that the environment of a coal mine can cause and aggravate chronic bronchitis, and he stated that it is possible the environment of the coal mine can aggravate sinusitis or rhinitis. He testified that based on his review of the records, Petitioner may have had sinusitis, as Petitioner's medical records reflect numerous entries regarding acute sinusitis, though he stated that any sinusitis or rhinitis did not cause Petitioner permanent impairment. Dr. Rosenberg testified that it was difficult to ascertain whether Petitioner's chronic bronchitis had resolved, as it did not appear that Petitioner had chronic bronchitis on a continual basis and his medical records did not demonstrate that any chronic bronchitis persisted after he left the coal mine. RX 2.

Dr. Rosenberg testified that coal workers' pneumoconiosis is a tissue reaction either in the airways or in the lung parenchyma called scarring or fibrosis. Dr. Rosenberg testified that the scar tissue of coal workers' pneumoconiosis may not function properly, but he stated that most patients with simple disease have preserved lung function. He testified that, on a microscopic basis, if scar tissue is laid down in normal structures, in a theoretical sense that area would not be working properly. Dr. Rosenberg testified it is possible to have radiographically significant coal workers' pneumoconiosis, yet have normal pulmonary function tests, normal blood gases, normal physical exam of the chest and no symptoms, which one may expect with simple coal workers' pneumoconiosis. Dr. Rosenberg testified that one must minimize exposure in order to minimize the risk of further progression of coal workers' pneumoconiosis. RX 2.

Dr. Kevin Oestmann testified by way of evidence deposition. Dr. Oestmann is board certified in family practice and he is a family practitioner at Logan Primary Care in Herrin, Illinois. He treats general medical problems and he occasionally treats coal miners or former coal miners. Dr. Oestmann has treated Petitioner since 1999. PX 3. Dr. Oestmann responded to correspondence from Petitioner's counsel dated March 27, 2014, at which time he opined that Petitioner has coal workers' pneumoconiosis caused by his work as a coal miner. He testified that because of his pneumoconiosis, Petitioner is impaired in the function of his lungs at the site of the scarring of his coal workers' pneumoconiosis. Dr. Oestmann also opined that Petitioner has chronic bronchitis and sinusitis, which were caused or aggravated by his exposures as a coal miner. Dr. Oestmann testified that the entries in his records of coughing, bronchitis, acute bronchitis and bronchospasms were consistent with the diagnosis of hyperreactivity or occupational asthma, which were caused or aggravated by his exposures as a coal miner. Dr. Oestmann testified that as a result of Petitioner's coal workers' pneumoconiosis, sinusitis, bronchospasms, hyperreactivity and

occupational asthma, any further exposure to the environment of a coal mine would present a risk to his health in the form of an increased potential for progression or worsening of those conditions. Dr. Oestmann opined that in light of his diagnoses, symptoms and complaints, as well as his clinical presentation, Petitioner no longer has the pulmonary capacity to work as a coal miner. Dr. Oestmann acknowledged that he is not an expert in the diagnosis of coal workers' pneumoconiosis. He assumed such a diagnosis was based on the chest x-ray and pulmonary function tests. Dr. Oestmann did not have a chest x-ray report in his records positive for coal workers' pneumoconiosis and he denied ordering any pulmonary function tests of Petitioner. Dr. Oestmann did not diagnose Petitioner with asthma while treating him, either occupational or otherwise. He diagnosed Petitioner with bronchitis on February 14, 2000 and one time thereafter, and bronchospasm and sinusitis on one occasion. PX 3.

Medical records from Logan Primary Care were admitted into evidence. Petitioner presented to Dr. Oestmann on August 9, 1999 complaining of right ear pain. He had no cough, but he had mild sinus congestion. A physical examination of the lungs revealed no adventitious sounds. On January 4, 2000, Petitioner returned to Dr. Oestmann with sinus congestion, scratchy throat, sinus drainage and cough. A physical examination of the chest revealed equal breath sounds without rales or rhonchi. Dr. Oestmann's assessment was acute bronchitis. Petitioner presented to Dr. Oestmann on February 14, 2000 with complaints of head congestion, cough and drainage, and he related shortness of breath with lying down. Dr. Oestmann diagnosed Petitioner with an upper respiratory infection, bronchitis and possible pneumonia. A chest x-ray confirmed the presence of pneumonia. Petitioner returned to Dr. Oestmann on February 18, 2000 for reevaluation. He had a productive cough, no shortness of breath, and some rhonchi. Dr. Oestmann's assessment was pneumonia and bronchospasm. PX 3. Petitioner presented to Dr. Oestmann on March 27, 2001 complaining of a cold. His lungs were clear on that date, and Dr. Oestmann diagnosed him with bilateral conjunctivitis and bronchitis. On April 1, 2002, Petitioner was assessed with suspect sleep apnea, diabetes and hypertension. Polysomnogram testing on October 3, 2003 revealed severe sleep apnea. PX 3, 6.

Petitioner returned to Dr. Oestmann on November 14, 2007 complaining of bilateral knee pain. Petitioner continued to smoke and his lungs were clear. On January 14, 2008, Petitioner denied shortness of breath or a cough, and he reported smoking three-quarters of a pack per day. Dr. Oestmann noted diminished breath sounds upon physical examination. On April 24, 2008, Petitioner reported continuing to smoke. An examination revealed that his lungs were clear. Dr. Oestmann advised Petitioner to quit smoking and warned him that he runs the risk of developing chronic obstructive pulmonary disease if he continues. Petitioner presented to Dr. Oestmann on February 24, 2009, at which time he was still smoking. A review of systems was negative for shortness of breath, cough, wheezing, dyspnea on exertion, post nasal drip and pleurisy. His lungs were clear. Petitioner presented to Dr. Oestmann on September 29, 2009 at which time his lungs were clear, he continued to smoke, and it was noted that Petitioner was taking Lisinopril. PX 3, 6.

On February 16, 2010, Petitioner presented to Dr. Oestmann for medical clearance in anticipation of knee surgery. He denied shortness of breath on exertion. A pulmonary examination revealed no shortness of breath, wheezing or dyspnea on exertion, clear lungs, but a chronic cough was noted. Petitioner underwent a chest x-ray on February 12, 2010 that revealed his hyperexpanded lungs in anterior to posterior dimension with flattening of the hemidiaphragms, left base atelectasis and/or pleural parenchymal scarring and old granulomatous disease. Dr. Oestamnn

testified the findings were generally present with significant tobacco use and was consistent with Petitioner's smoking history. PX 3, 6.

On March 9, 2011, Petitioner presented to Dr. Oestmann with complaints of nasal drainage, slight cough, sinus pressure, headache, but no fever. His lungs were clear, and Dr. Oestmann assessed him with a acute sinusitis. Petitioner underwent a chest x-ray on September 11, 2012. The exam quality was limited by Petitioner's body habitus and "less than optimal inspiration/patient position." Dr. Fred Harris, the interpreting radiologist, noted that "[i]t would be difficult to exclude mild pulmonary vascular congestion/interstitial edema" and he identified probable bronchovascular crowding in the bases suggesting atelectasis was also identified, which Dr. Oestmann testified may be associated with Petitioner's obesity. Dr. Harris further noted no well-defined lobar consolidation, visible pleural flue or pneumothorax upon x-ray. On October 1, 2012, Petitioner was seen in consultation by Dr. Raja Maddipoti of Prairie Cardiovascular following his recent hospitalization for cellulitis on his back at which time he was found to have atrial fibrillation. Petitioner was diagnosed with atrial fibrillation, hypertension, dyslipidemia, type II diabetes mellitus, chronic obstructive pulmonary disease, and long-term and current use of anticoagulants. Petitioner was again seen in follow-up with Dr. Maddipoti for those conditions on January 9, 2013. PX 3, 6.

Petitioner returned to Dr. Oestmann on August 12, 2013 with complaints of shortness of breath. Dr. Oestmann noted that "patient was contacted by a lawyer shortness of breath. Had some testing in past for black lung. Would like referral to pulmonologist. Dr. Istanbouli". Dr. Oestmann testified that he referred Petitioner at his request, but he had not seen a need to refer him prior to that date. On October 29, 2013, Petitioner returned to Dr. Oestmann concerning a rash on his feet and reported pulling invisible worms from his breast. Dr. Oestmann assessed Petitioner with formication and ceased his Metformin medication to ascertain if Petitioner was experiencing an adverse reaction to the medication that might cause a delusion. Thereafter, Petitioner continued to treat with Dr. Oestmann for formication, bilateral knee pain, diabetes, hypertension, diabetic neuropathy, atrial fibrillation, dyslipidemia, and tobacco use disorder. PX 3.

Medical records of Illini Medical Associates were admitted into evidence. On June 5, 2005, Petitioner related cough, congestion, and sinus pressure. An examination of the chest revealed respirations to be even and unlabored. Petitioner was assessed with acute sinusitis and conjunctivitis. Petitioner presented on November 21, 2005 with complaints of a head cold with sore throat and head congestion. An examination of the chest revealed respirations even and unlabored, and he was assessed with acute sinusitis and rhinitis. On March 7, 2006, Petitioner complained of sinus drainage and sore throat, but no cough. Examination of the chest revealed respirations to be even and unlabored. Petitioner was seen for a consultation with Dr. Stephen Jennison on April 6, 2006 for hypertension, diabetes mellitus, morbid obesity and shortness of breath. Dr. Jennison noted that Petitioner was a smoker, and an examination of the chest revealed normal respirations with normal diaphragmatic movement. Petitioner was assessed as a diabetic with shortness of breath and hypertension, and he was prescribed Lisinopil. Petitioner presented on October 16, 2006 for a fever, body aches, and bilateral knee pain. Examination of the chest revealed respirations to be even and unlabored. The diagnosis on this date was upper respiratory infection with cough and osteoarthritis of the right knee. On January 8, 2007, Petitioner presented with complaints of body aches, diarrhea, gagging, post nasal drip, vomiting and nausea. He was diagnosed with acute bronchitis on that date, as well as on January 11, 2007 and January 23, 2007. On January 30, 2007, Petitioner returned for a follow-up of his acute bronchitis, and Petitioner noted chest discomfort and sinus drainage. Petitioner related that he made a rattling sound when he breathed. Examination

of the chest revealed respirations to be even and unlabored, and clear to auscultation bilaterally. Petitioner was diagnosed with an upper respiratory infection. On May 3, 2007, Petitioner presented with right-sided leg pain present for several months and some right hip pain. An examination revealed that Petitioner had difficulty standing. On June 30, 2007, Petitioner presented to Dr. John Rollett and reported bilateral knee pain for three days, which Dr. Rollett assessed as a knee sprain. PX 9, RX 6.

Medical records from the Orthopedic Center of Illinois were admitted into evidence. On July 9, 2007, Petitioner presented to Dr. Rodney Herrin with complaints of his bilateral knees. RX 10. Petitioner underwent a right total knee arthroplasty on January 21, 2008 and a left total knee arthroplasty on April 12, 2010 with Dr. Thomas Davis. PX 9, RX 9.

CONCLUSIONS OF LAW

In regard to the disputed issues of disease and causal connection, under the Workers' Occupational Diseases Act, a claimant must prove that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. An occupational exposure need not be the sole or principal causative factor, as long as it was a causative factor in the condition of ill-being. *Bernardoni v. Indus. Comm'n*, 362 Ill. App. 3d 582, 596 (2005).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he has coal workers' pneumoconiosis. In so concluding, the Arbitrator finds the B-reading interpretations and opinions of Drs. Meyer and Rosenberg more persuasive that the B-reading interpretations of Drs. Smith and Alexander. The Arbitrator notes that Drs. Smith, Alexander, Meyer, Rosenberg, and Fulk all found evidence of granuloma upon review of Petitioner's x-rays, though Drs. Smith and Alexander interpreted the x-rays as also revealing the presence of coal workers' pneumoconiosis. Dr. Fulk interpreted Petitioner's x-ray of February 4, 2009 as revealing "small pulmonary nodular densities in the bilateral lungs probably due to prior granulomatous process", but he did not identify coal workers' pneumoconiosis. The Arbitrator finds the absence of any findings of coal workers' pneumoconiosis by Dr. Fulk significant, given that Dr. Fulk was not directly retained by either party in the present case. As the interpretations and opinions of Drs. Meyer and Rosenberg are more consistent with that of Dr. Fulk than are those of Drs. Smith and Alexander, the Arbitrator accordingly places greater weight on the interpretations of Drs. Meyer and Rosenberg.

Further, Dr. Tazbaz opined that Petitioner's chest x-ray of February 4, 2009 was compatible with coal workers' pneumoconiosis, yet he was unable to ascertain what opacities were present or their location in Petitioner's lungs, he was unable to assign a profusion rate to Petitioner's alleged coal workers' pneumoconiosis, and he deferred to a board certified radiologist for a final opinion. PX 1. Similarly, Dr. Istanbouly conceded that he was unable to distinguish the nodules present on Petitioner's x-ray as being resultant from coal dust or merely granuloma unrelated to coal dust exposure (PX 2), whereas Dr. Rosenberg specifically opined that the evidence of past granulomatous changes on Petitioner's chest x-ray were related to a prior granulomatous-type infection and were not related to any coal mine exposure. RX 2. While Dr. Oestmann diagnosed Petitioner with coal workers' pneumoconiosis, the basis of his opinions is unclear and do not warrant evidentiary weight, given that he acknowledged he did not review a chest x-ray positive for coal workers' pneumoconiosis and he denied ordering Petitioner to undergo any pulmonary function testing. PX

3. Based upon the foregoing and the totality of the evidence, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis.

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he has chronic obstructive pulmonary disease, asthma, hyperreactivity, chronic bronchitis, bronchospasm, or sinusitis causally related to the exposures of his coal mine employment. In so concluding, the Arbitrator finds probative Petitioner's testimony that his symptomatology improved following his separation from the coal mine in 2007, which undermines the suggestion of a causal relationship between his current condition and his employment, and instead demonstrates that his significant history of smoking and/or his co-morbid factors are solely causative of present complaints. As Dr. Rosenberg explained, smoking is generally associated with symptoms of cough, sputum production, upper respiratory infections, and acute bronchitis, which can progress in an individual that continues with the habit (RX 2), as Petitioner has continued to do to the present, and Dr. Instanbouly likewise testified that he anticipated Petitioner's condition to progress with his persistent smoking history. PX 2.

Furthermore, the Arbitrator notes that Dr. Oestmann did not diagnose Petitioner with asthma during his care and treatment of him, and he diagnosed Petitioner with bronchospasm on only one occasion. PX 3. The Arbitrator further notes that Dr. Tazbaz did not diagnose Petitioner with chronic bronchitis at the time of his evaluation in 2009, approximately two years after Petitioner left Respondent's employment. PX 1. Petitioner was not diagnosed with occupationally-related chronic obstructive pulmonary disease or chronic bronchitis until he presented to Dr. Instanbouly in 2013. The Arbitrator finds the temporal disparity of six years between his cessation of exposure in 2007 and his examination with Dr. Instanbouly in 2013 undermines the suggestion of any causal relationship between Petitioner's current condition of ill-being and his employment.

Moreover, the Arbitrator finds the absence of persistent and frequent respiratory symptoms after Petitioner's cessation of coal mine exposure in 2007 demonstrative of a lack of a causal relationship between his alleged current condition and his coal mine employment. The Arbitrator notes that Petitioner repeatedly denied shortness of breath until August 12, 2013 when Petitioner reported he was "contacted by a lawyer" and requested a referral to Dr. Istanbouly. PX 3. The Arbitrator further notes that many of Petitioner's presentations with symptoms consistent with bronchitis, such as that of February 14, 2000, February 18, 2000, October 26, 2006, and January 30, 2007, were diagnosed as upper respiratory infections and/or pneumonia that resolved, and that Petitioner's presentations with respiratory symptomatology, as on October 16, 2006 and January 8, 2007 for example, were frequently associated with other symptoms, such as sore throat, head cold, fever, body aches, diarrhea, vomiting and/or nausea (PX 3, 9, RX 6) more suggestive of a common temporary ailment than a chronic occupational disease.

The Arbitrator ultimately finds the opinions of Dr. Rosenberg persuasive in that they are corroborated by Petitioner's testimony and well-founded in the record, and accordingly places great weight on those opinions. Dr. Rosenberg opined that any continued symptomatology consistent with bronchitis is unrelated to Petitioner's previous coal mine exposure, as he explained that a cough and sputum production relative to past coal mine dust exposure would dissipate within months after the exposure had ceased. RX 2. The Arbitrator notes his opinion is supported by Petitioner's testimony that his symptoms have improved following his separation from the coal mine in 2007, as well as by the pulmonary function testing on February 4, 2009 by Dr. Tazbaz that revealed no

obstruction or restriction. PX 1. Dr. Rosenberg's opinion that Petitioner's findings on pulmonary function testing, including his reduced FVC and FEV1, respiratory impairment, and air trapping, are related to Petitioner's massive obesity and history of smoking (RX 2) is corroborated by Dr. Tazbaz's testimony that a low FVC and FEV1 with a normal ratio is indicative of a non-specific ventilatory defect that can be seen in patients who are obese or have a neurologic problem. PX 1. In addition, Dr. Rosenberg opined that any sinusitis experienced by Petitioner while employed by Respondent did not result in any permanent condition (RX 2), which is supported by the absence of persistent complaints indicative of a chronic condition after he separated from his coal mine employment in 2007 and Dr. Oestmann's testimony that he diagnosed Petitioner with sinusitis on only approximately one occasion. PX 3, 6, PX 9, RX 6.

Based upon the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner failed to prove that he suffers any occupational disease that arose out of or in the course of the exposures of his coal mine employment and that his current condition of ill-being is causally related to his employment. Claim is denied. The remaining issues are moot and the Arbitrator makes no conclusions as to those issues.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOLA HASSELLBRING,

Petitioner,

16IWCC0256

vs.

NO: 95 WC 06929

SAM'S CLUB,

Respondent.

ORDER under Section 19(h) and Section 8(a)

Petitioner, in her capacity as a check-out supervisor for Respondent, sustained an injury to her lower lumbar spine and right lower extremity while attempting to lift cases of soda on June 13, 1994. She filed a workers' compensation claim with the Commission and was subsequently awarded temporary total disability benefits for 143-6/7 weeks and a permanent partial disability benefit of 350 weeks of compensation as she was found to have lost 70% use of the person as a whole in a November 24, 2008, arbitration decision. She appealed the arbitration decision but then withdrew her appeal, choosing instead to accept the tendered awards. Commission Kevin Lamborn granted Petitioner's motion on August 27, 2009. Petitioner, on April 18, 2011, filed a Petition for Review under Section 8(a) and 19(h) of the Act, alleging that the condition of her lower lumbar spine and right lower extremity had worsened since her claim had been decided. The Commission notes Petitioner's petition was timely filed pursuant to Section 19(h) of the Act.

A hearing pursuant to Petitioner's motion occurred on August 21, 2014, with both parties being represented and Commissioner Lamborn presiding. A transcript of the proceeding was taken and included the testimony of Petitioner and Evelyn Bujna, a coworker of Petitioner, the deposition testimony and medical records of Dr. Shaun Kondamuri, Petitioner's treating pain medication physician, and the deposition testimony of Dr. Frank Phillips, Respondent's Section 12 examining physician. Additionally, both parties engaged in oral arguments before the Commission on February 22, 2016. The Commission, after reviewing the transcript of the proceedings and considering the arguments made before it, concludes Petitioner failed to

demonstrate a material change in her previously-found disability to justify increasing her permanent partial disability award.

It is axiomatic that for additional benefits to be warranted under Section 19(h) there must be a material change to the injured worker's disability and, to determine if such a change has occurred, the Commission must consider the evidence of disability presented in prior proceedings. In the instant matter, the Commission looks to the, November 24, 2008, arbitration decision for this evidence.

Noted in the November 24, 2008, arbitration decision is Petitioner's description of her then-present condition as well as the medication she took to address her condition. Petitioner was recorded as complaining of her back hurting constantly and of experiencing a gnawing pain at her waistline that travelled through her right lower extremity into her right foot. Also recorded was Petitioner using Vicodin, Ultram, Ibuprofen 800, Provigil and a permanently-implanted spinal cord stimulator to address those symptoms. The arbitration decision noted, as a result of her injury, Petitioner was transferred from her previously held position as a check-out supervisor to that of a greeter.

Before Commissioner Lamborn on August 21, 2014, Petitioner testified that she continued to be employed by Respondent as a greeter and continued to use Vicodin, Ultram, and Ibuprofen 800 to treat her symptoms. Petitioner did complain of experiencing "more" pain than she had as of the October 14, 2008, arbitration hearing. She testified, specifically, of having periodic, sharp pains in both her right and left legs, more frequently in the right leg than the left leg. The pain to Petitioner's left leg, she stated, began in 2011.

Ms. Bujna testified on Petitioner's behalf before Commissioner Lamborn on August 21, 2014. She indicated she sometimes works with Petitioner, also as a greeter, and has observed Petitioner being in more pain that when they first began working together. Ms. Bujna failed to explain how she arrived at that conclusion.

The Commission finds the testimony of Petitioner and Ms. Bujna fail to demonstrate any material change in Petitioner's condition after October 14, 2008. It also finds Dr. Kondamuri's treatment records and testimony also fail to do so as well.

Dr. Kondamuri's treatment records show he has been Petitioner's treating physician since well before her October 14, 2008, arbitration hearing and reveal, both before and after the arbitration hearing, Petitioner regularly complained of pain ranging 7-10/10 on the visual pain scale. These same records reveal the medication Dr. Kondamuri prescribed remained relatively consistent throughout the course of Petitioner's treatment. The adjustments made to the medications appear to be more in response to finding more effective relief to Petitioner's complaints of pain rather than due to complaints of increasing pain. The Commission finds only one instance when Petitioner received stronger medication to address increased pain. This occurred immediately after Petitioner's spinal cord stimulator was removed. Petitioner, who had been treating with Vicodin 7.5mg, was then prescribed Vicodin-ES for approximately two months following the removal of the spinal cord stimulator on January 9, 2009. After those few

months, the prescription of Vicodin 7.5mg was resumed and continues to be prescribed for Petitioner as of the date of the hearing before Commissioner Lamborn on August 21, 2014.

Petitioner supplemented Dr. Kondamuri's treatment records by having him provide testimony in an evidentiary deposition. His testimony, however, strays from his medical records when he testified that Petitioner experienced increased symptoms, most specifically with respect to the above reference spinal cord stimulator. His treatment records indicate problems with the spinal cord stimulator began as early as October 24, 2007, when Petitioner was recorded as complaining that she experienced no significant relief from it. A month later, on November 21, 2007, Dr. Kondamuri wrote of Petitioner wanting it removed. The following month, on December 19, 2007, he recorded that Petitioner was no longer using it. These entries are consistent with the deposition testimony Dr. Kondamuri later gave of the spinal cord stimulator being removed because "it was no longer a factor in controlling [Petitioner's] overall pain syndrome." He, however, grossly misstated the history as to when the spinal cord stimulator became ineffectual when he testified to the spinal cord stimulator functioning at least through the date of Petitioner's arbitration hearing, October 14, 2008. The Commission finds the scenario where the spinal cord stimulator being mechanically functional as of October 14, 2008, to be not the same as it being even minimally effective, particularly when Dr. Kondamuri's records indicate it had not been used in the approximately ten months leading up to the arbitration hearing.

Dr. Kondamuri's treatment records document Petitioner complained of increasing muscle cramping and spasms in 2011. His records reflect neither cramping nor spasms being found on any occasion he examined Petitioner. Dr. Kondamuri, however, testified to thinking that they had been present. His records indicate Petitioner's complaints of both tailed off over the course her treatment. This, when notice is taken Petitioner complained of neither when testifying before Commission Lamborn, leads to the conclusion that, if the cramping and spasms were experienced, they were only temporal in nature and not presently effecting Petitioner.

Dr. Kondamuri, on at least three occasions, addressed what he believed to the origin of Petitioner's complaints of pain, cramping, and tingling in her left lower extremity. On November 28, 2011, he wrote of assuming these were due to the original pathology, Petitioner's June 13, 1994, work accident, since Petitioner had not had any recent injury or precipitating event. He reasserted this position on December 29, 2011, writing, "Her left leg pain started approximately two months ago, which is most likely probably due to aggravation from her pre-existing condition due to work." He had Petitioner undergo a CAT scan of her lumbar spine on February 7, 2012, and, after reviewing the results of the CAT scan, "presumed" Petitioner's left leg complaints were the result of the degeneration at the L4-5 level that was revealed by the CAT scan, noting that the L4-5 level was a level adjacent to the level injured in Petitioner's June 13, 1994, accident. Dr. Kondamuri's assumptions and presumptions were not elaborated upon during his deposition testimony. Going unexplained, therefore, was why Dr. Kondamuri attributed complaints that emerged in 2011 to Petitioner's accident from more than seventeen years earlier or what aggravation did he believe Petitioner to have experienced to explain her complaints. Also going unexplained by Dr. Kondamuri was how the findings of the CAT scan were related to Petitioner's left lower extremity complaints, particularly in light of his cross-examination testimony that the CAT scan not revealing any nerve root compression. The onset of Petitioner's

left lower extremity complaints occurred in 2011, more than a decade and a half removed from her original accident, but is related back to that accident by Dr. Kondamuri through unsupported and unsatisfying speculation.

On December 20, 2012, Petitioner was seen pursuant to Section 12 of the Act by Dr. Frank Phillips at the request of Respondent. Dr. Phillips had previously examined Petitioner in 2006 in connection to her June 13, 1994, work accident. In comparing his more recent examination findings against his earlier ones and as well as reviewing Dr. Kondamuri's treatment records dating from May 12, 2003, through September 27, 2012, he concluded there was no change to Petitioner's physical condition. He also found there to be no causal relationship between Petitioner's complaints involving her left lower extremity and her work accident and offered no opinion regarding the origins of those complaints. The Commission finds Dr. Phillips to be almost as qualified to ascertain any changes to Petitioner's condition as Dr. Kondamuri given that Dr. Phillips has seen Petitioner both before and after her October 14, 2008, arbitration hearing and has had the opportunity to review Petitioner's treatment records from similar periods of time but more credible than Dr. Kondamuri. Whereas Dr. Kondamuri's testimony strayed uncomfortably from what was recorded in his treatment records, Dr. Phillips' testimony remained consistent with what Dr. Kondamuri had written over the years.

The Commission finds Petitioner's claim of her physical condition worsening since October 14, 2008, is unsupported by any reasonable measure. The most reliable evidence in this case is Dr. Kondamuri's medical records. Those records reveal, but for a temporary, approximately two-month worsening of her pain complaints and resultant temporary change in pain medication in 2009, Petitioner's complaints and the treatment of said complaints remained more or less unchanged from the time of her October 14, 2008, arbitration hearing through the time of her August 21, 2014, Section 19(b) hearing before Commission Lamborn.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition pursuant to Section 19(h) and Section 8(a) for additional benefits under Section 8(a) and Section (d)2 of the Act is denied.

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

DATED: APR 13 2016
KWL/mav
O: 2/22/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lupe Melo,
Petitioner,
vs.

NO: 10WC6872

Cicero Public Schools,
Respondent,

16IWCC0257

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 August 3, 2015. is hereby affirmed and adopted.

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

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

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

DATED: APR 14 2016
MJB/bm
o/4/11/2016
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MELO, LUPE
Employee/Petitioner

Case# 10WC006872

CICERO PUBLIC SCHOOLS
Employer/Respondent

16IWCC0257

On 8/3/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1067 ANKIN LAW OFFICE LLC
JOSUHA E RUDOLFI
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

1120 BRADY CONNOLLY & MASUDA PC
MATTHEW P SHERIFF
10 S LASALLE ST SUITE 900
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Lupe Melo
Employee/Petitioner

v

Cicero Public Schools
Employer/Respondent

Case # 10 WC 06872

16IWCC0257

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **April 3, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0257

FINDINGS

On **2/15/2010**, 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 $**9,360.00**; the average weekly wage was $**180.00**.

On the date of accident, Petitioner was **53** 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 $**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

Claim for compensation denied. Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on February 15, 2010 and failed to prove a causal connection between any said injuries and her current condition of ill-being regarding her right and left elbows and her right middle finger.

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

August 3, 2015
Date

ICArbDec p. 2

AUG 3 - 2015

FINDINGS OF FACT

Petitioner was employed by Respondent as a part-time lunchroom attendant from 2007 to 2010. Her duties from 2007 to January of 2010 required her to pick up trays of food and take them to tables. She would carry about 20 trays, weighing 20-40 pounds per lunch period. There would be up to 3 lunch periods. She would work about 15 to 20 hours per week. After the children ate their lunch, Petitioner would pick up the trays and put them on a cart and take them to the kitchen. In January of 2010, Petitioner began a rotation as a lunch supervisor. In this position, Petitioner did not lift trays. She did clean tables and move chairs.

Petitioner is right handed.

Petitioner testified that in February of 2010 she began to notice that both elbows hurt and she had developed a trigger finger. Petitioner testified that she saw her PCP, Dr. Rueda, on February 15, 2010 and was given a light duty work restriction (do not carry, push or pull more than 5 pounds). Petitioner gave notice to her supervisor on February 16, 2010. Respondent has a "No Light Duty" policy and Petitioner then began losing time from work. (PetEx. 6)

The records of Cicero Medical Clinica (Drs. Rueda and Licea) show that Petitioner was seen for mammogram results, left knee discomfort and left and right elbow discomfort by Dr. Rueda on February 15, 2010. The assessment was: left knee pain and Anaprox and an ortho referral were recommended. When Dr. Rueda saw Petitioner on March 2, 2010, she had pain in the left knee, shoulder and upper arms. The assessment was shoulder/knee pain and orthopedic follow up was suggested. A therapy note from MacNeal Hospital of March 15, 2010 shows that Petitioner was seen for: left shoulder pain, bilateral shoulder dysfunction. Tenderness was noted at both epicondyles. Petitioner was seen for release to work on May 15, 2010 by Dr. Licea. She felt "much better", "released to work per physical therapy." The assessment appears to be right epicondylitis, although it is noted that Petitioner would wear a brace on the left (for the knee?). Petitioner had been seen at MacNeal for left knee PT on April 6, 2010. Right hand/finger discomfort was noted on September 30, 2010. (PetEx. 1)

Petitioner was off work from February 16, 2010 through May 16, 2010. She returned to work on May 17, 2010 and worked for the school until June of 2010. She has not worked for Respondent since June of 2010.

Petitioner saw Dr. Chmell at U of I Medical Center on March 15, 2010 on a referral by Dr. Rueda. She was seen for bilateral arm swelling and mild left humerus pain that began after she was carrying trays. X-rays of the upper extremities were negative. The physical exam was benign. There was no tenderness to palpation of the humerus and elbows. Petitioner was also seen for left knee pain. Dr. Chmell recommended a HEP and Petitioner was released, PRN. (PetEx. 3)

Petitioner testified that she received PT at MacNeal Hospital from March 15, 2010 through November 8, 2010. The records from MacNeal reveal that Petitioner had therapy for her left shoulder and left knee as well as her elbows. The history was of bilateral elbow pain since January of 2010 (1/11/10) – she felt a lot of pain in both elbows and arms. The therapist's exam was said to show tenderness at the lateral epicondyles, but provocative tests did not show epicondylitis. A Patient Questionaire of September 16, 2010 is for both knees and there is no mention of elbow complaints. (PetEx. 5)

Petitioner saw Dr. Michael Jablon for treatment on April 12, 2010 and May 10, 2010. The history on April 10 was left shoulder and left, more than right, elbow pain. She lifted large trays over a 2-1/2 year period. In January, there was a rotation and she had a significant onset of bilateral elbow pain. The diagnosis was bilateral epicondylitis. Dr. Jablon recommended ergonomics, care in lifting, an elbow strap during the day and wrist splints at night, PT, medications and HEP. Petitioner had PT at Rapid Rehab and it was noted that the patient injured herself on January 12, 2010. "She reports lifting heavy metal trays in the cafeteria at work, which gradually resulted in increased pain in both elbows. The therapist documented that she had progressed well on May 10, 2010. She was able to do chores at home and could lift a gallon of milk. Dr. Jablon's chart note of May 10 shows that Petitioner's bilateral elbow pain had largely alleviated with therapy. Petitioner was released to full duty work and released from care as of May 10 (after completing one more week of therapy). Dr. Jablon prepared a narrative report for Petitioner's attorney on September 28, 2011. He thought that Petitioner's bilateral epicondylitis condition was causally related to her work activities (lifting trays weighing 30 pounds all day, three days per week). (PetEx. 4)

Petitioner had treatment by Dr. Mark Gonzalez at U of I for right 3rd finger trigger finger on May 4, 2011 and June 29, 2011. The history on May 4, 2011 was complaints of right 3rd finger trigger finger for months. Dr. Gonzalez gave Petitioner an injection on May 4. On June 29, 2011 it was charted that the condition had resolved. Petitioner had no problems. There was no pain and no triggering. (PetEx. 3)

Petitioner was seen by Dr. Sanjay Patari for a §12 examination at Respondent's request on February 20, 2012. Dr. Patari took a history of Petitioner's job duties and that she had no complaints while performing the carrying job for two years. Petitioner's pain complaints developed after she switched to a supervisory job with minimal physical activities. Petitioner said that she first noticed pain on February 15, 2010. The physical exam was benign, with it being documented that the right sided symptoms completely resolved and the left elbow exhibited minimal pain. There were no complaints regarding the right middle finger and Petitioner did not mention it during the exam. Dr. Patari thought that there was no causal connection between Petitioner's work activities and her elbow conditions because the onset of the complaints occurred after she switched jobs. (ResEx. 1).

At trial, Petitioner denied prior injuries to her elbows and right hand. Her elbows continue to hurt, especially with weather changes. She has decreased flexion in the right middle finger. She has pain in the right middle finger. Petitioner's Exhibit Number 1 was her claimed medical bills. No TTD or medical bills were paid by Respondent.

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on February 10, 2010 and failed to prove that there is a causal

connection between any such injury and her current condition of ill-being (status post bilateral epicondylitis resolved by therapy and HEP with minimal residuals and status post right 3rd finger trigger finger, onset early 2011, resolved by HEP and injection).

The onset of Petitioner's elbow complaints is clearly after she rotated out of the job that required her to carry the metal lunch trays. The onset of the trigger finger complaints is more than a year after she rotated out of that job. Dr. Patari's opinion on causation is persuasive and credible in this case.

Dr. Jablon's opinion is not persuasive in this case and appears to be premised on inaccurate information (Petitioner did not work all day lifting "heavy" trays 3 days a week). Additionally, Petitioner's testimony and the medical records do not support a finding of accident and causation in this case, as the onset of the elbow complaints is subsequent to the time that Petitioner ceased carrying heavy trays. The onset of the trigger finger problem appears to have occurred more than a year after Petitioner rotated out of the tray carrying job.

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:

Given the Arbitrator's findings regarding accident and causation above, the Arbitrator needs not decide this issue.

Additionally, the bill from Berwyn Orthopedic Surgeons is for treatment for the knees and was not supported by testimony or medical records. The OOP bill from I Desai & R Gokani, MD, SC was not supported by testimony or medical records. Finally, the claimed medications from Target are from unknown doctors, for unknown conditions and are not supported by testimony or medical records.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE AND WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Given the Arbitrator's findings regarding accident and causal connection above, the Arbitrator needs not decide these issues.

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

Jody Hathaway,
Petitioner,
vs.
SOI/Illinois Department of Corrections,
Respondent,

NO: 13WC 037869

16IWCC0258

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, notice, 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 May 5, 2015, is hereby affirmed and adopted.

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

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

DATED: APR 14 2016
MJB/bm
o-4/4/16
052

Michael J. Brennan

Ruth White

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HATHAWAY, JODY
Employee/Petitioner

Case# 13WC037869

SOI/ILLINOIS DEPT OF CORRECTIONS
Employer/Respondent

16IWCC0258

On 5/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

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

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

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

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

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

MAY 5 - 2015

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

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Jody Hathaway
Employee/Petitioner

v.

SOI/Illinois Department of Corrections
Employer/Respondent

Case #13 WC 037869

Consolidated cases: N/A

16 IWCC0258

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 10, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **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 **$91,592.00**; the average weekly wage was **$1761.38**.

On the date of accident, Petitioner was **44** years of age, ***single*** 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 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 bills paid by its group medical plan for which credit is allowed under Section 8(j) of the Act.

ORDER

Petitioner failed to prove he sustained an accident on June 19, 2013 that arose out of and in the course of his employment with Respondent or that his condition of ill-being in his hands was causally related to his injury or his employment with Respondent. Petitioner's claim 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.

Signature of Arbitrator

May 2, 2015
Date

MAY 5 - 2015

JODY HATHAWAY v. SOI/ILLINOIS DEPARTMENT OFCORRECTIONS,

13 WC 037869

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of arbitration the disputed issues included accident; notice; causal connection; medical bills; temporary total disability benefits; and the nature and extent of any injury. Present at the hearing was Respondent's representative, Randy Davis. During the course of the hearing Counsel for Respondent stipulated on the record that the dispute regarding temporary total disability was limited to liability and any objection to the time frame of Petitioner's temporary total disability was waived.

The Arbitrator finds:

On June 19, 2013 an Incident Report was completed by Petitioner and his supervisor, Randy Davis. Petitioner reported that tingling and numbness were causing discomfort and difficulty at times making it difficult to complete assignments in a timely fashion. "The Major feels the injury is directly related to the work that is performed during [his] current job duties along with duties performed in the past for the [IDOC]." (RX 1)

On August 30, 2013, Petitioner completed his employee Notice of Injury form. Petitioner indicated that the date of injury or illness was "unknown." The date he reported it was listed as June 19, 2013. Petitioner further represented that he had sought treatment with Dr. Swafford in Cape Girardeau, Missouri. Petitioner reported that he was experiencing "tingling in the hands and steadily gets worse." Petitioner stated that he was performing his everyday job duties at the time of injury. (RX 1)

On September 6, 2013 Petitioner was examined by his family physician, Dr. Matthew Winkleman, for the purpose of establishing care with Dr. Winkelman. Petitioner had complaints of hand pain that was gradual in onset and aggravated by work activities. Dr. Winkelman recommended a nerve conduction study. (PX 3)

On September 11, 2013, and at the request of his attorney, Petitioner was examined by Dr. Fakhre Alam, a neurologist. (PX. 4) Petitioner gave a history of numbness and tingling involving his hands. Dr. Alam performed a nerve conduction study which showed bilateral left (mild) and right (moderately severe) carpal tunnel syndrome.

In a note dated September 17, 2013 Petitioner was referred by Dr. Winkelman to Dr. Young. (PX 3)

On September 20, 2013 Petitioner returned to Dr. Winkleman. (PX. 3) Dr. Winkleman noted that the nerve conduction study confirmed carpel tunnel syndrome. It was noted that Petitioner had an appointment with a hand surgeon the next week. Petitioner was noted to be seeing a doctor who was prescribing testosterone and thyroid medication.Dr. Winkleman also found that Petitioner had hypertension and prescribed medication on September 20, 2013.

On September 30, 2013 a Supervisor's Report of Injury was completed. (RX 1; PX 8)

On October 9, 2013, Petitioner began treating with Dr. Steven Young at the Orthopaedic Institute for his hand complaints. Petitioner completed a questionnaire in which he gave a history of ongoing complaints for one year due to work duties of computer usage and writing. Petitioner listed his job as a "Shift Supervisor." Petitioner's hobby was listed as horseback riding. (PX. 5)

Petitioner was examined by Phil Erthall, Dr. Young's physician's assistant. (PX 5) Petitioner reported that "for about a year" he had been experiencing bilateral complaints in his hands with the right side worse than the left. He noted numbness, tingling, and loss of grip strength and night-time pain. Petitioner was noted to be taking Armour Thyroid and Lisinopril. On exam, Petitioner had normal testing at the elbows and had positive Tinel's and median nerve compression tests bilaterally. Dr. Young reviewed the nerve conduction study and agreed that Petitioner had bilateral carpal tunnel syndrome and he recommended bilateral releases. Dr. Young inquired about putting Petitioner on light duty but Petitioner preferred to remain on full duty. Approval through workers' compensation was to be requested.

On November 1, 2013 Petitioner signed his Application for Adjustment of Claim in this case. (AX 2)

On December 13, 2013, Dr. Young performed a right carpal tunnel release. Intra-operatively, Dr. Young observed very severe thickening of the transverse carpal ligament. (PX 5) Following surgery Petitioner continued to treat with Dr. Young. (Id.) Petitioner returned to see Dr. Young on December 27, 2013 and January 24, 2014 (PX. 5, PX. 9) He underwent occupational/physical therapy. Petitioner was released to return to work full duty without restrictions. (PX. 9, pg. 25)

On October 10, 2014 Petitioner's attorney e-mailed Petitioner requesting as much detailed information as possible with regard to Petitioner's job duties and the length of time at each correctional facility as the more details he could provide them the better the deposition would go "for us." (PX 9 – RX 2)

On October 11, 2014 Petitioner sent, via e-mail, the following information to his

attorney:

Started at Menard C.C. as a Correctional Officer March 6th 1995, transferred to Shawnee C.C. June 1st 1997. I was a member of the Tactical team from 1996 to 2004. I also was a member of the TRT/Sort team for 5 years which required a lot of training and weapons range work. Promoted to Assistant Warden of Operations at Shawnee C.C. June 1st 2004. Promoted to Warden at the Vienna C.C. June 1st 2006 and then transferred to Shawnee as Warden on October 16, 2007. I accepted a Shift Supervisor's (Major) on October 1st 2010 at the Vienna C.C. until present[.] As a Correctional Officer at Menard C.C. and Shawnee C.C. I performed a lot of repetitive movements in locking and unlocking doors and cuffing and uncuffing offender's [sic], and documenting offender movement. As a Supervisor a lot of computer work and paperwork required as well as inspections of the facility. A CMS-201 and CMS 104 explains in detail job duties if you ever have received them from a different case. I will be on vacation next week but will check my phone periodically if there is anything else you need.

(PX 9 – RX 2)

The foregoing information was forwarded to Dr. Young's office on October 12, 2014. (PX 9 – RX 2)

Dr. Young testified via deposition taken on October 14, 2014. (PX. 9) Dr. Young is a board certified orthopedic surgeon who treats people with hand and upper extremity problems. (Id., p. 4) Dr. Young performs about 400 carpal tunnel surgeries per year. (PX 9, p. 7) Dr. Young testified that he believes repetitive gripping, pinching, lifting, placing one's hands in a flexed position or potentially even an extended position, or anything off of neutral and potentially not even a forceful activity but an activity that is done or performed multiple times repetitively could cause one to develop carpal tunnel syndrome. (PX. 9, pp. 7-8) He was unaware of any threshold levels for carpal tunnel syndrome. (PX 9, p. 8) He acknowledged that carpal tunnel syndrome is more often seen in women than in men. (PX 9, p. 9) Dr. Young agreed that Petitioner's age of 45 puts him at an increased risk for the development of carpal tunnel syndrome. (Id., p. 13) Also, Petitioner's low thyroid function could increase the chance of developing carpal tunnel syndrome. His only hobby was horseback riding. (Id.)

Dr. Young's testimony concerning his treatment of Petitioner was consistent with his office notes and records. He acknowledged that Petitioner gave him a history of ongoing symptoms for one year. (PX 9, p. 10)He further testified that in terms of forming a causation opinion that it is significant if someone relates the onset or worsening of their symptoms to their work explaining that if the symptoms are particularly exacerbated by a certain activity that would lead one to believe that the activity is the causative or aggravating factor. (PX 9, p. 12) Dr. Young knew that Petitioner worked for Respondent as a shift supervisor. Dr. Young could not recall if he had treated similarly-positioned patients before but he "suspected" that he had. (PX 9, p. 13)

Dr. Young testified that Petitioner's age and hypothyroidism placed him at an increased

risk of developing carpal tunnel syndrome. (PX 9, p. 13) Dr. Young was unaware of any correlation between carpal tunnel syndrome and horseback riding. (PX 9, p. 14) Dr. Young could not recall having an "in depth" conversation with Petitioner about his job duties. He didn't know if Petitioner filled out a work questionnaire in the office. (Id.)

When Dr. Young last saw Petitioner on June 30, 2014, he was doing very well and was satisfied with the procedure. Petitioner still wanted to hold off on surgery on the left hand/wrist and Dr. Young would need to re-evaluate him before making any further recommendations on that side. (PX 9, p. 15)

Dr. Young acknowledged that Petitioner's attorney forwarded him copies of job duties to review prior to the deposition along with two IMEs pertaining to Menard Correctional Center and Shawnee Correctional Center, and two job analyses (one for each of the aforementioned facilities). There was also a work history timeline prepared by Petitioner and deposition of Dr. Sudekum. (PX 9, p. 16)

Dr. Young testified that Petitioner began working for Menard Correctional Center in March of 1995 and then transferred to Shawnee Correctional Center on June 1, 1997 where he was a member of a tactical team from 1996 to 2004. As such, Dr. Young believed Petitioner was required to be able to apply adequate force to subdue inmates. He was also a member of the TRT SORT team that involved training and weapons range work. (PX 9, p. 17)

Dr. Young acknowledged that, at the request of Petitioner's attorney, he reviewed some information, including 2 IMEs by Dr. Sudekum regarding Menard Correctional Center and Shawnee Correctional Center, a work history timeline and Dr. Sudekum's deposition. (PX 9, p. 16) Dr. Young testified that he reviewed the independent medical evaluations of Dr. Sudekum pertaining to Menard Correctional Center and Shawnee Correctional Center, Respondent's Job Site Analyses related to Shawnee Correctional Center and Menard Correctional Center, the deposition of Dr. Sudekum, and a work history timeline prepared by Petitioner. *Id.* at 16. Dr. Young was aware that Petitioner was on the tactical team from 1996 to 2004, and was aware that this required Petitioner to forcefully respond to subdue disruptive inmates. *Id.* at 17. Dr. Young was aware that Petitioner was a weapons training instructor. (T.17). He recited Petitioner's entire work history. *Id.* at 17-20. He testified that many of Petitioner's job duties throughout his tenure with Respondent were contributory factors in the development of carpal tunnel syndrome. *Id.* at 18.

Dr. Young testified that he believed locking and unlocking doors, cuffing and uncuffing offenders, computer work, discharging firearms/weapons range work, and bar rapping were all duties that could cause or contribute to the development of carpal tunnel syndrome. *Id.* at 19. When asked, "What is it about computer work and paperwork that

could be contributory or aggravating?", Dr. Young replied, "Could be position of the wrist at the time of activity. You know, the paperwork could be – could have something to do with the grip force necessary. The repetitive typing can certainly put some pressure on the carpal tunnel or the median nerve." (PX 9, pp. 18-19) Dr. Young also testified that the force of the recoil and forceful griping involved in discharging firearms in weapons training could contribute to development of or aggravate carpal tunnel syndrome. *Id.* at 19. He testified that the substantial vibration produced by bar rapping was also a factor. *Id.* at 19, 20. He testified that all of these activities over time contributed to the development of Petitioner's condition:

> Q: Okay. Now, doctor, based on the history that Mr. Hathaway gave you, the exam that you performed, the diagnostic studies that you had, as well as all of this information that I provided you with in preparation for today, do you have an opinion as to whether his cumulative employment for the State of Illinois as these various correctional facilities in any way caused, contributed to, or aggravated his carpal tunnel syndrome?
>
> A: I believe those activities could certainly aggravate or cause carpal tunnel syndrome, yes.
>
> Q: Okay. And what's the basis for your opinion here today?
>
> A: I think each of those activities individually could aggravate carpal tunnel syndrome. I think in combination it's a cumulative effect over time. *Id.* at 20.

When asked what he meant by a cumulative effect, he stated:

> I think that it's basically the combination of activities over a prolonged period of time that caused the symptoms to ultimately develop. So I think if a patient develops carpal tunnel and they have had it for a very short time period, I don't believe that that indicates that they have simply doing an activity for a very short time period to cause the symptoms. I think it has basically built up over months or years to the point where the symptoms are now manifested. *Id.* at 21.

Dr. Young testified that this was consistent with what is often referred to as a latency period, or the time that lapses between the development of a condition and the manifestation of symptoms; and he testified that the concept of latency does apply to carpal tunnel syndrome. *Id.* at 21. He stated, ". . . So it's the accumulation over time of the activity which ultimately causes the pathology to show or manifest." *Id.* at 21.

Dr. Young also testified that even if a person began to perform less strenuous duties after the development of carpal tunnel syndrome, one cannot automatically expect carpal tunnel syndrome to improve. *Id.* at 22. He testified that carpal tunnel syndrome can "get to a point where it's simply not going to improve or go away and is going to just slowly get worse over time." *Id.* at 22, 23. He described this as "essentially a point of no return, if you will." *Id.* at 22, 23. Dr. Young testified that Petitioner's 19 years of exposure to repetitive activities was sufficient to aggravate or contribute to the development of carpal tunnel syndrome. *Id.* at 23.

On cross-examination, Dr. Young agreed that Petitioner's BMI of 29 could possibly contribute to carpal tunnel syndrome. (PX. 9, pg. 28) Dr. Young testified that hypertension can cause increase pressure on the median nerve. (Id.)

On cross-examination, Dr. Young agreed that Petitioner's job duties of a Shift Supervisor, didn't involve any repetitive gripping, repetitive pinching or repetitive lifting. ~~(PX. 9, p. 29) Dr. Young stated that the use of computers and writing could be done~~ with the hands in a flexed or extended position over prolonged periods. (Id.) However, Dr. Young did not know how frequently Petitioner used a computer at work. (Id.)

Dr. Young acknowledged that it is important in looking at causation to know the activities leading up to the symptoms which, in this case, were computer usage and writing. However, Dr. Young testified that he had no knowledge as to how frequently Petitioner used a computer or the forces required in doing so. He didn't know how frequently Petitioner engaged in handwriting or the forces connected to that. (PX 9, pp. 30-31)

Dr. Young agreed that weight lifting could lead to the development of carpal tunnel syndrome; he didn't know if Petitioner was a weight lifter. (PX. 9, p. 32) Dr. Young testified that there is a study from the Mayo Clinic which states that disputes computer use as a causative factor for carpal tunnel syndrome. (PX. 9, p. 33) Dr. Young agreed that the newer studies do not provide a link between the use of computers and carpal tunnel syndrome. (PX. 9, p. 34) Dr. Young felt caring for horses could lead to carpal tunnel syndrome. (PX 9, p. 33) He testified that he didn't have any knowledge about details concerning Petitioner's job at Menard Correctional Center. (PX 9, pp. 34-35) Dr. Young also testified that he hasn't tested for the added qualification of hand surgery. (PX 9, p. 30)

Dr. Young was asked questions about the deposition of Dr. Sudekum and further testified that he didn't know if Petitioner was ever a Lt. at Menard.

Dr. Young testified that as of January 30, 2014 Petitioner was doing very well and wished to hold off on any left-sided surgery. (PX 9, p. 15)

At the request of Respondent, a Section 12 examination was performed by Dr. Mark S. Cohen on April 25, 2014. (RX. 5) In his written report Dr. Cohen indicated that he and Petitioner discussed Petitioner's job duties with Petitioner informing the doctor that he "runs shifts" at a correctional center and mainly performs paper work and computer work along with some inspections of the facility. Dr. Cohen reviewed records from Petitioner's primary care physician and an orthopedic surgeon. The last record he reviewed was dated December 27, 2013. Petitioner informed Dr. Cohen that he had a long history of symptoms that worsened in approximately June of 2013 and that right carpal tunnel surgery had been beneficial with only some rare tingling and numbness. Petitioner had not chosen to proceed with left-sided hand/wrist surgery as his symptoms were not yet to the point he felt he needed surgery. Petitioner was working without any restrictions and noting some occasional right palm pain/soreness. Petitioner's history of hypothyroidism was noted but Petitioner was no longer on medication for it.

Dr. Cohen performed a physical examination of Petitioner's hands which he described as "quite benign bilaterally." He did note a positive Phalen's on the left side.

Dr. Cohen was of the opinion that based upon evidence-based medicine carpal tunnel syndrome is not caused by clerical work, including data entry activities. Therefore, he did not feel Petitioner's condition was associated with or related to Petitioner's job. He specifically noted that "a manifestation of symptoms during a specific activity in no way suggests a cause or cause and effect relationship." (RX 5, p. 3) He felt Petitioner had reached maximum medical improvement with regard to his right hand and that his grip strength and palm sensitivity ("pillar pain") should continue to improve without formal treatment. He also felt Petitioner would be an excellent candidate for left surgery down the road. (RX 5)

Dr. Cohen's deposition was taken on November 17, 2014. (RX 6) Dr. Cohen is a board certified orthopedic surgeon who has an added qualification in hand surgery. (RX. 6, pg. 5) Dr. Cohen is a professor of orthopedic surgery at Rush University Medical Center and is the head of the orthopedic education for that department. (RX. 6, pg. 6)

Dr. Cohen is on the editorial board for Green's Operative Hand Surgery. (RX. 6, pg. 8) Dr. Cohen has also authored several journal articles in the Journal of Hand Surgery from the American Society for Surgery of the Hand. (Id.)

Dr. Cohen opined that using evidence based medicine, there is no association between computer use and carpal tunnel syndrome. (RX. 6, pg. 16) Dr. Cohen testified by way of deposition that the majority of patients with carpal tunnel syndrome no special risk factor and develop idiopathic carpal tunnel syndrome. (RX6, p.15). Dr. Cohen testified that the only occupational factors associated with carpal tunnel syndrome were duties that required or involved forceful and vigorous grasping, squeezing against resistance

throughout the day, and vibration. *Id.* at 14, 15. Dr. Cohen also did not believe that Petitioner's past work as a Correctional Officer caused or contributed to his development of carpal tunnel syndrome. *Id.* at 17, 18. He believed that only the activities that created current and constant exposure were relevant causal factors for carpal tunnel syndrome. *Id.* at 32, 33.

On cross-examination, Dr. Cohen testified that he had no independent knowledge of the job duties performed by Correctional Officers at either Menard Correctional Center or Shawnee Correctional Center or Petitioner's history prior to his position as shift manager. *Id.* at 19-32. He did not know what years Petitioner worked at Menard Correctional Center, he did not know what years Petitioner worked at Shawnee Correctional Center, and he acknowledged that his report made no mention of either Menard Correctional Center or Shawnee Correctional Center. *Id.* at 21, 22. He testified that he was not aware that Petitioner served on the tactical team, he did not know what the tactical team was, he was not provided with the testimony of Dr. Sudekum, and he was not provided with any videos of Petitioner's job duties at either Menard Correctional Center or Shawnee Correctional Center. *Id.* at 22, 23. He did not know what a chuckhole was, and he did not know what types of doors were at either facility. *Id.* at 24. He acknowledged that discharging firearms repeatedly from 1995 to 2006 could cause or contribute to the development of carpal tunnel syndrome in the trigger hand if it was done "all day throughout the day," but he had no knowledge of how long Petitioner was a range instructor or how often he shot or instructed on the range. *Id.* at 29, 30. He testified that all of this information was "not important to him" if Petitioner's symptoms started in 2013. *Id.* at 31, 32. When questioned if he asked Petitioner about what he did prior to 2010, he testified that he did not because he believed that Petitioner's symptoms began in 2013. *Id.* at 32. I

At his arbitration hearing, Petitioner testified that he is a 50 year old employee of the State of Illinois.Petitioner testified that he is currently employed as a Shift Supervisor at Shawnee Correctional Supervisor. Prior to beginning his career with Respondent in 1995, Petitioner was a Crew Chief in the Aircraft Maintenance division of the United States Air Force. He testified that he used wrenches, sockets and other hand tools to perform hand-intensive repairs. Petitioner testified that he began his career with the Department of Corrections at Menard Correctional Center in March of 1995 and left in June of 1997. Petitioner reviewed Respondent's materials describing the job duties of a Correctional Officer at Menard Correctional Center and testified that he performed the job duties described therein, including bar rapping and turning Folger Adams keys.

Petitioner subsequently transferred to Shawnee Correctional Center as a Correctional Officer from 1997 to 2004, where he spent the overwhelming majority of his time in Housing Units 2 and 3. Petitioner was assigned to Unit 2 for 5 years and Unit 3 for 2 to

3 years. Two wing officers, a control officer, and a core officer were Responsible for 448 cells; and if any turn of events occurred, additional responsibility fell one of the wing officers. Petitioner testified that he worked the 7am to 3pm shift for the entire time. There were no Folger Adams keys, and no bar rapping was done; but Petitioner testified that the hinged doors were made of solid steel. Petitioner testified that the Correctional Officer in the control room monitored and opened 4 different wings, but could not simultaneously open all of the cell doors; and when Officers were in different wings, they had to open their own doors. Petitioner testified that if he was not in one of the housing units, he was usually in segregation. Inmates in protective custody and segregation had to be fed through chuckholes.

Petitioner testified that he began his day by opening every door in the wing with the twist of a key and counting the inmates. Petitioner also performed compliance checks as he counted the inmates, which required him to use his hands and arms to open property boxes and inspect the inmates' property for contraband. Petitioner then began running call passes and recording where the inmates were sent. Petitioner testified that after inmates were sent to their destination, he had to go back through and ensure that all of the doors were secured by pulling on each one of them. Petitioner testified that pulling on the door was the only way to know if the door was secure.

Petitioner also testified that he was part of the tactical unit at Menard and Shawnee Correctional Centers. He was a tactical member from 1995 to 2004, and was also on the statewide tactical response team, which only has 24 members. Petitioner described his intensive training.

Petitioner testified that he discharged thousands of rounds from firearms such as the Glock 22, .40 caliber, and the Colt M16 semi-automatic. Petitioner testified that discharging these weapons created much recoil force. While a Correctional Officer, Petitioner worked 5 days a week, 7.5 hours a day.

Petitioner testified that in 2004, he was promoted to Assistant Warden of Operations at Shawnee Correctional Center. Petitioner testified that his job required "a lot of typing, writing, a lot of paperwork." He worked on average 8 to 10 hours a day. Petitioner estimated that 80% of his work day was spent using his hands for writing reports and using a computer keyboard and mouse, and 20% of his day was spent touring the facility and supervising operations. From 2004 onward he continued to annually qualify for his weapons by firing 50 rounds of handgun ammo and 40 rounds from a rifle and shotgun. Toward the end of his stint as Assistant Warden, Petitioner was given a secretary; but this did not diminish the use of his hands or computer work.

Petitioner testified that in the 12 years he had worked for the State (as reflected above) he did a lot of repetitious work but he didn't have any symptoms of numbness or tingling

in his hands.

Petitioner further testified that in 2006 he was promoted to Warden of Vienna Correctional Center. Although Petitioner had a secretary, Petitioner testified that his position as Warden required the same use of his hands for clerical tasks as the Assistant Warden position. He testified that everything had to be written down or typed and he was constantly looking at the computer. He estimated that 85% of his time as Warden was devoted to paperwork and computer keyboard use.

In the middle of 2007, Petitioner transferred back to Shawnee Correctional Center and served as Warden until he accepted a Shift Supervisor position at Vienna Correctional Center in 2010. Petitioner testified that he continues to do just as much paperwork, if not more, as a Shift Supervisor. In this position, Petitioner does not have the assistance of a secretary. However, the majority of his paperwork is now handwritten.

Petitioner was asked what, if anything, he noticed in the way of symptoms while performing his job duties at Vienna as a Shift Supervisor. Petitioner replied that he began noticing symptoms of numbness and tingling that eventually progressed to the point where they interfered with his work. Petitioner also testified that he had experienced symptoms for 4 or 5 years; however, he did not report his symptoms or seek care until they became intolerable and interfered with his ability to work. Petitioner estimated that about four to five years earlier he started getting slight numbness and tingling and it didn't affect his job duties or sleeping but just gradually, it did so. He couldn't hold a pencil or pen or type. He would wake up three to four times a night until he just couldn't sleep at all.

On cross-examination he testified that he kept choosing to ignore it until June 19th when he felt he wasn't performing his job duties correctly due to the tingling and numbness.

Petitioner further testified that he is right-hand dominant and he does not suffer from gout, diabetes, or rheumatoid arthritis. Petitioner is 5'9", weighs 195 pounds, and still lifts weights 3 or 4 days a week to stay in shape. He also cares for his horses and goes horseback riding on the weekends, weather permitting.

Petitioner testified that he discussed how his symptoms were affecting his job duties with his immediate supervisor, Assistant Warden Love, and subsequently turned in a DOC 434 to Warden Davis at Vienna Correctional Center on June 19, 2013. (PX8). On August 30, 2013, Petitioner completed an Employee's Notice of Injury. (PX8). Petitioner sought care for his symptoms with his family physician at Primary Care Group, Dr. Winkleman. (PX3)

Petitioner testified that his right hand improved following surgery. Petitioner testified that

despite the improvement resulting from surgery, he still has some symptoms in his right hand; but these have not interfered with his ability to work. He testified that his right hand continues to fall asleep, is weaker than before, and he still experiences slight pain; but his right hand no longer wakes him at night . With regard to his left hand, Petitioner elected not to undergo surgery, and he still experiences numbness and tingling. Petitioner testified that his left side primarily bothers him when he is doing computer work, when he keeps it in the same position or when he performs repetitive movement.

Petitioner testified that the carpal tunnel syndrome his left hand is not as severe as his right carpal tunnel syndrome; and he does not wish to have surgery on his left hand until it is required, because it is not currently interfering with his ability to function and he "really doesn't like to have surgery." He testified that he was told the symptoms will never go away and may get worse, but he still did not want to have surgery and he does not have any appointments scheduled for treatment of his left hand.

Petitioner testified that he treated with Dr. Swafford at Cape Family Practice in 2011 but never reported any numbness and tingling in his hands to him. He also acknowledged that he lifted weights three to four times a week from 1997 through 2004 during his lunch breaks. He would lift weights at the facilities. He also acknowledged having a membership in a private gym "off and on" but denied lifting weights at any private gym. He did acknowledged working out at home.

Petitioner called Randy J. Davis, Deputy Director of the South, to testify. He testified that he believed Petitioner's descriptions of his job duties at Menard and Shawnee Correctional Center were accurate. When asked if Petitioner's job descriptions of his duties as Warden and/or Assistant Warden were accurate, he stated they were probably a little heavy on the clerical aspect but Respondent is "paper heavy." However, generally, he didn't think clerical got worked that much. He later testified that there used to be a lot more typing but now, it's computer.

Mr. Davis testified that he has worked with Petitioner, and stated that Petitioner is a good employee. He also testified that when he was Warden at Vienna, there were times when he barely made it out of his office to make rounds. He also testified that Petitioner's weight lifting activities were fairly common knowledge around the prison.

The Arbitrator has reviewed PX 10 (a DVD for a Menard Correctional Officer); PX 11 (a Job Analysis form for Correctional Officers at Menard Correctional Center performed on 2/8/11); PX 12 (an IME for a Correctional Officer at Menard dated 4/29/11); and PX 13(Dr. Sudekum's deposition in 10 WC 27503, et. al. dated 6/13/11).

RX 2, 3, and 4 were pertinent position descriptions for the Assistant Warden and Warden positions setting forth the essential functions of each position.

The Arbitrator concludes:

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

Petitioner failed to prove he sustained an accident on June 19, 2013 that arose out of and in the course of his employment with Respondent or that his current condition of ill-being in his hands is causally related to his injury or employment duties with Respondent. In so concluding the Arbitrator notes that June 19, 2013 is a viable date of accident in this case; however, she is denying Petitioner's claim based upon the failure to prove that Petitioner's accident "arose out of" his employment and/or that his injuries were causally connected to his employment duties with Respondent. In so concluding the Arbitrator basis her determination on the following.

Initially, the Arbitrator addresses Petitioner's credibility which the Arbitrator found troubling in several respects. When Petitioner initially reported his alleged injury in June of 2013 he very clearly represented that he had already sought treatment for his alleged injuries and did so through Dr. Swafford. (see RX 1) At the arbitration hearing Petitioner denied treating with Dr. Swafford for his alleged complaints. This testimony stands in direct contrast to what he initially represented to Respondent when reporting his alleged injury. Furthermore, Dr. Swafford's records were not admitted into evidence. They could have corroborated Petitioner's testimony at trial. Their absence is troubling. Interestingly, although Petitioner represented he had treated with Dr. Swafford he didn't continue doing so after he reported his alleged injury. Instead, he initiated medical care with a new doctor. Petitioner provided no explanation for the change. Petitioner provided no explanation as to the contradiction between his initial report and his arbitration testimony.

The Arbitrator also notes that Petitioner was not forthright with his treating doctor, Dr. Young. He failed to advise him of his weight lifting activities, an activity Dr. Young clearly testified could lead to carpal tunnel syndrome. Petitioner's weight lifting was not a casual activity. He testified that he has been lifting weights three to four times per week since 1997. His lack of complete candor to his treating physician casts suspicion on his credibility.

Additionally, there was really no corroboration for Petitioner's claim of a "long history of symptoms." The August of 2013 Notice of Injury form provided no date of onset; rather, it was "unknown." When Petitioner initially presented to Dr. Young, he gave a history of symptoms for about a year. He made no mention of problems before or details concerning his employment duties then or prior thereto. Indeed, Dr. Young acknowledged during his deposition that the two of them had no substantive discussion regarding Petitioner's work duties nor did Petitioner fill out a workplace questionnaire. Most significant is Petitioner's testimony at arbitration in which he clearly stated that he had no symptoms of numbness or tingling in his hands for the first twelve years he

worked for Respondent. That completely contradicts Petitioner's theory of the case. Assuming his testimony was true, then Petitioner's symptoms began no earlier than 2006. It was at that time Petitioner's job duties changed to ones more clerical in nature.

Petitioner, who is right hand dominant, provided very little information regarding the specific way(s) in which he used his upper extremities while engaged in clerical duties. While he testified to typing, hand writing, and using a computer, he provided no detailed information as to the way in which those duties involved "repetitive gripping, pinching, lifting, placing one's hands in a flexed position or ...even an extended position" as discussed by Dr. Young in his deposition. (PX 9, pp. 7-8) Petitioner provided no testimony as to how hand writing would allegedly injure/involve his left hand/wrist.

Petitioner bore the burden of proof regarding his claim. A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. Orisini v. Industrial Commission, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). In cases involving the repetitive trauma concept, the petitioner must show the injury arose out of and in the course of his employment and was not the result of a normal degenerative aging process. Peoria County Bellwood Nursing Home v. Industrial Commission, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec.235 (1987). In cases involving a repetitive trauma theory, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood,* 115 Ill.2d 524 (1987); *Quaker Oats Co.* v. *Industrial Commission,* 414 Ill.2d 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show claimant's work activities caused the condition of which the employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 478 (4th Dist. 1987). The causation of compression neuropathy via repetitive has been deemed to fall in the area requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill. 2d 438 (1982).

The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24 (1977).

In the instant case Petitioner relies upon the opinions of Dr. Young to establish causal connection while Respondent relies upon those of Dr. Cohen. Dr. Young's opinion on causation is based upon a cumulative theory of liability – ie., Petitioner's job duties for Respondent from 1995 to 2013 have cumulatively caused or aggravated Petitioner's bilateral carpal tunnel syndrome. Petitioner failed to prove his theory. This determination is based upon the deficiencies noted above regarding Petitioner's testimony and exhibits as well and the Arbitrator's inability to be persuaded by the testimony of Dr. Young.

Dr. Young had no knowledge that Petitioner was a weight lifter and he conceded during his deposition that weight lifting could lead to carpal tunnel syndrome. He further testified that that computer work and paperwork "could" contribute to carpal tunnel syndrome but his answer was very speculative and not within a reasonable degree of

medical certainty. (See PX 9, pp. 18-19) While he later testified that any of Petitioner's job duties over the course of his employment with Respondent could have aggravated Petitioner's carpal tunnel syndrome, Dr. Young lacked sufficient knowledge of the details of those activities to find his opinion persuasive and, again, it was not based upon all pertinent information (ie., Petitioner's weight lifting activities). Dr. Young testified that a causation opinion is only as good as the history upon which it is based. His history was inaccurate in that it was not premised on an accurate understanding of the onset of Petitioner's symptoms and complaints. Dr. Young acknowledged that he and Petitioner had no real substantive discussions about Petitioner's work duties.Thus, his opinions were not persuasive in this instance.

In contrast, Dr. Cohen's credentials are impressive and his opinions are found to be more persuasive than those of Dr. Young.

E. Was timely notice of the accident given to Respondent?

Given the accident date of June 19, 2013, the Arbitrator concludes timely notice was provided. Petitioner provided both oral and written notice of an alleged injury on that date.

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?

Based upon the above, the issue is moot.

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

Based upon the above, the issue is moot.

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

****

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

Edna Chambers,
Petitioner,
vs.
K-Five Construction Company ,
Respondent,

NO: 11WC 20253

16IWCC0259

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Peitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permarnent partial disability,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 August 28, 2015, is hereby affirmed and adopted.

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

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

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

APR 14 2016

DATED:
MJB/bm
o/4/11/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

CHAMBERS, EDNA
Employee/Petitioner

Case# 11WC020253

16IWCC0259

K-FIVE CONSTRUCTION COMPANY
Employer/Respondent

On 8/28/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.20% 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:

0786 BRUSTIN & LUNDBLAD LTD
CHARLES E WEBSTER
10 N DEARBORN ST 7TH FL
CHICAGO, IL 60602

2097 GRANT & FANNING
DANIEL SWANSON
300 S RIVERSIDE PLZ SUITE 2050
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

EDNA CHAMBERS,
Employee/Petitioner

v.

K-FIVE CONSTRUCTION COMPANY,
Employer/Respondent

Case # 11 WC 020253

16IWCC0259

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **January 14, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0259

FINDINGS

On **September 16, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$73,216.00**; the average weekly wage was **$1,408.00**.

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, in part,*** paid all appropriate charges for all reasonable and necessary medical services. The Parties agreed that Respondent was entitled to a credit for all bills paid.

Respondent shall be given a credit of **$61,190.20** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$61,190.20**.

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

ORDER

Claim for compensation denied. Petitioner failed to prove a causal connection between the accidental injuries of September 16, 2010 and her current condition of ill-being regarding her left knee.

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

August 27, 2015
Date

AUG 28 2015

FINDINGS OF FACT

Petitioner was employed by Respondent as a flagger/laborer. She was hired in July of 2010. She was a member of Local 288. Respondent is in the road construction business. Petitioner's job duties required her to stand and direct traffic. She would slow down and stop traffic if necessary. She would also move barricades.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of her employment by Respondent on September 16, 2010. She was acting as a flagger with a co-worker, working with a grade-all and truck walking across the intersection of Lake and Keystone streets in Chicago. The grade-all strips the pavement up from the street and throws it into a dump truck in front of it. Petitioner was struck with a piece of asphalt that came out of the grinder, hit the dump truck and flew out and hit Petitioner in her left leg. Petitioner's testimony was that the asphalt hit her on the medial portion of her left knee and she fell to the ground. She fell to the side. Her whole knee hit the pavement. Her whole leg started swelling and turned blue. She worked until the end of the shift. Petitioner continued to work her regular job until the seasonal layoff that occurred around the beginning of December.

The accident was reported and Petitioner testified that she showed Bob Pearson and Mark Banaszak of Respondent her injury. Petitioner said that she would show her co-worker, Sandy Hackney, her injury every day after the accident. As Petitioner continued to work, she noticed swelling, discoloration and tenderness.

Sandy Hackney testified via evidence deposition. She worked with Petitioner for several years. The date of the injury was the last time that she worked with Petitioner. Hackney later moved to Tennessee. She no longer works for Respondent. Hackney saw Petitioner get hit in the left shin with a chunk of asphalt that hit the truck. Petitioner had a huge welt on her shin. Petitioner limped the remainder of the shift. The asphalt definitely hit Petitioner in the shin. (PetEx. 15)

Petitioner denied prior injuries to her left knee. She used to run 5 miles after work. Petitioner denied subsequent injuries to her left knee.

Petitioner first sought medical care with Dr. Charlotte Mitchell, her PCP, on January 25, 2011. There is no history of an accident or injury contained in the records of Dr. Mitchell. A Tib/Fib x-ray of the left leg was negative. An x-ray of the left knee showed minimal degenerative changes. Due to Petitioner's persistent left knee complaints, Dr Mitchell ordered an MRI of the left knee. The MRI showed blunting of the menisci, a questionable Baker's cyst, an endochrondroma and chondromalacia, along with patella alta. There were no acute findings. Dr. Mitchell recommended an orthopedic referral for a degenerated medial meniscus. (PetEx. 7)

Petitioner then began treatment with Dr. David Mehl at Well Group Partners. At the first visit, on May 16, 2011, Petitioner gave a history of an injury to her left knee on September 10, 2010. She was struck with a slab of asphalt on the inside of her left knee. She has had persistent pain since the injury, but continued working. The physical exam revealed persistent skin discoloration on the medial and posterior medial aspect of the knee. There was a positive McMurray's test on the medial side and significant tenderness on the medial side was noted. Dr. Mehl reviewed the MRI. His diagnosis was: 1. Left knee medial meniscus tear, post traumatic; 2. Benign distal femur bone cyst; and 3. Mild right (?) degenerative disease. He thought that the work injury caused a medial meniscus tear. Dr. Mehl offered Petitioner surgery. Petitioner was taken off work, effective May 16, 2011. The surgery was done on May 31, 2011. There was no torn meniscus found, although Dr. Mehl claimed to have found post traumatic chondroamalaci, a medial plica and a suprapatellar plica. Petitioner underwent therapy and work conditioning. She has had Synvisc injections. She was never released to return to her former job. Dr. Mehl placed restrictions of no standing for more than 3 hours without rest and of no

standing more than five hours in a work day. Petitioner testified at trial that she continues to treat with Dr. Mehl. (PetExs. 1, 2, 3 and 11)

Petitioner has not returned to work in any capacity. She does have an associates degree in electrical engineering. Petitioner started a self directed job search and contacted 5 prospective employers, without success. She met with Lisa Helma, CRC, of Vocamotive, on 1 occasion. Petitioner received SSDI benefits. Petitioner was 65 years old at the time of trial.

Petitioner saw Dr. Mark Levin for a §12 examination at the request of Respondent. (ResEx. 1) Petitioner saw Dr. Samuel Chmell for an examination at the request of her lawyer. (PetEx. 14)

Petitioner testified that she has pain on the medial aspect of her left knee every day. She has problems sleeping. She can walk about a block. She has numbness in her leg. She wears an Ace bandage. She can stand for about 20 minutes without pain.

Petitioner was cross-examined regarding the mechanism of the injury, the histories to the various physicians and the size and weight of the asphalt chunk that hit her. At the conclusion of cross, Petitioner confirmed that she had a huge knot on her shin after the accident.

Lisa Helma testified that there was a stable labor market for someone with Petitioner's restrictions. However, given Petitioner's other situational factors, such as age, narrow work experience, physical capabilities and lack of computer skills, Petitioner did not have access to a stable labor market. Petitioner's efforts to find a job would not be characterized as diligent.

Dr. Mehl testified at the request of Petitioner. Dr. Mehl testified that there was a causal connection between the accident (being hit on the anterior portion of the knee) and the traumatic chondromalacia and flap type tears of the cartilage that he found at surgery. He thought that the plicas were inflamitory responses to the trauma. The injury to the lateral tibial plateau and the patella caused the plica. It was noted that the doctor misidentified some of the still photos from the surgery. (PetEx. 11)

Dr. Chmell testified at the request of Petitioner. He testified that his diagnosis was post traumatic chondromalacia, aggravation of plicas and traumatic aggravation of osteoarthritis of the left knee. The osteoarthritis and the chondromalacia preexisted the injury. His report did not detail where Petitioner was struck by the asphalt. His recollection was that Petitioner was struck in the back of the knee. He did not know the force of the blow, the size of the asphalt and how heavy the asphalt was, other than to say that Petitioner fell after she was hit with the asphalt. Dr. Chmell thought that there was a causal connection between the accidental injury and the left knee conditions that he diagnosed. (PetEx. 14)

Dr. Levin testified at the request of Respondent. He examined Petitioner, took a history and reviewed medical records. Dr. Levin did not believe that there was a causal connection between the accidental injuries and petitioner's condition of ill-being regarding her left knee. He did not think that the MRI revealed any traumatic pathology. Pathology under the kneecap and in the lateral compartment was not consistent with the mechanism of the injury described by Petitioner. Petitioner said that she was hit in the inner back part of the knee. Dr. Levin said that there was no evidence that the accident caused or accelerated any condition in Petitioner's knee. He disagreed with many of Dr. Mehl's opinions regarding the intraoperative photos. (ResEx. 1)

CONCLUSIONS OF LAW

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

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

The Arbitrator finds that Petitioner failed to prove that there is a causal connection between the accidental injury of September 16, 2010 and her current condition of ill-being regarding her left knee.

Petitioner's testimony regarding the mechanism of the injury is found to be not credible. Petitioner's testimony was that she was struck on the medial aspect of the left knee. Her testimony is not consistent with that of the eye-witness, Hackney. Hackney said that Petitioner was struck in the left shin. At the conclusion of her testimony, Petitioner testified that she did have a huge knot on her left shin after the injury. Additionally, Petitioner's testimony is not consistent with the histories that were given to Dr, Mehl, Dr. Chmell and Dr. Levin. The Arbitrator finds that Petitioner suffered a blow to the left shin on September 16, 2010. There was no injury to the knee. Therefore, any condition of ill-being regarding the left knee is not related to the accident.

Further, it is to be noted that Petitioner continued to work at her job on the day of the accident until the end of her shift. She did not seek immediate medical attention and, in fact, continued to work at her regular job as a flagger (standing, walking, directing and stopping traffic and moving barricades) until the seasonal layoff for road construction workers came about (late November or early December). The first medical treatment is on January 25, 2011 (Dr. Mitchell, no history of injury), some 4 months after the accident. This is too long of a time gap to persuade the Arbitrator that any condition of ill-being regarding Petitioner's left knee is related to the injury.

The Arbitrator finds the opinion of Dr. Levin that there is no causal connection between the accident and any condition of ill-being of petitioner's left knee to be credible, persuasive and most consistent with the evidence adduced. The opinions of Dr. Mehl and Dr. Chmell are not persuasive.

Accordingly, the claim for compensation is 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:

Most of petitioner's bills were paid by Respondent. At trial, Petitioner submitted a bill from Dr. Mehl and from South Suburban Hospital. The bills were disputed on the basis of liability. Based upon the Arbitrator's finding above regarding causal connection, the claimed bills are denied.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner claimed TTD from November 28, 2010 to the date of trial. Based upon the Arbitrator's finding regarding causal connection above, the claim for TTD is denied.

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

As the Arbitrator has found that Petitioner failed to prove a causal connection between the accidental injuries and her current condition of ill-being, the Arbitrator needs not decide this issue.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's claim for Penalties and Fees is 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

Phillip Easton,

Petitioner,

vs. NO: 13WC 38564

16IWCC0260

SOI/Chester Mental Health,

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 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 August 20, 2015, is hereby affirmed and adopted.

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

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

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

DATED: APR 14 2016
MJB/bm
o-4/4/16
052

Michael J. Brennan

Ruth White

Thomas J. Tyrrell

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

EASTON, PHILLIP
Employee/Petitioner

Case# **13WC038564**

16IWCC0260

SOI/CHESTER MENTAL HEALTH
Employer/Respondent

On 8/20/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

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

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MGMT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

AUG 20 2015

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

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)

Phillip Easton
Employee/Petitioner

v.

SOI/Chester Mental Health
Employer/Respondent

Case # **13** WC **38564**

Consolidated cases: **16IWCC0260**

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 **6/15/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0260

FINDINGS

On the date of accident, **9/18/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**46,225.00**; the average weekly wage was $**888.94**.

On the date of accident, Petitioner was **30** 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 $ 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 reasonable and necessary medical services outlined in Petitioner's group exhibit pursuant to the medical fee schedule, as provided in § 8(a) 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 § 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $592.63/week for 26 1/7 weeks, commencing 12/14/14 through 6/15/15, as provided in § 8(b) of the Act.

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

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

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

Signature of Arbitrator

8/14/15
Date

ICArbDec19(b)

AUG 20 2015

STATE OF ILLINOIS)
)SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Phillip Easton II
Employee/Petitioner

v.

Case # 13 WC 38564

STATE OF ILLINOIS/Chester Mental Health
Employer/Respondent

16IWCC0260

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of injury, Petitioner was a 30 year-old Security Therapy Aide I with Respondent, Chester Mental Health. (T. 10). Petitioner's injury occurred on September 18, 2013, which is corroborated by medical records and the Application for Adjustment of Claim, even though the Request for Hearing erroneously holds that the date of accident was September 8, 2013. On the date of accident, September 18, 2013, Petitioner injured his lower back while restraining patients. (T. 11).

Petitioner candidly testified that he sustained a muscle strain in his back in 2009 while working as a diesel mechanic. (T. 11-12). Petitioner did not file a worker's compensation claim. Petitioner testified that no diagnostic tests were performed; he merely performed physical therapy and his condition resolved. *Id.*

Petitioner began working for Respondent in March of 2011. (T. 12). At that time, Petitioner was required to take and pass a pre-employment physical. (T. 12-13). Petitioner passed the physical and testified at trial that he was under no prescribed treatment of any kind for his back during the time of the physical. (T. 13).

Petitioner testified that immediately after the September 18, 2013 injury, he experienced sharp stabbing pain in his back which occasionally extended down into his legs. *Id.* Petitioner presented at the Steeleville Clinic on September 19, 2013, with symptoms of tingling in his feet, tenderness, and a 5/10 pain rating. (PX3 9/19/13). On this visit, Petitioner was placed off work for one week and was told to return and reevaluate after that. *Id.* Petitioner returned to the Steeleville Clinic on September 26, 2014, at which time physical therapy was recommended and

he was returned to work with no restrictions. (PX3 9/26/13). Petitioner worked with no restrictions until October 11, 2013, when he returned to the Steeleville Clinic with worsening symptoms of low back pain. (PX3 10/11/13). On this visit, Petitioner had x-rays taken, was prescribed physical therapy, and was told to follow up in a week. *Id.* Petitioner returned to the clinic after a week on October 18, 2013. (PX3 10/18/13). On this visit, Petitioner was told that his physical therapy and x-rays were pending approval. *Id.* The Steeleville Clinic ordered a two week follow-up and placed Petitioner off work until the follow-up appointment. *Id.*

On November 5, 2013, Petitioner came under the care of Dr. Raskas. (PX4 11/5/13). Dr. Raskas took Petitioner's medical history, noted narrowing of the L5-S1 disc space, ordered physical therapy, and returned Petitioner to work with restrictions. *Id.* On December 3, 2013, Petitioner returned to Dr. Raskas and stated that the light duty work, which consisted of prolonged sitting in desk chairs, was actually more painful for his low back than regular duties. (PX4 12/3/13). Dr. Raskas returned Petitioner to work full-duty on a trial basis and ordered him to return in 5-6 weeks. *Id.* Petitioner worked full-duty until February 18, 2014, when he returned to Dr. Raskas with continuing symptoms of back pain, radiating into his legs, and tingling in his toes. (PX4 2/18/14). Dr. Raskas recommended an MRI of the lumbar spine. *Id.*

On February 25, 2014, Petitioner underwent an MRI of the lumbar spine at Professional Imaging. (PX6). The MRI revealed objective findings of protrusion at L3-4 and L4-5, along with a tear of the annulus fibrosis at L5-S1. *Id.*

On February 25, 2014, Dr. Raskas reviewed the MRI and recommended epidural injections first at L3-4 and then L4-5. (PX4 2/25/14). Petitioner testified at trial that the injections brought temporary pain relief, but after a while the pain returned. (T. 15). On March 31, 2014, Dr. Raskas' note reads as follows:

> Given the fact he continues to have some subjective back pain complaint, I have no doubt that he has developed chronic back pain as a result of his disc herniations. I just do not think at this point in his life the pain is to the point where surgical intervention would be necessary. The cause of these disc herniations is obviously his work injury and the cause of his chronic back pain is obviously his work injury. This is a situation that may or may not progress over the course of his life. Certainly any progression would be related to the inciting event of the work injury causing the disc herniations. (PX4 3/31/14)

Dr. Raskas told Petitioner he could continue to work his regular duties and that over-the-counter pain medication should be sufficient for the time. *Id.*

Petitioner worked at regular duties for three months until he returned to see Dr. Raskas with increasing symptoms of back pain on July 14, 2014. (PX4 6/14/14). Dr. Raskas' notes for this

date record that Petitioner's pain had become so severe, that there were times he was unable to get out of bed. *Id.* Dr. Raskas prescribed Tramadol and Celebrex and ordered Petitioner to return in six weeks for a reevaluation. *Id.* On August 25, 2014, Dr. Raskas ordered discographies at L2-3, L3-4, L4-5, and L5-S1. (PX4 8/25/14).

On September 18, 2014, Petitioner received a CT lumbar spine post discogram, which revealed objective findings of central disc herniations with annular tears at L3-4, L4-5 and L5-S1. (PX8). Dr. Raskas testified by way of deposition that these annular tears were present on the February 25, 2014 MRI, but were recorded under a different name. (PX11 p. 17). Dr. Raskas stated, "I think that what you have to kind of understand is that an annular tear – the annulus has to be disrupted in order for a disc to protrude." *Id.* The MRIs on February 25, 2014 record protrusions at L3-4 and L4-5, which would only be possible with an annular tear. (PX6; PX11 p. 17).

Dr. Raskas reviewed the findings of the discogram with Petitioner on September 23, 2014, and stated the following in his notes,

> ~~He is 30 years old, almost 31. He is frustrated by the pain he has~~ had. He has had over six months of non-operative treatment including activity modification, home exercise programs, physical therapy. He has tried non-steroidal anti-inflammatory drugs and Tylenol and aspirin for over six months. He has been through injections for over a period of six months all with failure of his symptoms to substantially improve. He has trouble after he sits in one position for longer than about 20 or 30 minutes. He has to change positions frequently due to his lower back pain going into his legs…
>
> Given the failure of this non-operative management one could consider surgical intervention in the form of a fusion I think at L5-S1 only. (PX4 9/23/14).

On November 7, 2014, Petitioner underwent posterior lumbar fusion surgery at Frontenac Surgery and Spine Care Center. (PX9). Petitioner tolerated the surgery well and testified at trial that it improved his condition. (T. 16).

Despite the improvements from surgery, Petitioner testified that he continues to experience decreased symptoms of low back pain. *Id.* Petitioner is still treating with Dr. Raskas and continues to undergo physical therapy with Apex. (PX10; T. 16). Petitioner testified that he takes ten milligrams of Flexeril daily and Norco 7.5 every 6 hours throughout the day. (T. 30).

Petitioner was fired by Respondent on December 14, 2014. (T. 10).

On April 10, 2015, Petitioner was released to work with restrictions. (PX4 4/10/15). Petitioner testified that he is still treating with Dr. Raskas and will see him again on June 22, 2015 for a follow-up. (T. 20)

Dr. Kitchens performed an independent medical examination on January 20, 2015. After his examination, Dr. Kitchens composed a half-page report, in which he opined that Petitioner's current state of ill-being was not causally related to his work injury, but rather was the result of a degenerative disk disease. (RX5 p.12). Dr. Kitchens stated that, because the work injury did not exist, Petitioner was at MMI in regards to his work injury. *Id.* However, Dr. Kitchens stated that regarding the degenerative disc disease, Petitioner had not yet reached MMI. Dr. Kitchens' report reads:

> It is my opinion, within a reasonable degree of medical certainty, that he has reached maximum medical improvement with regard to the September 18, 2013, work accident.
>
> His current treatment is for his preexisting lumbar degenerative disc disease. He has not reached maximum medical improvement regarding treatment for this condition. Therefore, he is on restrictions as a result of his recent surgery for lumbar degenerative disc disease. He is not on work restrictions based on the September 18, 2013, work incident. *Id.*

Dr. Kitchens charged $1,000 for his report. (RX6 p. 5).

Depositions were taken of Dr. Raskas and Respondent's doctor, Dr. Kitchens. Dr. Raskas testified by way of deposition that Petitioner's current state of ill-being was causally related to the altercation he was involved in on September 18, 2013. (PX11 p. 14). Dr. Raskas also testified that the annular tears at L3-4, L4-5, and L5-S1, which were present on the September 18, 2014 discogram, were also present in the February 25, 2014 MRI under the title of protrusions. (PX11 p. 17-18).

Dr. Kitchens testified by way of deposition that Petitioner's lumbar injuries at L3-4, L4-5, and L5-S1 were genetic degenerative diseases, meaning that Petitioner's back was deteriorating because of his advancing age. (RX6 p. 18). At the time of injury, Petitioner was a 30-year old male. Dr. Kitchens admitted that it was unusual for a man so young to suffer from a degenerative disease. (RX6 p. 14). One factor contributing to Dr. Kitchens' diagnosis of a degenerative disease was his belief that Petitioner was a smoker. *Id.* Petitioner testified at trial that he has never been a smoker. (T. 30-31).

Dr. Kitchen's admitted that genetic degenerative disc diseases "are chronic conditions that take years to develop." (RX6 p. 28). Dr. Kitchens felt confident diagnosing Petitioner's condition as such, despite not having any MRIs prior to Petitioner's date of accident. *Id.* Dr. Kitchens

testified,

Q. Okay. So you feel confident about [the diagnosis], even though we don't have any prior MRIs to compare this one to?

A. Yes, ma'am *Id.*

Dr. Kitchens supported his diagnosis of Petitioner's injury by stating that the CT discograms taken on September 18, 2014, exhibited annular tears which were not exhibited in the February 25, 2014 MRI. However, Dr. Kitchens was alone in his opinion that the CT discograms showed new damage. Dr. Raskas testified that both tests indicated annular tears, the only difference was one of nomenclature. (PX11 p. 17). Dr. Raskas testified that the MRI of February 25, 2014 listed the annular tears as protrusions and the CT discograms listed them as annular tears. *Id.*

Dr. Kitchens acknowledged that a disc herniation reflected an annular tear. He stated in his deposition that "A disc herniation is part of the disc is ruptured through the annulus and is outside the boundaries of the annulus." (RX6 p. 37). Initially, Dr. Kitchens testified in his deposition that disc herniations may be referred to as protrusions, saying

Q. Would you agree that Mr. Easton has disc herniations at L3-4, L4-5, and L5-S1?

A. Yes, ma'am.

Q. And that can also be referred to as a disc protrusion?

A. Yes, ma'am. (RX6 p. 27).

Later, Dr. Kitchens changed his testimony and attempted to draw a distinction between protrusions and herniations. (RX6 p. 37). Dr. Kitchens claimed that the protrusions would not necessarily cause annular tears, only herniations cause annular tears.

Q. Doctor, wouldn't you agree that the MRI report from February 25, 2014, indicates central disc protrusion, L3-4 and L4-5, with a slightly more prominent central herniation at L5-S1, with a tear of the annulus fibrosis?

A. Yes, ma'am.

Q. Okay. So those disc herniations did appear on that MRI scan?

A. Which disc herniations?

Q. At L3-4 and L4-5 and L5-S1

A. That's not what the report said. The report said central disc

protrusion at L3-4 and L4-5. (RX6 p. 36).

However, Dr. Kitchens failed to demonstrate a significant distinction between protrusions and herniations. (RX6 p. 38).Dr. Kitchens testified,

> Q. Okay. Well, let me ask you this then. A disc protrusion means that the disc is actually herniating, correct?
>
> A. No, ma'am. A disc protrusion is just an outpouching of the disc. A disc herniation is part of the disc is ruptured through the annulus and is outside of the boundaries of the annulus.
>
> Q. So is that the distinction to you, that a disc protrusion does not encroach upon the annulus and actually break the annulus?
>
> A. The normal disc encroaches on the annulus. That's – the annulus is part of the disc. The annulus is the outer rim of the disc. So the inner part of the disc or the nucleus is always touching the part of it, at least, the outer part of the annulus is always touching.
>
> Q. Right. So a disc protrusion, to you, is when the annulus is not compromised?
>
> A. No. The annulus may be compromised, and there may be tears within the annulus or a part of the annulus. *Id.*

Dr. Kitchens testimony shows that he is willing to admit that the terms herniation and protrusion may be used interchangeably, that both herniations and protrusions name annular tears, and that the MRI of February 25, 2015 listed protrusions at L3-4 and L4-5. (RX6 p. 27, 36-38,).

Before September 18, 2013, Petitioner candidly testified that he was a member of a motorcycle club. (26). Petitioner rode his motorcycle on the weekends. (T. 26-27). Petitioner also testified that after his work accident on September 18, 2013, he was unable to ride his motorcycle due to his back pain and was placed on "medical," meaning he could attend the events of the motorcycle club but was not allowed to ride. (T. 26). In his September 5, 2013 note, Dr. Raskas stated that Petitioner had halted his motorcycle riding due to low back pain. (PX4 11/5/13).Dr. Raskas testified that riding a motorcycle would not aggravate Petitioner's condition. (PX11 p. 29).

Conclusion of the Law

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

Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 673 (Ill. 2003) (emphasis original). "Petitioner need

only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission*, 309 Ill.App.3d 1037, 723 N.E.2d 846 (3rd Dist. 2000).

Both Dr. Kitchens and Dr. Raskas agreed that Petitioner sustained annular tears in his spine located at L3-4, L4-5, and L5-S1. (RX p. 27; Px4 8/25/14; PX11 p. 17).

Dr. Raskas testified by way of deposition and stated in his visit notes that the cause of Petitioner's injuries were his work accident on September 18, 2013. (PX4 3/31/14; PX11 p. 14). The Arbitrator finds the opinion of Dr. Raskas to be consistent and credible.

The Arbitrator finds the opinion of Dr. Kitchens to be inconsistent and incredible. Dr. Kitchens opined that Petitioner's current condition of ill-being was not related to his work injury on the basis that his back injuries of annular tears at L3-4, L4-5, and L5-S1 were caused by a genetic degenerative disease. Dr. Kitchen's admitted that genetic degenerative disc diseases "are chronic conditions that take years to develop." (RX6 p. 28). The Arbitrator notes that at the time of his accident, Petitioner was only 30. The Arbitrator also notes that one factor contributing to Dr. Kitchens' diagnosis of a degenerative disease was his belief that Petitioner was a smoker. (RX6 p. 14). Petitioner testified at trial that he has never been a smoker. (T. 30-31).

Dr. Kitchens felt confident diagnosing Petitioner's condition as a degenerative disease, despite not having any MRIs prior to Petitioner's date of accident. Dr. Kitchens testified,

> Q. Okay. So you feel confident about [the diagnosis], even though we don't have any prior MRIs to compare this one to?
>
> A. Yes, ma'am (RX6 p. 28).

Dr. Kitchens initially stated that the CT discograms taken on September 18, 2014, exhibited annular tears which were not exhibited in the February 25, 2014 MRI. However, Dr. Kitchens was alone in his opinion that the CT discograms showed new damage. Dr. Raskas testified that both tests indicated annular tears, the only difference was one of nomenclature. (PX11 p. 17). Dr. Raskas testified that the MRI of February 25, 2014 listed the annular tears as protrusions and the CT discograms listed them as annular tears. Dr. Raskas stated, "I think that what you have to kind of understand is that an annular tear – the annulus has to be disrupted in order for a disc to protrude." *Id.*

Yet, Dr. Kitchens later admitted that a disc herniation reflected an annular tear. He stated in his deposition that "A disc herniation is part of the disc is ruptured through the annulus and is outside the boundaries of the annulus." (RX6 p. 37). He further admitted that,

> Q. Would you agree that Mr. Easton has disc herniations at L3-4, L4-5, and L5-S1?
>
> A. Yes, ma'am.
>
> Q. And that can also be referred to as a disc protrusion?

A. Yes, ma'am. (RX6 p. 27).

In short, Dr. Kitchens diagnosed a 30-year old Petitioner with a long-term, chronic, genetic condition on the basis of two tests taken only 7 months apart, both of which were after Petitioner's date of accident, and which, in the professional opinion of Dr. Raskas, showed identical results.

For this reason, the Arbitrator finds the medical opinion of Dr. Kitchens to be incredible and prefers instead the opinion of Dr. Raskas.

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 442 N.E.2d 908 (1982). 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. *Darling v. Indus. Comm'n of Illinois,* 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135, 1140 (1st. Dist. 1988).

The uncontroverted facts show that prior to the accident of September 18, 2013, Petitioner, although he sustained a back injury in 2009, was able to complete his work at full duty without any complaints. (T. 11-12). The Arbitrator notes that Petitioner was able to complete his job in this fashion for four years before the date of accident. Immediately following the accident of September 18, 2013, Petitioner presented with symptoms of pain in his lower back and was taken off work. The fact that Petitioner was able to perform his duties for years prior to his accident and subsequently unable to perform the same duties immediately following his accident establishes a causal connection between his accident and his current condition of ill-being.

Accordingly, the Arbitrator finds that Petitioner met his burden of proof in establishing that his current lumbar spine conditions are causally related to the undisputed work accident of September 18, 2013.

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?

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

Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to prospective medical care. The Arbitrator notes that at no point in time following his

accident has Petitioner's condition stabilized or returned to baseline. Dr. Kitchens only placed Petitioner at MMI under the assumption that Petitioner's work injury was non-existent. (RX5 p. 12). As far as the annular tears at L3-4, L4-5, and L5-S1 were degenerative diseases, Dr. Kitchens recognized that Petitioner was not yet at MMI. *Id.* Dr. Kitchens stated that Petitioner "has not reached maximum medical improvement regarding treatment for this condition." *Id.* Therefore, based on the above findings that Petitioner's injuries are not a degenerative disc disease, but rather a traumatic injury resulting from his September 18, 2013 accident, Dr. Kitchens supports the position that Petitioner is not yet at maximum medical improvement for his work related injury. The Arbitrator also notes that Dr. Raskas, Petitioner's treating physician, never placed Petitioner at maximum medical improvement and in fact continues to treat him up to and beyond the date of arbitration, June 15, 2015.

Dr. Raskas testified in his deposition that his bills were reasonable and customary for the services provided. (PX11 p. 14). The Arbitrator notes that Dr. Raskas treated Petitioner conservatively, opting for various non-surgical solutions, including physical therapy, medication, and injections, before proceeding with a lumbar fusion surgery.

Respondent shall therefore pay the medical expenses contained in Petitioner's group exhibit and shall have credit for any amounts already paid. Respondent shall authorize and pay for the further necessary care recommended by Dr. Raskas, including but not limited to surgery. Respondent shall indemnify and hold Petitioner harmless from any claims from these medical providers arising out of the expenses for which it claims credit, pursuant to § 8(j) of the Act.

L. What temporary benefits are in dispute? (TTD)

The period in dispute is December 14, 2014, through the date of trial, June 15, 2015, representing 26 1/7 weeks. On December 14, 2014, Petitioner was fired by Respondent. (T. 10). The Arbitrator notes that termination is not sufficient reason for Respondent to cease TTD payments. The Supreme Court of Illinois found that:

> For the reasons stated above, we hold that an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged—whether or not the discharge was for "cause." When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits. (*Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n.* 236 Ill. 2d 132. (2010).

The Arbitrator notes that Petitioner's condition never stabilized. Dr. Kitchens only placed Petitioner at MMI under the assumption that Petitioner's work injury was non-existent. (RX5 p.

12). As far as the annular tears at L3-4, L4-5, and L5-S1 were degenerative diseases, Dr. Kitchens recognized that Petitioner was not yet at MMI. *Id.* Dr. Raskas also stated that Petitioner was not at MMI by the date of trial and continues to treat Petitioner. (PX11 p. 14; T. 20).

Because Petitioner's condition has not yet stabilized, Respondent is still obligated to pay Petitioner's TTD for the period of December 14, 2014 through June 15, 2015.

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.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DONOHUE,

Petitioner,

16IWCC0261

vs. NO: 09 WC 48055

SYSCO FOOD SERVICES OF CHICAGO,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on Remand from the Circuit Court of Cook County, Illinois, in Michael Donohue v. Illinois Workers' Compensation Commission, and Sysco Food Service of Chicago, 14 L 50862.

By way of history, Petitioner appealed the Commission's Decision and Opinion on Review dated October 24, 2012. By that Decision, the Commission affirmed and adopted the Decision of the Arbitrator filed February 14, 2012. There, the Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment on November 6, 2009, that Petitioner's left knee torn meniscus injury is causally related to his work injury, that Petitioner failed to prove his degenerative left knee condition is causally related to his work injury, that Petitioner's average weekly wage in the year preceding the injury was $1,591.03 and that the Petitioner's current average weekly wage in his new position is $1,000.00.

Additionally, the Arbitrator found that Petitioner was temporarily totally disabled for a period of 41-3/7 weeks, that being from November 12, 2009 through November 22, 2009, January 04, 2010 through February 22, 2010, May 13, 2010 through August 16, 2010, and from

16IWCC0261

August 18, 2010 through January 04, 2011. The Arbitrator also found that Petitioner sustained a permanent injury resulting in 30% loss of use of the use of his left leg under Section 8(e) of the Act and that Petitioner is entitled to $9,543.00 for necessary medical expenses under Section 8(a) and pursuant to Section 8.2 of the Act, and that Respondent is entitled to a credit of $34,927.33 for TTD benefits paid.

Petitioner sought judicial review of the Commission's October 24, 2012 Decision. On December 23, 2013, the Circuit Court of Cook County, Illinois, in Michael Donohue v. Illinois Workers' Compensation Commission, and Sysco Food Service of Chicago, 12 L 51452, issued a Remand Order. In its Remand Order of December 23, 2013, the Circuit Court determined that the Commission's finding that the Petitioner failed to prove entitlement to an award of a wage differential under Section 8(d)1, and failed to prove that his degenerative condition of his left knee was casually related to his work injury, was against the manifest weight of the evidence. The Circuit Court Ordered the Commission to reverse the prior decision of the Commission and find Petitioner established that the degenerative condition of his left knee is casually related to his work injury, and that Petitioner is entitled to a wage differential under Section 8(d)1.

In the Commission's October 28, 2014 Decision and Opinion on Remand, the Commission took specific note of the Circuit Court's conclusion relative to the issue of causal connection, reading in pertinent part:

> "Contrary to the Commission's finding, Dr. Regan was not silent on the issue of whether the degenerative condition of Plaintiff's left knee was causally related to the work accident, Dr. Regan specifically mentioned Petitioner's degenerative condition in a letter dated June 7, 2011, which is in the record on page 352. The letter contains evidence that Plaintiff could have used to further his case. Any reasonable trier of fact would have noted this evidence in the record and weighted it accordingly. The fact that the Commission ignored it suggests that they were determined to reach a particular outcome."

The Commission noted that with regard to the June 7, 2011 report of Petitioner's treating physician, Dr. Regan, found at page 352 of the record, and which was discussed by the Circuit Court, the Commission noted, reviewed, considered, analyzed, and weighed this report in reaching its decision. Dr. Regan specifically opined:

"In terms of commenting on whether or not degeneration is related to the aging process or on the job, I have a more difficult time saying one versus the other. It is easy for me to say the meniscal tear and the bone bruise have relationship to the on the job accident." (emphasis added). (Attachment A).

This comment does not establish the doctor's belief that a causal nexus existed between the alleged work accident and the Petitioner's degenerative process. The Commission found "no

evidence in the record to support any finding that Petitioner's degenerative condition of his left knee is causally related to the work accident. His treating doctor is silent on the issue. (PX2)."

The Commission further took umbrage with the Circuit Court's insinuation that the findings of the Commission were pre-ordained. The Commission did not have an agenda and to suggest otherwise is an affront to the integrity of the members of the Commission that have been appointed by the Governor and confirmed by the Senate of the State of Illinois.

It was the Commission's reasoned Opinion and belief that Petitioner's degenerative left knee condition was not caused, aggravated or accelerated by the work injury. The Commission noted that this conclusion was based upon a review of the record as it was enunciated by the decision of Arbitrator Lee. He concisely stated the reasons why the Petitioner failed to establish the necessary nexus that would require the Commission to find a causal connection between Petitioner's work-related injury and his degenerative left knee condition. Dr. Walsh, Respondent's Section 12 examiner, opined Petitioner's degenerative left knee condition was not caused, aggravated or accelerated by the work injury, that Petitioner required no work restrictions as a result of his work injury and that it would be reasonable to restrict Petitioner from returning to work as a truck driver for the unrelated degenerative left knee condition.

As a result of its belief that Petitioner failed to prove a causal nexus between his degenerative knee condition and his current condition of ill-being, the Commission likewise previously found that Petitioner was not entitled to a Section 8(d)1 wage differential and that Petitioner was not partially incapacitated from returning to work in his former position as a truck driver as a result of his work related injury.

However, based upon the December 23, 2013 Circuit Court's remand order, as aforesaid, the Commission was required to find that Petitioner established his current degenerative left knee condition is causally related to his November 6, 2009 work related injury, that Petitioner was entitled to a wage differential of $394.68 per week pursuant to Section 8(d)1 of the Act as of January 16, 2011, the date Petitioner returned to work in his alternative position for Respondent, and otherwise affirmed and adopted the Arbitrator's Decision. The wage differential award was based upon Petitioner's average weekly wage prior to his work related injury, $1,592.03, and his current earnings in his alternative position, $1,000.00, both wages having been established by the evidence submitted at the time of the arbitration hearing in this matter. [The parties have since stipulated to $1,100.00 as representing Petitioner's current earnings in his alternative position, per the August 10, 2015 Remand Order.]

Petitioner sought judicial review of the Commission's October 28, 2014 Decision. On August 10, 2015, the Circuit Court of Cook County, Illinois, in Michael Donohue v. Illinois Workers' Compensation Commission, and Sysco Food Service of Chicago, 14 L 50862, issued a Remand Order. In its Remand Order of August 10, 2015, the Circuit Court Reversed and Remanded the Commission's October 28, 2014 Decision and Opinion on Remand, and determined that the Commission incorrectly calculated Petitioner's wage differential benefits,

and ordered the Commission to recalculate Petitioner's wage differential award "because the evidence as to Plaintiff's earning capacity presented at the first arbitration hearing was not considered by the Commission." Specifically, the Court ordered that "the Commission shall issue a decision including the determination of (1) Plaintiff's average weekly wage at the time of the accident and explanation as to the calculation thereof; (2) Plaintiff's earing capacity as of November 4, 2011, being the final date of the first arbitration hearings, and explanation as to the calculation thereof; and, (3) Plaintiff's wage differential benefit award and explanation as to the calculation thereof.

Based upon the December 23, 2013 Circuit Court's Remand Order, and the August 10, 2015 Circuit Court's Remand Order, the Commission is required to find that Petitioner established his current degenerative left knee condition is causally related to his November 6, 2009 work related injury, that Petitioner was entitled to a wage differential of $394.68 per week pursuant to Section 8(d)1 of the Act as of January 16, 2011, the date Petitioner returned to work in his alternative position for Respondent, and otherwise affirms and adopts the Arbitrator's Decision. The wage differential award was based upon Petitioner's average weekly wage prior to his work related injury, $1,592.03, and his current earnings in his alternative position, $1,100.00, both wages having been established by the evidence submitted at the time of the arbitration hearing in this matter.

In determining (1) Plaintiff's average weekly wage at the time of the accident and providing an explanation as to the calculation thereof, the Commission finds that Petitioner's average weekly wage as of the date of the November 6, 2009 accident was $1,592.03, based upon the wage information provided at the time of arbitration. The Application for Adjustment of Claim filed by Petitioner on November 20, 2009 alleged an average weekly wage of $1,171.35. (T5). At the time of the September 7, 2011 and November 4, 2011 Arbitration hearings the Petitioner alleged an average weekly wage of $1,402.75(T188), and Respondent alleged an average weekly wage of $1,033.60(T188). Following the September 7, 2011 and November 4, 2011 Arbitration hearings, the Arbitrator found an average weekly wage of $1,592.03. (T24). The Commission affirms the Arbitrator's finding as to Petitioner's average weekly wage at the time of his accident, $1,592.03. In so finding, the Commission relies upon the wage statement (T567) detailing Petitioner's earnings in the year preceding his accident, which on a weeks and parts thereof basis amounts to 14.1 weeks for the period in question. Overtime earnings are stated to be $7,528.26, and based upon straight time rate required to be used, and dividing $7,528.26 by 1.5 equals $5,018.84 in straight time earnings. These earning when added to the regular hour earnings of $17,428.86 depicted in the wage statement, yields totals yearly earnings of $22,447.70. Petitioner worked 14.1 weeks in that year and therefore his average weekly wage is $1,592.03.

In determining (2) Plaintiff's earing capacity as of November 4, 2011, being the final date of the arbitration hearing, and explaining as to the calculation thereof, the Commission finds Petitioner's earning capacity as of November 4, 2011 is $1,621.80, as established by the evidence submitted at the time of the Arbitration hearings in this matter. The Commission finds

the testimony of Jim Juhnle to be speculative as to Petitioner's earning capacity, and insufficient evidence as to same. Instead the Commission relies upon the testimony of Petitioner, and the testimony of Charles DeCola, reflecting the current rate of pay per hour for a delivery driver is $27.03 per hour, and Petitioner's testimony that he worked an average of 12 hours per day, which DeCola testified was a normal work day for a delivery driver.

Jim Juhnle, called as a witness at the time of the September 7, 2011 Arbitration hearing, testified he works for Respondent as a delivery driver, is a member of Teamsters Local 170, and presently earns $27.03 per hour, and averages about 12.5 hours per day, five days a week. He further testified that a year or so ago, Petitioner worked the route he is currently working. (T36-38, 46). Petitioner testified when employed by Respondent he worked 8 hours a day, but averaged 12 plus hours a day with overtime, five days a week, and earned $26.03 per hour on the date of accident, November 6, 2009. Petitioner further testified that he was off work for a period of time between November 2008 and November of 2009 for an un-related work-related accident, and that he was working 40 hours of regular time when he was back at work. Petitioner further testified that the present straight time rate of pay is $27.03 per hour. (T49-55, 84). Charles DeCola, a business agent for Teamsters Local 710, was called to testify by Petitioner. DeCola testified that he was familiar with the Teamster's contract with Respondent, that at the time of Petitioner's injury he was earning approximately $26.00 per hour as s delivery driver, that the current wage of a delivery driver is about $27.00 per hour, and that as a delivery driver under the Teamster's contract a delivery driver is guaranteed eight hours at a minimum, with a normal workday being 12 to 14 plus hours a day. (T102-112).

In determining (3) Plaintiff's wage differential benefit award and explaining as to the calculation thereof, the Commission finds that Petitioner is entitled to a wage differential award under §8(d)1 of the Act, in the sum of $347.51 per week, commencing on January 16, 2011, the date he accepted and began working as a security guard earning $1,100.00 per week, and continuing for the duration of his disability as provided in §8(d)1 of the Act. This award under §8(d)1 of the Act is based upon 66-2/3% of the difference between the average amount which Petitioner would be able to earn in the full performance of his delivery driver duties in the occupation he was engaged at the time of the accident ($1,621.80) and the average amount he is earning in the security guard employment he is engaged in post-accident($1,100.00).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2012, as modified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $9,543.00 for medical expenses under §8(a), and pursuant to §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,061.35 per week for a period of 41-3/7 weeks, from November 12, 2009 through November 22, 2009, January 4, 2010 through February 22, 2010, May 13, 2010 through

August 16, 2010, and August 18, 2010 through January 4, 2011, 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 wage differential benefits in the sum of $347.51 per week, commencing on January 16, 2011, and continuing for the duration of his disability as provided in §8(d)1 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 15 2016
KWL/kmt
R-04/11/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roberta Smiley,

Petitioner,

vs.

NO: 14 WC 31509

16IWCC0262

Unilever,

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 27, 2015, is hereby affirmed and adopted.

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

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

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

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 18 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

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

SMILEY, ROBERTA
Employee/Petitioner

Case# 14WC031509

16IWCC0262

UNILEVER
Employer/Respondent

On 7/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4642 O'CONNOR NACKOS
MATT WALKER
120 N LASALLE ST 35TH FL
CHICAGO, IL 60602

0560 WIEDNER & McAULIFFE LTD
MARK D WILKENING
1 N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0262

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)

Roberta Smiley
Employee/Petitioner

v.

Unilever
Employer/Respondent

Case # 14 WC 31509

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **January 7, 2015.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

16IWCC0262

FINDINGS

On the date of accident, **8/13/14**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,522.36**; the average weekly wage was **$1,125.43.**

On the date of accident, Petitioner was 66 years of age, *single* with 0 dependent children.

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

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

Respondent is entitled to a credit of **$1,818.76** under Section 8(j) of the Act.

ORDER

Claim for compensation denied. Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 13, 2014 and failed to prove that there is a causal connection between any such accidental injuries and her current condition of ill-being with respect to her neck and right shoulder.

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 27, 2015
Date

ICArbDec19(b)

JUL 27 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In support of the Arbitrator's decision relative to Paragraph "(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?" and "(F) Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator finds the following facts:

Petitioner is a 66 year old and has been employed by Respondent for eleven years. Petitioner's jobs with Unilever have included Line Operator, Material Handler and Relief Operator. At the time of Petitioner's alleged injury, she was employed as a Relief Operator. As a Relief Operator, Petitioner provides relief for the line operators when they are unavailable. Petitioner testified that there are normally three operators working on a line and that it is her job to step in for them whenever necessary. Petitioner testified that she has been employed as a Relief Operator for approximately eight years.

At the time of the alleged injury, Petitioner was working second shift which began at 2:00 p.m. Upon arrival at work, Petitioner would proceed to the locker room and change into her work gear. Thereafter, she would attend a shift meeting that would take between 15-20 minutes. Thereafter, she would go to her assigned work location. Upon arriving on the floor, Petitioner would proceed to the line and remove one jar of mayonnaise from the line and take it to the lab. Petitioner testified that a jar of mayonnaise weighs a little bit less than 4 lbs.

Petitioner testified that she was required to lift jars of mayonnaise and pails of mayonnaise all of the time. She testified that she was required to lift the jars if there was something wrong with the jar. The jar could be overfilled or under filled. There could be a black mark in the jar of mayonnaise or the label may be wrong. A jar could be bent. If that were the case, she would remove the jar from the line by throwing it into a dumpster. When asked how often she was required as a reliever to take jars off the line, Petitioner responded by saying, "As many times as it takes." She also stated, "If it is all day, whatever, that's what we do."

Petitioner testified that she is also required to lift boxes or pails of glue. She stated that the boxes weigh 30 lbs. and that the pails weigh 50 lbs. She transports three boxes on a cart at a time and takes the boxes of glue to the line. She indicated that she performs this maneuver at least two times per day. When Petitioner transports pails of glue, she takes two at a time on her cart.

Petitioner testified that she also is required to take cardboard trays off of a forklift truck which is right next to the line. She removes these cardboard trays and then slides them into the magazine.

Petitioner testified that she also is required to lift boxes of mayonnaise. She testified that if there is something wrong with the box as it moves down the line, she is required to remove it from the line. She also testified that she is sometimes required to lift skids. She did not testify as to how often that task is required. She also stated that she is required to slide a 60 gallon drum filled with mayonnaise approximately 4 or 5 feet if a sanitation worker is not available.

Petitioner testified that she is required to remove whole trays of mayonnaise from the line when the line jams. Some days the line jams all day and other times it goes a full day without any jamming.

Petitioner testified that on August 13, 2014, while working as a Relief Operator for Unilever, she was required to throw bottles off of the line into a dumpster. She said that this was required because the mayonnaise was bad. She was throwing jars that weighed a little bit less than 4 lbs. She testified that she was performing this maneuver for approximately 1 hour. She testified that she filled a dumpster with these jars. She estimated the dumpster to be approximately 3 ½ feet high. She testified that while performing this task, her right arm gave way and she noticed pain in her right shoulder. She also testified that she felt pain in her neck. Petitioner testified that she provided notice of this occurrence to her safety supervisor, Steve Murphy. According to her testimony, she told him that she hurt her arm and felt a pull in it while throwing bottles off. She was going to see a doctor the next day. Murphy said that Petitioner probably had arthritis.

The following day, on August 14, 2014, Petitioner sought treatment with Dr. Myriame Casimir. The records of Dr. Casimir regarding treatment of the Petitioner on that date reflect the following history: "Complains of worsened right shoulder pain times few months. Took Aleve with minimum relief. Denies trauma. Lift a lot of boxes at work." Dr. Casimir prescribed physical therapy. (PetEx. 1)

On August 22, 2014, Petitioner sought treatment with Dr. Cicero of Chicago Neck and Back Institute. In the history portion of the records of Dr. Cicero, Petitioner was asked when her present attack began. Petitioner indicated as follows: "2 months ago." When asked the question as to what caused the attack, Petitioner indicated as follows: "Don't know." When asked how often she would have this kind of pain, Petitioner responded as follows: "When I move different ways." (PetEx. 2)

Petitioner testified that on August 22, 2014 she attempted to deliver a note describing her restrictions to her safety supervisor, Steve Murphy. She testified that Mr. Murphy was in a hurry and was unable to take delivery of the note. Accordingly, Petitioner took the note to Chelsea Rutledge, a Human Resource Specialist. Petitioner did not recall what Chelsea Rutledge said when she was provided with the note. Petitioner did testify that Respondent did not provide a position within the restrictions set forth on the note.

Petitioner testified that she returned to Unilever on August 25, 2014 and had a conversation with Steve Murphy. She testified that he advised her that he had seen the note and that she was not able to work with those restrictions. She also testified that she advised Russell Boyce, her supervisor, about her restrictions and he advised her to stop working and to leave.

Thereafter, Petitioner continued treatment with Dr. Casimir, Dr. Wilson and Dr. Cicero. As of September 3, 2014, Dr. Casimir took Petitioner completely off of work. As of September 10, 2014, Dr. Cicero also took Petitioner completely off of work. Thereafter, Dr. Casimir referred the Petitioner to Dr. Bush-Joseph. Dr. Bush-Joseph saw Petitioner on December 19, 2014. Respondent authorized the visit with Dr. Bush-Joseph. At that time he placed her on restrictions of a 20 lb. maximum lift with frequent lifting up to 10 lbs. (PetEx. 1,2 & 5)

At trial, Petitioner testified that her right shoulder was full of pain. She testified that the pain was there most of the time and that she cannot sleep at night. She testified that it hurts her throughout the day. She testified that she takes pain killers. She also testified that she has pain in her neck that runs up and down her shoulder. She indicated that the pain went between the shoulder and the neck. She testified that she cannot do housework like she is supposed to do and that she cannot wash her hair. She indicated that she lifts with her left hand. She indicated that she drives but that she drives with her left hand. She testified that Dr. Bush-Joseph had recommended surgery for her shoulder.

The records of ATI Physical Therapy (PX4) contain an assessment from December 5, 2014. As of that date, the records reflect that the Petitioner had been seen on 30 prior occasions for skilled therapy. It was concluded that Petitioner had progressed toward and achieved her established goals really well. The report concluded that there was subjective improvement in range of motion, strength, disability, joint mobility and soft tissue mobility. It was concluded that Petitioner had made functional improvements with increased ability to perform bathing, caring, cleaning, dusting, washing overhead and dressing. It was concluded that Petitioner could still benefit from additional therapy and three additional weeks were recommended. It was determined that after completion of physical therapy, Petitioner would benefit from work condition/hardening to allow for a safe return to full duty work.

Petitioner admitted that she had seen Dr. Bush-Joseph on December 19, 2014. She admitted that he did not restrict her to only performing work with her left arm. She admitted that she could lift 10 lbs. repetitively and 20 lbs. occasionally.

Petitioner admitted that when she when to see Dr. Casimir, she did not tell her about throwing mayonnaise jars off of a line into the dumpster. However, Petitioner insisted that she did give a specific history to Dr. Cicero and that he failed to include it in his records relative to her visit of August 22, 2014.

Petitioner admitted that when she removes jars of mayonnaise from the line that are defective, she does not need to lift overhead to remove them as the line is only waist high.

As for boxes of products, Petitioner agreed that sometimes a full day will go by and none of the cases are defective and she is therefore not required to lift any of the boxes. She testified that other days there are more cases open and she must remove them from the line. Petitioner acknowledged that she does not lift boxes off of the line very often. Her answer to that question was as follows: "Not the whole box, no."

As for the trays, the Petitioner agreed that these are cardboard trays. She admitted that the cardboard trays are very light.

Chelsea Rutledge testified on behalf of Respondent. Chelsea Rutledge has been employed by Respondent for two years. She has been employed as an HR Specialist since August, 2014. She is the first point of contact for hourly employees with any of their concerns, benefits or absences. She testified that the Petitioner came to see her on August 22, 2014 in Chelsea's office. Chelsea Rutledge testified that Petitioner provided her with a note from her doctor. Ms. Rutledge asked Petitioner if anything happened at work and whether or not she injured herself. Petitioner advised Ms. Rutledge that she could not recall anything specifically happening at work nor could she provide Ms. Rutledge with a date of accident. Chelsea Rutledge questioned Petitioner as to whether or not the doctor was suggesting that she could not perform her duties. Petitioner advised her that the doctor did not preclude her from returning to work. Ms. Rutledge asked Petitioner as to whether or not she was able to do her job and Petitioner said yes. Ms. Rutledge further advised Petitioner that if she was unable to perform her job, she could apply for short term disability with Liberty Mutual.

Chelsea Rutledge further testified that the following Monday, she and Petitioner did had a conversation. At that time, Petitioner advised Ms. Rutledge that she had injured herself. She said she had dropped a jar and her shoulder gave way. Ms. Rutledge then provided Petitioner with the Liberty Mutual information. Ms. Rutledge testified that she had provided her with this information as she was under the assumption that this was not a work related situation.

Russell Boyce testified on behalf of the Respondent. Mr. Boyce has been employed as a Production Supervisor for the Respondent for 15 years. Mr. Boyce is familiar with all of the jobs on all of the lines at Unilever and is familiar with Petitioner's job. Mr. Boyce is also familiar with Petitioner, as he has been her supervisor on and off for approximately 11 years. As of August, 2014, he was her supervisor. Mr. Boyce testified as to Petitioner's job duties as follows:

1) Petitioner is required to perform quality checks. Quality checks require an operator to pull a jar off of the line every hour and check the jar. He testified that Petitioner performs this job approximately 1 hour per day.

2) Petitioner also performs the job of a labeler. As a labeler, Petitioner is required to take a bundle of labels off of a cart and put them in the magazine. To check the label integrity is a visual check. In the course of a day, the Petitioner would be required to lift 12 to 14 boxes of labels weighing approximately 26 ½ lbs. each.

3) Petitioner would perform the job of a tray packer. A tray packer is required to grab a bundle of cardboard trays and load them into a magazine. These cardboard trays when lifted 20 at a time would weigh approximately 4 to 5 lbs.

4) Petitioner would also perform the job of loading glue into the glue pot. Petitioner was required to grab a scoop and scoop the glue out of the box and put it inside the gluer. The scoop is like a cup. The scoop would weigh less than 1 lb.

5) Petitioner would perform the rework job. This job would be performed approximately once per week. This would last a couple of hours. Petitioner might have to lift up to 60 boxes in the course of 2 hours. These boxes would have between 3 and 4 bottles of mayonnaise in each box.

Mr. Boyce testified that the majority of Petitioner's work requires observing the line. Petitioner is also required to occasionally run pails. While running pails, Petitioner would be sitting down and the pail would come to the station on the conveyor. Petitioner would be required to tie the plastic bag and push it down to the next station. Occasionally, if there was a product issue, Petitioner would need to lift the pail and place it on the floor where someone else would take it away. Mr. Boyce testified that approximately once per week, boxes are open as they come down the line and the operator would be required to move it because it is not sealed properly. Occasionally Petitioner would be required to clear bottle jams by climbing up 10 feet on a ladder and use a stick to clear the bottle jam. If there is a dented jar, she might occasionally have to remove that jar with her hand. Other than clearing bottle jams, none of Petitioner's jobs require overhead work in her daily function.

The Arbitrator does not find Petitioner's job to be sufficiently repetitive to have caused the injuries from which she now suffers. Further, the Arbitrator does not find that the petitioner injured her right shoulder and neck on August 13, 2014 in the manner described by her at arbitration. In support of these findings, the Arbitrator is persuaded by the medical records of Drs. Casimir and Chicago Neck and Back. On August 14, 2014, Petitioner was seen by Dr. Casimir. Petitioner did not provide a specific history of injury as was testified to at trial. On cross examination, Petitioner admitted that she did not tell Dr. Casimir about the incident as described at arbitration of throwing mayonnaise jars into a dumpster. The records of Chicago Neck and Back dated August 22, 2014 also do not include a specific history of injury. Instead, these records indicate that the Petitioner advised them that she does not know what caused her injury and that she has been having the pain for two months. When asked how often she has the pain, she responded that she has the pain when she moves different ways.

Chelsea Rutledge testified that when she met with Petitioner on August 22, 2014, Petitioner advised her that she did not know how she injured herself and that it was not related to a work injury. Not until three days later, on August 25, 2014 did Petitioner provide the description of injury to Ms. Rutledge. Russell Boyce, a production supervisor for 15 years with Respondent testified credibly as to Petitioner's job duties. Mr. Boyce's description confirms that Petitioner's job duties were mostly observational and when they became physical, they were not repetitive and they were not overhead. Petitioner agreed that there were days that would go by that she would not have physical activities to perform.

The Arbitrator also notes that the medical opinions of the physicians involved do not support a causal connection between the Petitioner's description of accident of August 13, 2014 and her current medical condition as it relates to her right shoulder and neck. Dr. Casimir's records merely indicated that Petitioner advised the doctor that she had been experiencing right shoulder pain for the past few months, that she denies trauma, and that she lifts a lot of boxes at work. Dr. Casimir does not relate Petitioner's shoulder problems to a specific incident of August 13, 2014. Nor does Dr. Casimir specifically relate her shoulder problems to repetitive activity at work.

The records of Chicago Neck and Back Clinic contained Petitioner's answers to when her present attack began. She responded by indicating, "Two months ago." When questioned as to what caused it, Petitioner responded by indicating, "Don't know." When asked how often she has the pain, Petitioner replied, "When I move different ways." In this questionnaire, no history of a work accident is given.

In a different portion of Petitioner's Exhibit 2, there is a history of complaint stating that Petitioner began experiencing right shoulder pain on August 13, 2014 while at work. The history goes on to state that while lifting a jar of mayonnaise she began feeling pain but continued working with pain persisting.

Dr. Cicero concludes in his notes of August 22, 2014 that Petitioner has right arm and right shoulder pain secondary to a work injury. However, Dr. Cicero does not specifically describe the mechanism of injury.

Dr. Cicero referred the petitioner to Dr. John Wilson who examined Petitioner on September 3, 2014. Dr. Wilson charted that Petitioner was moving gallon jars when she developed pain in the right arm and right shoulder. He concluded that her right arm pain was secondary to a work injury. Once again, Dr. Wilson does not describe a specific mechanism of injury.

Finally, Petitioner did seek treatment with Dr. Charles Bush-Joseph on December 19, 2014. No chart note regarding this visit was placed into evidence. Dr. Bush-Joseph only placed work restrictions on Petitioner and did not provide a diagnosis or causation opinion.

It is axiomatic that Petitioner bears the burden of proving that she sustained accidental injuries which arose out of and in the course of her employment and also proving that her current condition bears a causal relationship to her alleged work injury. In this case, Petitioner appears to have alleged 2 different theories of accident. The first theory being a specific injury at work on August 13, 2014. The second theory of accident being a repetitive trauma claim. The Arbitrator does not find that Petitioner has met her burden under either theory.

Petitioner gave inconsistent histories to Dr. Casimir and also to Chicago Neck and Back Clinic. While there are some vague descriptions of a specific accident, there are also contrary histories given by Petitioner on several occasions throughout the records.

Neither Party called Steve Murphy to testify. His testimony could have supported Petitioner's testimony about the events of August 13, 2014, or refuted it. The absence of Murphy's testimony is not considered by the Arbitrator in deciding the issue of accident.

Further, Petitioner's job duties are simply not repetitive. This finding is based upon the credible testimony of Russell Boyce as well as the admissions made by Petitioner on cross examination. A large percentage of Petitioner's job is simply observing the line. On those occasions where she is required to perform physical activity, the activities do not require overhead work and they do not require repetitive physical maneuvering.

The medical records submitted by Petitioner are not persuasive on the issues of accident or causation.

Accordingly, for the above reasons, the Arbitrator finds that Petitioner has failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 13, 2014 and has failed to prove a causal connection between any such injury and her current condition of ill-being with respect to her neck and right shoulder.

In support of the Arbitrator's decision relative to Paragraph "(J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?", "(L) What temporary benefits are in dispute?" and "(M) Should penalties or fees be imposed upon Respondent?", the Arbitrator finds the following facts:

As the Arbitrator has found that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment by Respondent on the claimed date and failed to prove a causal relationship between her condition of ill-being and any alleged work accident, the Arbitrator needs not decide the above issues.

The Arbitrator finds that Respondent's disputes in this case were in good faith and do not support and award of penalties or fees.

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

Brandon Albright,

Petitioner,

vs.

NO: 11 WC 21434

White County Coal, LLC,

16IWCC0263

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, prospective medical, occupational disease, permanent partial disability, evidentiary rulings, Respondent medical credit, and the number of choices of doctors, 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 19, 2015 is hereby affirmed and adopted.

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

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

16IWCC0263

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 19 2016

MB/mam
o:4/7/16
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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALBRIGHT, BRANDON
Employee/Petitioner

Case# **11WC021434**

11WC021436

16IWCC0263

WHITE COUNTY COAL LLC
Employer/Respondent

On 6/19/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0384 NELSON & NELSON PC
DAVID NELSON
420 N HIGH ST
BELLEVILLE, IL 62220

2742 HAZLETT & SHORT PC
KEVIN M HAZLETT
1167 FORTUNE BLVD
SHILOH, IL 62269

16IWCC0263

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

BRANDON ALBRIGHT

Employee/Petitioner

v.

WHITE COUNTY COAL, LLC.

Employer/Respondent

Case # 11 WC 21434
Consolidated Case# 11 WC 21436

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 **April 20, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **3/30/09,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

On that 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 $**59,271.68**; the average weekly wage was $**1,139.84**.

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

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

ORDER

Respondent shall pay the reasonable and necessary medical expenses of Dr. George Paletta and The Orthopedic Center of St. Louis as set forth in Petitioner's Exhibit 9 and as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule. Respondent shall be given a credit for any amounts that have been paid, including any amounts paid by its group medical plan for which credit is allowed under Section 8(j) of the Act and shall hold Petitioner harmless from same.

Respondent shall pay TTD benefits to Petitioner in the amount of **$759.89/week** from **5/19/09** through **8/31/09** and **02/5/13** through **6/09/13**, a period of **32 6/7 weeks**, as provided in Section 8(b) of the Act. Respondent shall be given a credit for TTD paid.

Respondent shall pay petitioner permanent partial disability benefits of **$664.72 / week** for **75 weeks**, because the injuries sustained caused **15% loss of use of a man as a whole.**

Respondent shall pay Petitioner compensation that has accrued from March 30, 2009 through April 20, 2015 and shall pay the remainder of the award, if any, in weekly installments.

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

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

Signature of Arbitrator

June 18, 2015
Date

JUN 19 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner has two claims pending against Respondent both involving a right shoulder injury: Case # 11 WC 21434 (date of accident – 3/30/09) and Case # 11 WC 21436 (date of accident – 3/17/11). Both cases were consolidated for purposes of hearing with the disputed issues being identical for both cases. The parties requested that one decision issue; however, subsequent to the date of hearing the Arbitrator was advised by the Chairman of the Commission that separate decisions should be issued in consolidated cases. Therefore, separate decisions are being issued. The only witness testifying before the Arbitrator was Petitioner.

The Arbitrator finds:

Petitioner is an underground coal miner. At the time of arbitration Petitioner had worked for Respondent for eight years. Petitioner's job title at the time of his 2009 accident was "roof bolter." On March 30, 2009 Petitioner was involved in an undisputed accident while installing a roof bolt into the roof of the mine when he felt something tear and pop in his right shoulder. He felt the immediate onset of severe pain.

Petitioner sought immediate medical treatment and presented to the emergency room at Deaconess Hospital in Evansville, Indiana. (PX 1) The emergency room notes contain a consistent history of the accident with Petitioner reporting that it felt like he tore something in his right shoulder. He also stated that he thought something popped. Petitioner was reporting constant right shoulder pain. A history of prior tendinitis in his right shoulder was noted. Petitioner's symptoms included weakness and limited range of motion. An audible clicking was felt during range of motion. X-rays were negative. Petitioner was placed in a sling and given pain medication. He was also placed on light duty and advised to follow up with Orthopaedic Associates and the company's "comp person." (PX 1)

Petitioner presented to "OA East" on April 2, 2009 where he was examined by nurse practitioner Samantha Hodges. Petitioner's complaints included pain, difficulty moving his right arm, weakness, giving away, popping, and stiffness. On exam, Petitioner had tenderness about the greater tuberosity but no tenderness around the AC joint or the posterior elements of the spine. He had 4/5 strength to forward elevation and external rotation. Hawkins sign was greater than Neer but both were positive. Petitioner's symptoms were described as "substantial" and due to the severity of his pain and functional limitations, an MRI was recommended. He was then to be seen by Dr. Lowery. (PX 2; PX 4)

Petitioner underwent an MRI on April 8, 2009. According to the report it showed moderate thickening and signal abnormality in the supraspinatus tendon consistent with tendinopathy and some minimal intrasubstance partial tearing. No full thickness tears were seen. The tendinopathy was noted to be much more advanced than is typically seen in a 26 year old. There was also a small amount of fluid in the subacromial/subdeltoid bursa. Petitioner's labrum and long head of the biceps tendon appeared to be intact. (PX 1; PX 2; PX 4)

An MR arthrogram the same day found no acute internal derangement.

Dr. Lowery examined Petitioner on April 16, 2009 at which time they discussed further treatment options and test results. Petitioner's symptoms remained unchanged. Petitioner's physical examination revealed 4/5 strength to forward elevation and external rotation. Sulcus was noted more posterior than anterior. Positive relocation was noted on the right side. Petitioner had positive Hawkins and Neer signs, with the former being greater. There was no evidence of adhesive capsulitis and cross-body adduction was minimal reproducing AC pain. On palpation Petitioner was noted to be tender about the greater tuberosity. Petitioner was diagnosed with right shoulder tendinitis and started on a Medrol dose pack. Petitioner was also given an injection. Petitioner was advised to use his arm for activities of daily living as comfort would allow as it was unlikely doing so would cause any structural damage or accelerate any degenerative process. He was to begin physical therapy and he was limited to left handed work only. (PX 1; PX 2; PX 4)

Petitioner began physical therapy at Oxford Progressive Therapy Services on April 28, 2009. (PX 3)

Petitioner returned to Dr. Lowery's office on May 7, 2009 for a recheck of his shoulder post injection. He reported 50 – 60% relief for about 4-5 days after the injection. On exam Petitioner was noted to be tender to palpation about the greater tuberosity, not so much over the biceps. He displayed 4/5 strength to forward elevation and external rotation. Instability testing did not recreate any symptoms. Belly press maneuver test was negative. Hawkins test was positive greater than Neer. There were no signs of adhesive capsulitis right to left. Cross body adduction was minimal reproducing AC pain. There were no Lhermite or Spurling signs. Petitioner's diagnosis remained right shoulder tendinitis. They discussed surgery in the form of a bursectomy and decompression with repair of a torn tendon if one was found. Surgery was to be scheduled. (PX 1; PX2; PX 4)

Petitioner underwent surgery on May 19, 2009 at Deaconess Hospital. The pre and post-operative diagnosis was impingement tendinitis. In the operative report Dr. Lowery noted that Petitioner had just underneath the long head of the biceps interarticularly superiorly a small maybe 5 mm. by 6 mm. area where there was a little bit of a surface loss of cartilage. However, it looked smooth and the doctor found no floating debris in the shoulder and concluded it was not part of Petitioner's clinical symptoms. He suspected the smoothness around the edges suggested it was something older and pre-existent rather than recent. The long head of the biceps, the cartilaginous surfaces of the humeral head and glenoid, and the labrum were pristine. On the bursal surface of the cuff Petitioner had some very, very mild fraying. There were no signs of anything other than a standard tendinopathy. Petitioner was noted to have a generous acromial hook and a generous amount of subacromial bursa. Petitioner was also noted to have no evidence of instability. (PX 1; PX 2; PX 4)

Petitioner was re-examined by Dr. Lowery's nurse practitioner on June 3, 2009 at which time he was noted to be doing well without unexpected complaints. Petitioner did report that he had recently begun having occasional pain in the same area of his shoulder as before surgery. Petitioner was undergoing physical therapy to improve his range of motion and his work restrictions were continued. He was taken out of his sling. Medications were no refilled. (PX 2; PX 4)

Petitioner was seen in physical therapy on June 3, 2009 with the therapist expressing concern over Petitioner's pain with range of motion at eighty-five degrees of flexion. He also added that he noted crepitus on June 2, 2009 and extreme pain at the AC joint and CA ligaments. (PX 2; PX 3)

According to the physical therapist's report of July 1, 2009 Petitioner was reporting slight pain at end ranges with flexion and abduction. He continued to be weak in shoulder flexion and the therapist felt

Petitioner would benefit from strengthening exercises. (PX 2; PX 3; PX 4) Dr. Lowery re-examined Petitioner that same day. Petitioner voiced ongoing complaints of discomfort and while he felt better than before surgery, he continued to be in constant pain which he described as "3/10 and dull." On examination Petitioner reported tenderness anterior to superior which coincided where part of the bone was removed. Petitioner was given an injection. His diagnosis was recorded as impingement. He remained on left hand duty only. (PX 2)

Petitioner continued with physical therapy. According to the July 23, 2009 report Petitioner was reporting that he was getting better but did not yet feel ready to go back to work. Petitioner tolerated his treatment "fairly." (PX 3)

Petitioner was again examined by Dr. Lowery on July 29, 2009. Petitioner reported he had been doing well but had recently begun experiencing a lot of discomfort after a recent physical therapy visit where he had to move boxes of different weights around. Dr. Lowery felt Petitioner's symptoms were related to overworking in therapy and Petitioner's shoulder was again injected. Work restrictions were continued. (PX 2; PX 4)

Petitioner's physical therapy report of August 21, 2009 indicated Petitioner was reporting pain in the anterior portion of his shoulder with positive impingement signs. (PX 2; PX 3)

When re-examined by Dr. Lowery on August 25, 2009 Petitioner reported his shoulder wasn't popping but he continued to be in a lot of pain that was different than his previous pain. He also reported sneezing the other day and experiencing a burning sensation in his shoulder. On examination Petitioner was non-tender over the clavicle and AC joint. He did exhibit posterior muscle tenderness radiating into his neck. Concerned with Petitioner's continuing pain in to his neck and the burning sensation in his shoulder Dr. Lowery wished to proceed with a work-up of Petitioner's neck pending discussion with workers' compensation. The doctor's office was to call Petitioner. (PX 2; PX 4)

On September 6, 2009 Dr. Lowery documented "residual symptoms after [Petitioner's] shoulder decompression" and "residual discomfort specifically with overhead work." Dr. Lowery provided an impairment rating for "tendinitis/impingement syndrome." (RX 3, Dep. Ex. 2 –p. 4/43)[1]

Petitioner was examined by his primary care physician, Dr. Alexander, on March 2, 2010. Petitioner reported undergoing surgery on May 19, 2009 and being off work for about four months. Petitioner had seen Dr. Lowery who thought he was having some neck problems and Petitioner was scheduled to see Dr. "Braney" [sic] about it. Petitioner reported he still has a "catch" and burning for 30 to 45 seconds. He denied any shooting pain if he turned his head. Petitioner had good range of motion of his neck and no tenderness; however, his shoulder was painful with range of motion. The doctor's assessment was shoulder dysfunction and he wanted Petitioner seen by Dr. Treg Brown. The doctor noted, "I think his initial surgery failed, or did not correct the problem." (PX 5; PX 4)

Petitioner was examined by Dr. Robert Vraney at Orthopedic Associates on March 16, 2010 per the request of Dr. Lowery. Petitioner reported some improvement after his shoulder surgery but persistent discomfort which was primarily activity based. He gave a "vague history" of neck involvement in the past which is why Dr. Lowery requested an examination. Petitioner pointed directly

[1] There is no actual office note contained in Dr. Lowery's records (PX 2). Rather, this information was gleaned from Dr. Moskal's IME report of July 14, 2011(RX 3 – Dep. Ex. 2)

to the anterior aspect of his shoulder as his source of pain and denied any symptoms impacting the trapezius. He further denied any neck symptoms at all that day. Petitioner demonstrated types of behaviors, postures, and positions that reproduced pain that all involved forward flexion of his shoulder. Dr. Vraney concluded that Petitioner had no issues with his neck but, rather, impingement of the shoulder. (PX 2)

Petitioner presented to the office of Dr. Treg Brown (affiliated with SIOC) on April 13, 2010. In a cover sheet from Dr. Alexander's office to "SIOC" under comments it states, "w/c inform – Charlotte Hagan case manager White County Coal. Okay to see Dr. Brown." Petitioner provided background information concerning his March 2009 accident and further indicated he had been off work from May 18, 2009 through September of 2009. Petitioner was referred for purposes of a second opinion for his right shoulder having injured it on March 31, 2009 while at work when he felt a tearing sensation in his shoulder followed by the immediate onset of pain and inability to continue working. Petitioner identified the anterolateral aspect of his shoulder as the most painful area. He also reported pain with extreme external rotation and reported the inability to perform his routine activities at work and play with his children. Petitioner described his pain as "7/10" and denied any prior right shoulder problems. On examination Petitioner displayed active range of motion with nearly full range but some pain on full forward elevation. He had full external and internal rotation. Petitioner had pain with Neer's impingement testing but good rotator cuff strength in all motor groups. He had equivocal pain with Hawkins test. Diagnostic ultrasound was performed and showed an area of hypoechogenicity in the anterior supraspinatus tendon region consistent with tendinosis versus intrasubstance partial tearing. No full thickness tear was noted. Dr. Brown believed Petitioner had some level of chronic tendinosis and possible partial thickness tearing. If truly intrasubstance, his diagnostic arthroscopy could have been normal despite the MRI findings of partial tearing. If indeed that was the case, Petitioner would have likely had continued pain and some level of dysfunction. Treatment options, including a repeat diagnostic arthroscopy or ultrasound guided platelet rich plasma injection therapy, were discussed. Petitioner wished to proceed with the arthroscopy. Dr. Brown also noted that his exam of Petitioner's cervical spine was normal. Petitioner was told to continue with his present modified work duty status. (PX 4)

That same day Dr. Brown performed an ultrasound of Petitioner's right shoulder. According to the report, Petitioner was placed in a seated position with his elbow flexed at ninety degrees and his palm supinated and resting on his thigh. While in this position, Petitioner's "arm was passively and actively brought through internal and external rotation and the subscapularis appeared normal, again visualized in a cranial to caudal fashion with no abnormal echo patterns seen. Dr. Brown's impression was intrasubstance chronic tendinosis versus a partial thickness tear, possibly extending to the articular surface of the anterior supraspinatus tendon. (PX 4)

On April 21, 2010 Dr. Brown's request for a repeat diagnostic right shoulder arthroscopy was denied by Dr. Peter T. Kirsch of Bluegrass Health Network Utilization Review. The basis for the denial was Dr. Kirsch's belief that Petitioner's "active effects of [his] injury suffered ceased by 9/09." At that time there was no "significant objective residual" and now eight months later there appeared to be no objective change clearly identified to warrant a repeat procedure. (PX 4)

On April 29, 2010 Dr. Brown's office notified Petitioner that his surgery had been denied by workers' compensation but that he could proceed on his personal insurance if he wished. (PX 4)

On May 3, 2010 Petitioner called Dr. Brown's office requesting a repeat MRI. In a Nurse's Note of that same date Petitioner was advised by the doctor that he would need to see him in order to verify its necessity to workers' compensation. (PX 4)

Petitioner presented to Dr. Brown's office on July 6, 2010 reporting that his symptoms were largely unchanged; however, he did feel a pop in his shoulder two weeks earlier that had exacerbated his pain resulting in numbness and pain all the way down into his right hand. Additionally, internal and external rotation motion tended to cause a catching sensation and pain in his shoulder described as "8/10." Petitioner reported pain when his arm would go above chest high and also night pain on his right shoulder. Dr. Brown noted full active range of motion, 4+/5 supraspinatus and infraspinatus strength against resistance, and 5/5 subscapularis strength against resistance. Petitioner was noted to have a positive Hawkins' sign and negative Speed and O'Brien tests. Petitioner also had a palpable and audible clunk and catching sensation to passive external rotation. Dr. Brown's impression was chronic right shoulder pain and he ordered an MRI arthrogram to evaluate Petitioner's cuff and labrum. Petitioner was released to return to work without restrictions. (PX 4)

Workers' compensation did not authorize the MRI arthrogram. Petitioner was advised he could proceed through his personal insurance. (PX 4) In a Nurse's Note dated July 13, 2010 Petitioner advised Dr. Brown's office that he wished to proceed using his personal insurance. (PX 4)

A right shoulder MRI arthrogram was performed on July 20, 2010. It revealed mild supraspinatus tendinosis with some bursal surface fraying involving the posterior fibers. There was minimal intrasubstance fissuring involving the posterior fibers of the supraspinatus without identification of a discrete tear or tendon retraction and a small amount of fluid in the subacromial/subdeltoid bursa which might represent mild bursitis v. the sequel of prior therapeutic injection. Neither a discrete labral tear or detachment or a paralabral cyst was identified. (PX 4)

Petitioner followed up with Dr. Brown/ PA-C Cutler on August 18, 2010 reporting no change in his symptoms and again stating that his symptoms had never gotten better since his original arthroscopy despite physical therapy. His exam remained unchanged from the last visit. They reviewed the MRI arthrogram findings. It was Dr. Brown's impression that the arthrogram and diagnostic ultrasound were consistent with one another showing mild fraying v. a partial tear of the supraspinatus tendon. In light of the failure of physical therapy and activity modification Dr. Brown recommended a repeat arthroscopic procedure. If the procedure failed to show any abnormalities, Petitioner would be able to return to work after a short course of physical therapy. Current restrictions were to remain in effect. Petitioner was to return two weeks after surgery. (PX 4)

Petitioner underwent no further treatment between August 18, 2010 and March 17, 2011. On March 17, 2011 Petitioner sustained another undisputed accident at work for Respondent when he had his arms outstretched while lifting a 50 to 60 pound rock and felt something pop in his right shoulder.

Petitioner presented to the emergency room at Deaconess Health System on March 17, 2011 reporting that he had his arms outstretched and was lifting a "50 or 60" pound rock earlier that day when he got stuck and felt something pop up in his right shoulder. He denied any direct blow to his shoulder. Petitioner reported having "some issues before" and undergoing a bursectomy. He reported pain with external rotation of the right shoulder and some limited range of motion reaching across his body "which he states is old." No obvious deformity or swelling was noted. On examination Petitioner had pain with external rotation of his right upper extremity and some pain with reaching across his

body. X-rays were negative for a fracture. Petitioner was given pain medication by injection as well as pain medication prescriptions. Petitioner stated he would like to follow up with Dr. Goris and Dr. Goris' information and the "Comp Center's information" were provided to him. The doctor's impression was right shoulder pain and strain. (PX 1)

On March 18, 2011 Petitioner presented to Dr. Goris of Orthopaedic Associates. Petitioner gave an accident date of March 17, 2011 and reported picking up a rock stuck on a pinner with his arm extended when he noted pain. Examination of Petitioner's shoulder revealed no evidence of atrophy or deformity nor was there any crepitation or tenderness over the AC joint. Petitioner's active forward flexion was 140, abduction was 130. He was tender to palpation over the anterior portion of his shoulder. No instability was noted. Subjectively, Petitioner complained of some numbness in his fingers. Impingement testing was negative. Petitioner was diagnosed with tendinitis and started on Lortab and Naprosyn. The doctor felt there was a good change his symptoms would return to baseline within a few weeks. Petitioner did report that he had been experiencing some degree of symptoms since his earlier surgery. Petitioner was given restrictions and encouraged to work on his home exercise program. (PX 2)

On April 1, 2011 Petitioner was seen at Oxford Progressive Therapy. The therapist noted that Petitioner's shoulder did not present typically and his symptoms were significant. The therapist wrote, "...most pain seems to consistently stem from the biceps tendon (long head) area to the AC joint." He also noted rotator cuff signs as well. The therapist recommended that further therapy be postponed pending further assessment of Petitioner's shoulder. (PX 2)

Petitioner followed up with Dr. Goris on April 4, 2011 at which time Dr. Goris ordered an MRI arthrogram with contrast. Petitioner's arm remained sore especially when turning his arm out. Riding the arm bike in therapy would reportedly cause popping and increased soreness. The diagnosis remained unchanged. (PX 2)

Petitioner underwent an MRI arthrogram with contrast on April 8, 2011. According to the report, Petitioner had no evidence of any acute internal derangement. The rotator cuff was intact and the long head of the biceps was intact and properly located within the biciptal groove. Petitioner was noted to have a type 2 acromion. (PX 1; PX 2)

Petitioner followed up with Dr. Goris on April 12, 2011. Petitioner reported no dramatic change in his symptoms. His examination was essentially unchanged. Dr. Goris injected Petitioner's shoulder and advised Petitioner that if that didn't help, he recommended an arthroscopy and decompression. (PX 2)

At the next visit on April 26, 2011 Petitioner reported his arm was really hurting with the pain being located deep in the front of his shoulder. In recent days he had noted popping. Surgery was recommended due to Petitioner's substantial functional limitations and level of discomfort. Petitioner was advised of a less than 85% chance of substantial improvement. (PX 2)

Petitioner signed his Applications for Adjustment of Claim in both cases on May 16, 2011. (AX 3, 4)

Petitioner returned to see Dr. Goris on May 24, 2011 and was advised surgery had been denied by workers' compensation. Petitioner's symptoms remained unchanged and he reported increasing pain

in his shoulder when working with normal activity during the preceding week. Petitioner was going to decide if he wished to proceed with surgery using his personal insurance. (PX 2)

Dr. Goris re-examined Petitioner on June 17, 2011 with Petitioner reporting pain in the front and about the sides of his shoulder and trouble with motion. Dr. Goris' diagnoses included AC joint dysfunction and impingment syndrome. Dr. Goris noted that "It is reasonable to say that his pain is from the work related injury since he was doing well until the injury." Petitioner did not have a completely normal shoulder prior to the injury but he didn't have the pain he was having until the injury. While diagnostic testing didn't reveal any internal derangement it would be reasonable to look, via arthroscopic surgery, for any partial tendon tearing or problems with the AC joint. In the interim Petitioner would not be doing any harm to himself to continue with normal daily activity. (PX 2)

Petitioner underwent an independent medical examination on July 14, 2011 with Dr. Moskal. At the time of the examination Dr. Moskal performed both a right static ultrasound and a dynamic ultrasound. (RX 3, Dep. Ex. 2 – pp. 40-41/43) Petitioner's long head of the biceps tendon had linear longitudinal echoes and punctuate short-segment echoes. Petitioner reported complaints of pain while undergoing range of motion during the dynamic ultrasound. (Id.)

Dr. Moskal issued a lengthy report on July 29, 2011 which included photographs of Petitioner, a discussion of his examination, and his findings and opinions. Included in his Summary (RX 3, Dep. Ex. 2 – p. 4/43) was mention of Petitioner's 9/6/09 visit with Dr. Lowery[2].

Dr. Moskal was of the opinion, based upon a radiologist's report of April 8, 2009, that Petitioner had an active pre-existing clinical problem of intrinsic rotator cuff degeneration long prior to the event occurring proximate to March 31, 2009. In Dr. Moskal's opinion, that pre-existing condition was not changed by the March 31, 2011 "event." (Id., p. 3/43) On page 5 of his report, Dr. Moskal stated, "[Petitioner] has not had a recent injury around March [of] 2011 and [he] has a number of symptoms unrelated and related to the diagnosis that Dr. Lowery rendered before surgery (May 19, 2009), multiple times after surgery, and on September 6, 2009." (Id., p. 5/43) He felt the surgery Dr. Goris was recommending was for a condition since March of 2009 (and which Dr. Lowery provided a permanent partial disability impairment for on September 6, 2009. (Id., p. 6/43) Dr. Moskal found no findings on examination related to Petitioner's March 17, 2011 injury and he didn't think Petitioner sustained an injury on that date. (Id., pp. 7-8/43) At page 32 of his report Dr. Moskal quoted Petitioner as saying "' All I know is everything I do hurts, all of it. It's been like this for 2 years.'" (Id., p. 32/43)

Dr. Goris' deposition testimony was taken on August 29, 2011. (PX 11) Dr. Goris testified that he began treating Petitioner on March 18, 2011 at which time Petitioner told him he had suffered an injury while lifting a rock stuck in a pinning machine. (PX 11, p. 5) Dr. Goris was aware that Petitioner had been previously treated by his partner Dr. Lowery and had undergone right shoulder surgery. Petitioner had injured his arm on March 31, 2009 and undergone treatment with Dr. Lowery which led to an arthroscopic evaluation of Petitioner's shoulder with a subacromial decompression. He had the standard post-operative rehabilitation but continued to have some difficulty with right shoulder pain even post-surgery although Petitioner described the pain as somewhat different post-surgery. (PX 11, p. 6) Dr. Goris further testified that Petitioner had also been examined by his partner, Dr. Vraney, regarding a possible cervical component to his symptoms but that was ruled out. (PX 11, pp. 6-7)

[2] An incomplete copy of Dr. Lowery's office visit of that date is found at pp. 20-21/43 of Dep.Ex. 2 of RX 3)

Thereafter, Petitioner was returned to full duty work and was so engaged at the time of his March 11, 2011 accident. (PX 11, p. 7)

Dr. Goris went on to testify regarding his care and treatment of Petitioner and his testimony was consistent with his office notes discussed previously herein. (PX 11, pp. 7 – 11) Dr. Goris further testified that, to the best of his knowledge, he has had Petitioner on work restrictions since their first visit and they remained in effect as of the date of his deposition. (PX 11, p. 11) Dr. Goris also testified that the injection he gave to Petitioner was important in that Petitioner had relief of his symptoms which suggested that his symptoms were coming from the subacromial space and not Petitioner's neck or elsewhere. (PX 11, p. 12)

Dr. Goris testified that he has suggested surgery for Petitioner and, while he doesn't like to perform surgery for solely diagnostic purposes, in Petitioner's case he was having symptoms but there were no clear findings on the MRI to explain why he was having those symptoms. Dr. Goris recommended the procedure to try and alleviate the popping and pain in Petitioner's shoulder although he acknowledged he didn't exactly know what was causing the popping. (PX 11, pp. 12-13) Dr. Goris testified that he performs 200 to 250 shoulder surgeries per year and that an MRI does not always pick up everything that can be potentially causing pain in one's shoulder. He explained that he has a higher concern for the patient, like Petitioner, who has pain and something catching or popping and a negative MRI than a patient with no such complaints and a negative MRI. "[W]hen you are able to do a dynamic visualization of what's happening in the joint, sometimes it becomes apparent what was causing that popping." (PX 11, p. 14) He further testified that Petitioner's ongoing right shoulder pain and popping was limiting his function and had not improved despite physical therapy and a corticosteroid injection. He could either tell Petitioner to live with it or proceed with surgery to try and alter where his shoulder currently is. (PX 11, p. 17) Dr. Goris testified that Petitioner has bursitis and potential residual impingement that were causally connected to his March of 2011 lifting injury (PX 11, pp.15- 16) and that his need for surgery was similarly causally connected and necessitated by that 2011 injury. (PX 11, p. 18)

On cross-examination Dr. Goris was asked if there were any records to reflect why Petitioner began treating with him rather than returning to see Dr. Lowery and Dr. Goris testified that he believed there was some dissatisfaction with the outcome from surgery with Dr. Lowery in that he continued to have residual symptoms and he elected to treat with him. (PX 11, p. 19) Dr. Goris has not discussed Petitioner's case with Dr. Lowery; however, he was familiar with the doctor's records as they are available to him through their office. (PX 11, pp. 19-20)

Dr. Goris testified that he was unaware of any treatment Petitioner had other than with Dr. Lowery. (PX 11, p. 20) Dr. Goris was unaware of Petitioner's treatment with Dr. Treg Brown. (PX 11, p. 21) He did not inquire about any other MRI scans having been performed subsequent to Petitioner's care with Dr. Lowery. (PX 11, p. 21)

Dr. Goris also testified that Petitioner's right shoulder symptoms when he initially examined him were reportedly "worse" than they had been in the past. He had limited range of motion of his shoulder which the doctor felt would not have been expected if he had been able to work as a roof bolter prior to March 17, 2011. (PX 11, p. 22) He readily acknowledged that his opinions on causation could change if there was information in Dr. Brown's records which would change his understanding of Petitioner's history. When asked if it would be of benefit to review Dr. Brown's records, Dr. Goris testified that the more information available always helps in forming an opinion. (PX 11, pp. 22-23)

When asked if he was aware of a July 20, 2010 MRI, Dr. Goris acknowledged that that had been provided to him as part of the records furnished by Petitioner's attorney prior to the deposition for his review. Dr. Goris believed he received those records during the preceding week and he first looked at them the morning of the deposition. Those records consisted of Dr. Brown's records covering April of 2009 through August 18, 2010. (PX 11, p. 23) Dr. Goris testified that he looked at the MRI but didn't spend a lot of time looking through Dr. Brown's records. (Id.) After looking at Dr. Brown's records, Dr. Goris agreed that Petitioner's complaints of popping and catching in his shoulder were noted by Scott Cutler on August 18, 2010 and those were essentially the same complaints he presented to Dr. Goris for in March of 2011. (PX 11, p. 24) Dr. Goris acknowledged he never asked Petitioner why he didn't go back to Dr. Brown. (PX 11, p. 25)

Dr. Goris further testified that the July of 2010 MRI showed some subtle bursal-sided tearing of the rotator cuff and fluid in the subacromial subdeltoid bursa which might represent mild bursitis or fluid from a previous injection. When asked why the MRI he ordered didn't show palpable findings, Dr. Goris testified that he felt the 2010 findings were relatively "subtle" and that different radiologists might interpret them differently. The other possibility was that in the time between the two MRIs, the fluid in the bursa may have resorbed to some degree or the rotator cuff tendon (bursal-sided fraying) might have improved. (PX 11, pp. 25-26)

Dr. Goris was asked what he thought was causing Petitioner's popping and catching and he replied "Well, it's always hard to say." (PX 11, p. 26) He explained that he often tells patients with a normal MRI and symptoms of popping that determining the cause of the popping is often one of the hardest things to do. There may be a small flap of tissue, a small flap of thickened bursa, or a subtle tear that has been missed by the MRI. Sometimes, there is nothing found during the procedure. One can proceed with the surgery and find nothing there to fix. (PX 11, pp. 26-27) He acknowledged that the surgery he was proposing was, in many ways, essentially the same surgery Dr. Lowery performed two years earlier. (PX 11, p. 31) He believed Petitioner had a less than 85% chance of substantial improvement with this surgery because it would be a second surgery. (PX 11, pp. 31-32)

Dr. Goris did not know if Respondent was accommodating Petitioner's work restrictions. (PX 11, p. 27) He did believe, however, that Petitioner was working in some capacity for Respondent and was able to function in that position. (Id.)

Dr. Goris further testified that if Petitioner didn't proceed with the surgery he didn't think Petitioner was going to sustain any ongoing damage to his shoulder although he did have some limited range of motion and if he continued to have that for a protracted period of time he might have some permanent loss of motion of the shoulder but no "structural harm." (PX 11, pp. 27-28) He further testified that if one is an avid runner or jogger one may have some discomfort if the shoulder is inflamed from the bouncing associated with the activity but he wouldn't expect anything major. (PX 11, p. 28)

Dr. Goris also explained that the ten pound restriction he has imposed on Petitioner (no lifting more than ten pounds floor up to waist level) meant Petitioner could lift from the ground up to the belt or waist level because that doesn't really involve movement of the shoulder. He explained that it is when one starts to raise one's arm or move one's arm away from the body that one begins firing the muscles in the rotator cuff and using the shoulder joint. Petitioner should not lift overhead with his right arm although he acknowledged the restrictions might not entirely state that. (PX 11, pp. 29-30)

Dr. Goris testified that he has prescribed Lortab for pain control but he is not prescribing Lexapro which, he believed, is an antidepressant. (PX 11, p. 31)

With regard to the operative report of May 19, 2009 Dr. Goris agreed that there was nothing "overly abnormal" as the head of the biceps appeared pristine, the labrum was pristine, the humeral head and glenoid were pristine, and the rotator cuff underneath the surface was pristine. He agreed the only abnormality was some very, very mild fraying on the bursal surface of the rotator cuff. (PX 11, p. 33) Dr. Goris believed there was a reasonable possibility of finding something that has been overlooked that is continuing to cause Petitioner's symptoms. He did not believe it was normal for an otherwise healthy 28 year old man to have ongoing popping, pain, and limited function of his shoulder. (PX 11, pp. 33-34) He further testified that if he cannot find anything during the procedure to change Petitioner's symptoms Petitioner will be so advised. (PX 11, p. 34)

With regard to Petitioner's complaints, Dr. Goris testified that Petitioner's popping (which he could demonstrate on examination) was an objective finding. Petitioner's pain was a subjective finding unless an objective test supported it. He acknowledged that some people have popping but it isn't painful. (PX 11, p. 35)

Dr. Goris could not verify that Petitioner did the home exercises he was instructed to perform. He only underwent one injection. He, again, didn't feel Petitioner was doing any harm to himself continuing to work in his current job classification on a full-time basis without surgery, especially if he could continue to work on maintaining the motion that he has. (PX 11, p. 36) Dr. Goris has not noticed any atrophy in any of his exams. (PX 11, p. 37)

On redirect examination Dr. Goris explained that he views Petitioner's problem as one of symptoms and functional limitations, not one of permanent damage. Therefore, if he can work within a level that is tolerable he doesn't believe it will cause him any long-term harm. (PX 11, p. 38) He does not believe Petitioner can return to work without any restrictions without experiencing substantial pain. (PX 11, p. 39)

Dr. Goris was also asked about any difference in Petitioner's range of motion between the time of Petitioner's last visit with Dr. Brown in 2010 and his examinations. Dr. Goris testified that in July of 2010 Petitioner had full range of motion which was greater than what he found in his exams of 2011. He also testified that Petitioner had good strength in April of 2010 whereas he noted some weakness in 2011. (PX 11, pp. 40-41) Dr. Goris did not believe Petitioner's numbness was a completely new symptom because Petitioner did undergo an evaluation for his neck, but he acknowledged he didn't recall seeing it directly addressed anyplace else. (PX 11, p. 42)

The deposition of Dr. Moskal, Respondent's examining physician, was taken on September 22, 2011. (RX 3) Dr. Moskal testified consistent with his earlier report. In his deposition, Dr. Moskal opined that Petitioner had tendinosis (of the rotator cuff tendon) (RX 3 at 13). He did not believe the condition was work-related i.e. he did not believe the condition related to either of Petitioner's claimed injuries. (Id. at 14) There were two reasons he gave in support of that opinion. First, the tendinosis in the rotator cuff was not consistent with the areas of pain that Petitioner reported to Dr. Moskal; and second, according to the doctor, Petitioner's physical exam, history, and radiographic evaluations did not show evidence of an injury. (Id. at 16)

Dr. Moskal further testified that the ultrasound findings were very complimentary or similar to those on the MRI and showed nothing abnormal in the rotator cuff. (RX 3, p. 13)

On cross-examination Dr. Moskal explained that Petitioner's tendinosis would indicate a weaker tendon. Dr. Moskal did not recall asking Petitioner about any right shoulder pain or tenderness before March of 2009. He believed Petitioner told him there was an event in March of 2009. He acknowledged having no details of the March 2009 event. (Id., p. 40)

After having last seen Dr. Goris on June 17, 2011, Petitioner resumed treatment on May 2, 2012 but with a different doctor – Dr. Paletta.

Prior to the appointment with Dr. Paletta Petitioner completed a Patient Health Questionnaire on April 3, 2012. He indicated he was being seen for right shoulder pain that began in March of 2009 when he was injured at work. Petitioner denied that he was taking any current medications for his pain. Petitioner was presently employed as a coal miner. He exercised daily "lifting and walking." He acknowledged that he was not referred by a "Workers' Compensation Doctor." He acknowledged having a lawsuit but did not identify his attorney. (PX 10 – Dep. PX 2)

Dr. Paletta examined Petitioner on May 2, 2012. Petitioner reported that he worked for Respondent but no longer as an underground coal miner. Instead, he drove a coal car underground and performed no actual mining activities underground. Petitioner's chief complaint was right shoulder pain and "catching" in his right shoulder. Petitioner gave a history of an accident in March of 2009 when he was working underground, pushing a roof bolt at shoulder level, and felt a pop in his shoulder as he pushed forward resulting in pain. Petitioner summarized his treatment, including surgery for removal of "bone spurs." He reported no significant improvement in his symptoms after the surgery as he described things as being about the same. (PX 10 – Dep. PX 2)

Petitioner reported that over the course of the last couple of years he has had ongoing pain in his shoulder with any type of overhead activities. He reported no problems below shoulder level but if he has to use his arm overhead or do anything repeatedly in an overhead position, it caused shoulder pain. He also described a "catching" in his shoulder when he would bring it down from overhead positions. Petitioner traced his pain along the anterior aspect of his shoulder and the bicipital groove. Petitioner was tender to palpation of the bicipital groove but the doctor could not appreciate any obvious instability of the biceps tendon. He had good strength on rotator cuff manual resistance testing. Internal and external rotation strength was 5/5. Supraspinatus strength was 5/5. X-rays revealed normal bony anatomy. Petitioner's MR arthrogram of April 2011 was reviewed with nothing remarkable being noted. Dr. Paletta's impression was right shoulder pain and mechanical symptoms of uncertain etiology and/or a possible subluxing biceps tendon. He recommended a dynamic ultrasound to evaluate for biceps tendon instability. No work restrictions were imposed. A copy of the report was sent to Dr. Alexander, Petitioner's primary care physician. (PX 10- Dep. PX 2)

Dr. Paletta reviewed the ultrasound on July 31, 2012. It demonstrated evidence of mild medial subluxation of the biceps tendon on external rotation, some tendinopathy of the rotator cuff, and subacromial bursitis. Given Petitioner's young age a biceps tenodesis was recommended along with a subacromial decompression and bursectomy to address the subacromial bursitis. (PX 10 – Dep. PX 2)

Petitioner did not return to see Dr. Paletta until February 4, 2013 at which time Petitioner's condition was reportedly "about the same." (PX 10 – Dep. PX2)

Petitioner underwent surgery on February 5, 2013. Intra-operative findings included evidence of medial subluxation of the biceps tendon and moderate tenosynovitis of that portion of the long head of the biceps tendon that could be pulled into the joint and out of the bicipital groove. It appeared that there had been some disruption of the biceps sling and significant scar at the interval between the rotator cuff and superior glenoid. Moderately proliferative scar tissue and recurrent subacromial bursitis was noted at the subacromial space. Petitioner underwent extensive debridement of the subacromial bursa and subacromial scar tissue, limited debridement of the superior labrum, and a right shoulder biceps tenodesis.(PX 10 – Dep. PX 2)

Petitioner followed up with Dr. Paletta post-surgery. As of April 1, 2013 Petitioner reported feeling much better than he was after his first surgery. He reported minimal pain and progressing along in physical therapy. He stated that "for the first time he can reach and put his seatbelt on without significant discomfort or dysfunction." (PX 10 – Dep. X 2)

Petitioner's last visit with Dr. Paletta was on June 26, 2013. At that time Petitioner reported overall he was doing "extremely well." His shoulder felt great and he had no pain complaints. He was back to full work activities and could throw and baseball and football without any pain. Overall, Petitioner was very pleased. Petitioner had full range of motion in all aspects. There was normal rotator cuff strength and no instability. Petitioner's outcome was described as "excellent" and he was released from care being told he could resume full, unrestricted activities as tolerated with no work restrictions or limitations. Petitioner was to return as needed. (PX 10 – Dep. PX 2)

The deposition of Dr. Paletta was taken on June 19, 2014. (PX 10) Dr. Paletta began treating Petitioner on May 2, 2012 for right shoulder complaints. Dr. Paletta testified concerning his care and treatment of Petitioner which was consistent with his office notes discussed previously herein. (PX 10, pp. 9 -) Dr. Paletta further testified that based upon his physical exam on May 2, 2012 he felt Petitioner had signs suggestive of a possible subluxing biceps tendon (ie. a tendon slipping in and out of the bicipital groove). Therefore, he recommended a dynamic ultrasound for further evaluation. Dr. Paletta explained that a dynamic ultrasound differs from a static ultrasound in that the latter involves the shoulder being kept in one position as when an MRI is performed. He further explained that with the dynamic ultrasound he would be able to put the shoulder through motion and watch the biceps tendon. (PX 10, pp. 11- 12) Petitioner's dynamic ultrasound was performed at Barnes and demonstrated that there was subluxation of Petitioner's biceps tendon when his arm was rotated out away from the body. Thus, Dr. Paletta believed Petitioner has dynamic instability or subluxation of his biceps tendon and that would be consistent with Petitioner's symptoms of pain and catching. (PX 10, pp. 12 -14) Dr. Paletta recommended Petitioner undergo a biceps tendonesis which involved cutting the biceps tendon as it enters the shoulder and stitching it in to stabilize it from further slipping in and out of the groove. He also recommended that the scar tissue from earlier surgery be cleaned out in case that had something to do with his symptoms of snapping or catching. (PX 10, pp. 14 – 16)

Dr. Paletta testified that he ultimately performed surgery on Petitioner and during surgery he found moderate scar tissue in the area of Petitioner's prior surgery. He also had instability of his biceps tendon, which he felt accounted for the majority of Petitioner's symptoms. Post-surgery Petitioner underwent therapy and made a full recovery. (PX 10, pp. 16 – 17)

Dr. Paletta was of the opinion that Petitioner's initial surgery was ineffective in relieving Petitioner's symptoms because the biceps pathology was not addressed. Petitioner's symptoms did go away after surgery with Dr. Paletta indicating to the doctor that his diagnosis was correct. Dr. Paletta also testified that the dynamic ultrasound supported his diagnosis of instability. (PX 10, p. 18) Dr. Paletta's finial diagnosis was instability of the biceps tendon characterized predominantly by medial subluxation, meaning the tendon was slipping out to the inside of the groove or towards the center of his body. In his opinion, the condition was caused by the accident in March of 2009 because it was the appropriate mechanism and Petitioner had the appropriate symptoms thereafter. (PX 10, p. 19)

Dr. Paletta took Petitioner off work from the date of surgery through June 10, 2013. (PX 10, p. 20) He was released to full duty work. (Id.)

Dr. Paletta was asked about Dr. Moskal's opinion that Petitioner suffered from chronic intrinsic degeneration of his rotator cuff and that he felt Petitioner had tendinosis in the area of the rotator cuff. He also acknowledged reviewing the doctor's records. Dr. Paletta agreed with the imaging finding of tendinopathy of the rotator cuff but disagreed that it was of any clinical significance because Petitioner had no symptoms of rotator cuff pain or pathology. According to Dr. Paletta, it was an incidental MRI finding. Petitioner, according to Dr. Paletta, did not have typical complaints of rotator cuff pain or typical exam findings suggestive of rotator cuff pathology. In Dr. Paletta's opinion Petitioner has had instability of the biceps tendon all along (since March of 2009). (PX 10, pp. 20 – 23)

On cross-examination Dr. Paletta acknowledged that he had no records, except an operative report, before June of 2014. He was then provided with a "big stack" of records in conjunction with a letter. He estimated he spent about an hour reviewing the stack a lot of which was irrelevant. They included records of Petitioner's previous treating physicians, including diagnostic studies. Dr. Paletta did not recall how he came to have a copy of the operative report. Dr. Paletta also acknowledged that Petitioner left blank the referral information on the patient health questionnaire. Dr. Paletta did not know how Petitioner was referred to him. (PX 10, pp. 23 – 28)

Dr. Paletta was asked about the 2010 ultrasound performed by Dr. Brown and he testified that offhand, he did not recall it. He explained, however, that "dynamic" means moving. Dr. Paletta then found the ultrasound within Dr. Brown's records and acknowledged it was performed on April 13, 2010 and that Dr. Brown, and not a radiologist, performed it. Dr. Paletta also acknowledged that he believed Petitioner's biceps tendon problem has been present since March of 2009. He was not surprised that earlier surgeons had not found it as it's a relatively uncommon diagnosis and requires a dynamic ultrasound to confirm. (PX 10, pp. 28-30)

Dr. Paletta further testified that it was his understanding that Petitioner's symptoms remained, essentially, unchanged since 2009 and that the first surgery did not result in any change in his symptoms. However, he acknowledged that Dr. Lowery's records indicate Petitioner had a very good result from his surgery which would be different than what Petitioner suggested. Dr. Paletta also understood that when Petitioner presented to Dr. Moskal it was for an alleged accident to his shoulder in 2011. He couldn't say whether Petitioner's complaints were different at that time because he was being seen for something else because he wasn't there. It was Dr. Paletta's understanding that Petitioner was pushing a roof bolt and was shoulder level when he felt a pop in his shoulder and immediate pain and that would be an appropriate mechanism for biceps tendon instability. He acknowledged that "in theory" it would be nice to know the weight and manner of pushing. Just

"reaching up" would be a less common way to get an unstable biceps tendon. Dr. Paletta testified that the most classic complaint for an unstable biceps tendon is pain that they trace along the front of the shoulder down the bicipital groove right where the biceps tendon runs. When they bring the arm up overhead or any kind of rotation they may notice snapping, catching, or popping. Weightlifters can also have unstable biceps. (PX 10, pp. 30 – 34)

Dr. Paletta testified that Petitioner completed his patient questionnaire on April 3, 2012. The ultrasound was performed on July 31, 2012 and Petitioner then returned on February 4, 2013 and surgery was performed the next day. (PX 10, pp. 34-36)

On redirect examination, Petitioner's attorney directed the doctor's attention to Dr. Brown's ultrasound in 2010 Dr. Paletta agreed that it appeared the doctor's concern was whether Petitioner had impingement or a partial tear of his rotator cuff. He did not appear suspicious of a biceps tendon problem. Dr. Paletta testified that "typically" when a dynamic ultrasound is performed the shoulder is put through a range of motion and the biceps tendon is visualized continuously through that range of motion. Dr. Paletta believed, based upon the report, that Dr. Brown did the ultrasound with Petitioner's shoulder in two static positions – one with his arm resting at his side with his elbow bent to 90 degrees and the other on his hip. Dr. Paletta went on to testify that the only part of Dr. Brown's study that appeared to have been dynamic is that he looked at the subscapularis (a rotator cuff tendon) and Petitioner's arm was passively and actively brought through rotation and the subscapularis appeared normal. The report does not mention the biceps tendon during the dynamic phase of the study. That the report did not find or suggest any biceps pathology was not surprising because the structure itself was normal whereas the instability was not. (PX 10, pp. 36- 42) Finally, Dr. Paletta reviewed and addressed photographs of Petitioner's shoulder taken during his examination with Dr. Moskal and he identified those photographs (the top two and bottom left on page ten of the report and the image on page 11) consistent with instability. (PX 10, pp. 42-44)

On further cross Dr. Paletta acknowledged that he didn't look at the actual ultrasound DVD or video itself; rather, he relied upon the radiologist's report; however, typically pertinent frames are forwarded to the doctor. (PX 10, p. 48)

Petitioner's case proceeded to arbitration on April 20, 2015. As of that date Petitioner had been employed by Respondent for approximately eight years. Petitioner testified that he currently works as a scoop operator; however, at the time of his undisputed accidents he was a roof bolter. According to Petitioner a roof bolter (a/k/a "pinner") engages in manual labor throughout one's shift, especially pushing and lifting heavy objects (ie., steel pins). A scoop operator drives a small backhoe around to move dirt and doesn't perform any physical lifting or pushing.

Petitioner testified that he felt something tear or pop in his right shoulder on May 31, 2009 [sic] as he was bending some steel and pushing a roof bolt (a six foot long piece of steel). As a result of that accident, Petitioner ultimately underwent surgery on May 19, 2009 with Dr. Lowery. When asked if he got better after surgery, Petitioner testified to experiencing a lot of pain through therapy until he was released at which point he returned to work as a roof bolter but was removed from the position because he couldn't perform it.

Petitioner testified that he tried to get more treatment so he went to Dr. Goris who recommended additional surgery which was denied by workers' compensation. Petitioner also testified that he then

returned to work and eventually went to Dr. Alexander, his family doctor, who referred him to Dr. Brown who did an ultrasound and recommended further surgery but it, too, was denied.

Petitioner testified that Dr. Lowery and Dr. Goris are partners and after the results of his first surgery he did not wish to return to Dr. Lowery but, rather, desired to see another surgeon but not necessarily Dr. Goris. Someone from Orthopedic Associates scheduled him to see Dr. Goris.

Petitioner further testified that his family doctor, Dr. Alexander, was his second choice of physician and that he went to him because his shoulder still hurt. Petitioner was given pain medication and referred to Dr. Brown. This all occurred in April of 2010 and Petitioner was working during that time.

Petitioner testified that in March of 2011 he was standing beside the roof bolter and a 50-60 lb. rock fell between two trays and as he reached up to pull the rock straight up, he experienced the same pop/burning in his shoulder again. He went back to Dr. Alexander who gave him more pain pills and the doctor referred him to Dr. Paletta and an appointment was scheduled for April of 2012. Dr. Paletta had him undergo a dynamic ultrasound and ultimately he underwent further surgery.

Petitioner returned to work as a roof bolter after the surgery but only for two weeks as he couldn't handle the ten hour shifts due to pain. Petitioner testified that his supervisor took him off the job.

Petitioner acknowledged that before his accidents he would work out at the gym and his work outs included bench pressing. Petitioner testified that in the days, weeks, and months "leading up to that surgery" he did "185, 195 reps, reps of ten". Since his surgery with Dr. Paletta, 135 is as high as he can go with his repetitions. Petitioner still goes to the gym and while he used to curl 150, he is not at 120. He can no longer perform overhead presses as he is in pain for two to three days thereafter.

Petitioner also testified that his current job requires him to move a big cable about 3 – 4" in diameter about 1000 feet long (a "miner's cable"). Before his first injury he might have lifted it about seven to eight times a night. However, he can no longer do so. Instead he hangs the ropes for it because "they" don't want him to hurt his shoulder again.

Petitioner is right hand dominant.

Petitioner testified that he cannot lift a full gallon of milk with his right hand above his shoulder. He can no longer lift his kids over his head. He also finds he has to use his left arm to reach in and over to get his seatbelt.

Petitioner denied missing any work due to an injury or undergoing any right shoulder treatment in the days, weeks, and months before his first accident. Petitioner acknowledged having tendinitis in his right shoulder when he was 17 and that he had a sling for a few days.

Petitioner testified that the photographs taken by Dr. Moskal showed him pointing to the front of his shoulder as the source of his pain.

On cross-examination Petitioner testified that Dr. Lowery was the attending physician at the emergency room in March of 2009. He agreed that Dr. Lowery released him to return to work, regular duty, on August 25, 2009. He also testified that because of ongoing pain Petitioner called Dr. Lowery's office and wanted a referral to another doctor and that's how he got Dr. Goris. He also

acknowledged that after seeing Dr. Goris he returned to Dr. Alexander and was given pain medication. When told the records showed Petitioner saw Dr. Alexander in March of 2010 and Dr. Goris after his second accident in 2011 Petitioner replied he didn't know if the records were wrong. Petitioner believed he called Dr. Lowery's office to get the referral to another doctor in 2009 or 2010, not very long after his first surgery.

Petitioner denied that Dr. Brown performed a shoulder MRI.

Petitioner did not believe that he saw any doctor for his right shoulder complaints between August of 2010 and the second accident in 2011. He last saw Dr. Goris on June 17, 2011 and he was working for Respondent at that time. Between March 17, 2011 and June 17, 2011 Petitioner lost no time from work. He did not recall calling Dr. Paletta's office in December of 2011.

On redirect examination Petitioner testified that his shoulder hurt everyday between August 2010 and his second accident in March of 2011.

The Arbitrator concludes:

In regard to disputed issue (F) – Causal Connection:

Petitioner's current condition of ill-being in his right shoulder is causally connected to his March 30, 2009 undisputed accident. This conclusion is based upon Petitioner's very credible testimony, the medical records, and a chain of events.

With the exception of an episode of right shoulder tendonitis when he was 17 years old, Petitioner had no problems with his right shoulder before March 30, 2009. Petitioner began working at the mine in approximately 2007 as a roof bolter, a job strenuous in nature and involving a great deal of upper body and overhead work. There is no dispute Petitioner sustained an accident on March 30, 2009 and, quite succinctly, his shoulder has never been the same. After the March 30th accident Petitioner sought immediate medical care and he underwent surgery with Dr. Lowery shortly thereafter. As of his August 25, 2009 visit with Dr. Lowery, Petitioner had not yet been found to be at maximum medical improvement nor had he been released from care. Indeed, a referral to Dr. Vraney (for a neck consultation) was pending. It is troublesome to the Arbitrator that Dr. Lowery's complete office visit of September 6, 2009 is not a part of the record but it was seemingly available to both parties. Since the complete copy of the visit isn't available the circumstances surrounding its issuance remain unknown.

Nevertheless, as requested by Dr. Lowery, Dr. Vraney saw Petitioner on March 16, 2010 and he concluded Petitioner's problem was in his shoulder. Dr. Alexander shared that same view and referred Petitioner to Dr. Brown. Dr. Brown examined Petitioner and recommended additional surgery which was denied by Respondent. Petitioner continued to work during this time and while Dr. Brown's records indicate some restrictions off and on, it is unclear from the record just what Petitioner was doing at work. At the time of Petitioner's exam with Dr. Moskal in July of 2011, he had been working as a trainer for approximately one year. Later, in Dr. Moskal's report Petitioner is noted to have stated he worked from August to May of 2010 but not as a roof bolter and then in January of 2011 he was again roof bolting.

While Petitioner may have been working full duty as a roof bolter prior to March 17, 2011 no doctor had found him at maximum medical improvement prior to March 17, 2011. Petitioner testified, and the records corroborate, that Petitioner returned to work during that time but he was not asymptomatic. Petitioner was then involved in another undisputed accident and began treating with Dr. Goris who recommended surgery. That surgery was denied by U.R. but only with regard to the March 17, 2011 accident.

Dr. Goris testified that the surgery he recommended was on account of Petitioner's March 17, 2011 accident. Dr. Goris was unaware of Petitioner's treatment with Dr. Treg Brown and that the surgery he was proposing, along with Petitioner's complaints, were very similar to what Dr. Brown had recommended and noted. Dr. Moskal examined Petitioner in July of 2011 at Respondent's request; however, his report and deposition testimony indicate he was focused only on the March of 2011 accident and not the 2009 accident and its role in Petitioner's ongoing complaints. Dr. Moskal did note in his report that he was of the opinion the surgery Dr. Goris was proposing was related to the March 9, 2009 accident. (RX 3 – Dep. Ex. 2, p. 6/43)

While Petitioner underwent no treatment between June 17, 2011 and May 2, 2012 Petitioner credibly testified (and the records corroborate) he has never been pain free. He has also been working. Petitioner then presented to Dr. Paletta in May of 2012 and the doctor performed a dynamic ultrasound, diagnosed Petitioner with subluxation of his biceps tendon, and ultimately performed surgery with a very favorable result. Petitioner has resumed full work activities and unrestricted activity.

Dr. Paletta was of the opinion that Petitioner's need for surgery was due to the first accident. He was unaware of the second accident and had not reviewed any prior treatment records. While in some instances this Arbitrator would be concerned about this, in this instance Dr. Paletta's opinion is found persuasive nonetheless. Dr. Paletta was the third orthopedic surgeon to recommend arthroscopic surgery for Petitioner and all requests had been denied by workers' compensation/Respondent but those denials were not based upon full and complete understandings or considerations of both of Petitioner's accidents, his lack of prior problems before the first accident, and his ongoing issues between the two accidents. All doctors, including Dr. Moskal, consistently mentioned a problem with tendonitis in Petitioner's shoulder. Utilization Review failed to address the first accident. Dr. Moskal failed to address the first accident except to the extent he felt Petitioner's surgery (as proposed by Dr. Goris) was related to the 2009 accident. What is clear from the record is that Petitioner's right shoulder was asymptomatic before March 30, 2009 (even Dr. Moskal saw no real evidence to the contrary) and symptomatic thereafter. While Petitioner did sustain another accident on March 17, 2011 the overwhelming evidence (both through records and Petitioner's credible testimony) indicates that the first accident remained a cause of Petitioner's ongoing complaints and under Illinois law that suffices to establish causal connection. Respondent's defense efforts with regard to these claims and Petitioner's desire for additional surgery appear focused on the 2011 accident while overlooking the 2009 accident and its sequela.

The Arbitrator notes that Petitioner was a very credible witness. While he had trouble, at times, with dates and who he saw and when, those uncertainties never undermined his consistent, forthright, and direct testimony that he has never been pain free in his shoulder until after his surgery with Dr. Paletta. While the testimony concerning Petitioner's activities at the gym did give the Arbitrator some "cause for pause" when he answered that he was actively so engaged up until the date of "surgery," the Arbitrator believes that the question posed to him may have been poorly phrased and that given

the totality of the circumstances surround the questioning at the time, counsel was probably referring to Petitioner's activities before his "injury" and not his "surgery" as if it was the latter he didn't indicate which surgery. While Petitioner did not submit an office note to corroborate his office visit with Dr. Alexander (after his second accident) the Arbitrator believes that office note would have been equally available to both parties by subpoena. As it stands, Petitioner's testimony regarding the visit was credible and unrebutted.

Respondent has challenged causation contending that Dr. Paletta's opinion on same, as well as his treatment, was contradicted by the evidence of prior treating and examining physicians, most notably Dr. Brown's records and his ultrasound. The Arbitrator is not persuaded for two reasons. Frist, the ultrasound performed by Dr. Brown was not completely dynamic in nature. The doctor only put Petitioner's arm through motion when testing the subscapularis. The biceps tendon was not dynamically tested. Respondent could have deposed Dr. Brown in an effort to more thoroughly discuss the nature of the ultrasound and make clear that Petitioner's biceps tendon was put through a dynamic ultrasound; however, it did not. Additionally, there was another dynamic ultrasound performed – namely, one by Dr. Moskal in July of 2011. Petitioner reported pain in conjunction with that dynamic ultrasound.

In regard to disputed issues (J;M) – Medical Expenses and Credit:

Petitioner's medical bills are found in PX 9. Included in PX 9 is a bill from Dr. Goris and a bill from Evansville Radiology. Those bills were incurred in connection with Petitioner's March 17, 2011 accident and are, therefore, not awarded. The only outstanding bills related to this case (based upon the Arbitrator's causation analysis above) are to Dr. Paletta and The Orthopedic Center of St. Louis Petitioner is awarded those bills. All other bills found in Petitioner's Exhibit 9 reflect zero balances. Respondent has proven its entitlement to a credit under Section 8(j) for any medical bills paid by its group medical plan pursuant to Section 8(j) of the Act. Petitioner acknowledged as much during cross examination. Therefore, to the extent Respondent has paid the bills found in PX 9 through its group medical plan under Section 8(j) (except for Dr. Goris and Evansville Radiology) Respondent shall hold Petitioner harmless therefrom.

In regard to disputed issue (K) – TTD Benefits:

The Arbitrator concludes Petitioner is entitled to TTD benefits from 0/19/09 to 8/31/09, a period of 15 weeks, and also from 2/5/13 to 6/9/13 a period of 17 6/7 weeks. Respondent stipulated to the first period. (AX 1) In awarding the second period the Arbitrator relies upon her causation determination above.

In regard to disputed issue (O) – Number of Choice of Doctors:

The Arbitrator concludes Petitioner did not exceed his choices of doctor for whose care Respondent is liable under the Act. Petitioner's first choice of doctor for his 2009 injury was Dr. Lowery. His second choice was Dr. Alexander. Dr. Alexander then referred Petitioner to Dr. Brown.

According to Petitioner, Dr. Alexander referred him to Dr. Paletta. The fact that Dr. Paletta did not know, at the time of his deposition, how Petitioner was referred to his office, does not prove that Petitioner was not referred to Dr. Paletta by Dr. Alexander. Petitioner's testimony was un-rebutted.

Furthermore, Dr. Paletta "cc'd" Dr. Alexander on all of his office notes; therefore, the Arbitrator reasonably infers that Dr. Alexander referred Petitioner to him. Otherwise, there was no reason to copy the doctor in on the visits.

In regard to disputed issue (L) – Nature and Extent of Injury:

Petitioner is relatively young and has undergone two surgical procedures albeit with, objectively, excellent results. Petitioner testified about his some diminished strength and an inability to lift his children overhead. He also testified to limitations in how he operates a seat belt. This testimony was not entirely corroborated by the medical records, especially since the last few visits with Dr. Paletta evidence an excellent recovery with little to no complaints. Petitioner was released to full duty activity with no restrictions. Petitioner is performing a different job now than when he was injured and while he was released with no restrictions, he tried roof bolting for two weeks and was removed from the job by his supervisor because he was in too much pain. Petitioner's testimony regarding this was unrebutted. Petitioner is still going to the gym but not lifting as much as he once did and notes significant pain for several days when attempting overhead presses. The Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 15% loss of a man as a whole.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly Tuchel,

Petitioner,

vs. NO: 13 WC 04366

McLean County Unit Dist. No. 5, **16IWCC0264**

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, temporary total disability, causal connection, permanent partial disability, evidentiary ruling 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 31, 2015 is hereby affirmed and adopted.

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

DATED: APR 19 2016

MB/mam
o:4/7/16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TUCHEL, KIMBERLY
Employee/Petitioner

Case# **13WC004366**

16IWCC0264

McLEAN COUNTY UNIT DIST NO 5
Employer/Respondent

On 8/31/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.20% 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:

2738 McCARRON LAW FIRM PC
JOSEPH A McCARRON
624 N MAIN ST
BLOOMINGTON, IL 61701

0264 HEYL ROYSTER
JAMES J MANNING
300 HAMILTON BLVD
PEORIA, IL 61601

16IWCC0264

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

Kimberly Tuchel
Employee/Petitioner

Case # 13 WC 04366

v.

McLean County Unit Dist. No. 5
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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Peoria**, on **July 20, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational
B. 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, 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 injuries, Petitioner earned $**44,016.44** and the corresponding average weekly wage was $**846.47.**

On the date of the alleged 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, nor is it obligated to do so.

ORDER

The Arbitrator finds that the Petitioner has failed to prove an accident arising out of her employment causally related to her conditions of ill being and, therefore, the Petitioner's claim is 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.

D Dyba Mc Cuskey
Signature of Arbitrator

August 25, 2015
Date

AUG 31 2015

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

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

Petitioner is alleging a repetitive trauma claim arising out of her work for Respondent as a custodian. In such a case, the issues of whether the accident arose out of her employment and is causally related to her conditions of ill being are properly considered together.

Petitioner testified that she began working for Respondent as a substitute custodian on August 3, 1998. She was hired on full time as of July 27, 1999 and currently works the second shift from 3:00 pm to 11:30 pm at Sugar Creek Elementary School. However, between April of 2011, when her son was involved in a serious automobile accident and November 20, 2012 when she first presented to Dr. Holt with complaints of hand problems, Petitioner missed approximately eighty days of work according to her testimony as well as Respondent's Exhibit 8. Therefore, Petitioner worked on average about four days a week (not five days) during the year and a half period prior to her first treatment for hand problems.

Petitioner's specific job duties as a custodian for Respondent, and the times those various tasks are performed, are well documented in a job description submitted as Respondent's Exhibit 2. The first two pages of Respondent's Exhibit 2 were prepared by Craig Montgomery, Director of Custodial Services for Respondent. It details the work performed by Petitioner and the times when the various work is performed so that substitute custodians have a schedule to follow. Page 3 of Exhibit 2 is a site plan that depicts Sugar Creek Elementary and the areas within the school that are assigned to the Petitioner. Pages 4 and 5 of Exhibit 2 are the work schedule prepared by the Petitioner herself which is generally consistent with the work schedule prepared by Craig Montgomery.

Petitioner testified that her second shift work starts at 3:00 pm. Since the school children are not released until 3:30 pm, Petitioner first checks in with the day custodian and with the office staff to see what may need to be done that evening and whether there are any night activities at the school for which preparation is needed.

Around 3:30 pm on a typical day after the children are dismissed from school, Petitioner testified that she will start cleaning the classrooms upstairs on the second level of the school. Page 3 of Respondent's Exhibit 2 shows that there are eight classrooms upstairs, three restrooms, and also the $4^{th}/5^{th}$ grade commons area.

Petitioner testified that each classroom takes twenty to twenty five minutes to empty the pencil sharpeners, pick up pencils, pens, crayons, markers or other items on the floor and empty the trash cans, clean the sink, wipe down desks and the whiteboard, clean windows where needed and she spent approximately fifteen minutes vacuuming the carpeted floors. She testified that she would complete one classroom at a time before proceeding with the next classroom. With eight classrooms upstairs, this would take between 160 to 200 minutes just to clean the classrooms (or between two hours and forty minutes to three hours and twenty minutes). Petitioner testified that she also cleaned two classrooms downstairs, but stopped cleaning those rooms in 2010.

She testified that the upstairs $4^{th}/5^{th}$ grade commons area would take approximately fifteen minutes to wipe down the tables, pick up paper or other items from the floor and vacuum the carpeting where needed.

The boys' and girls' restrooms upstairs would take approximately fifteen minutes each to sweep the floors, clean the sinks, toilets, and urinals, to check and refill the soap, paper towel and toilet paper dispensers and to mop the floor. Cleaning the teachers' restroom upstairs would take five to ten minutes to perform the same tasks as there is only one sink and toilet in that bathroom.

She would then take the trash out to the dumpster and walk around to make sure all the outside doors were locked if there were no activities planned at the school that evening. This may take ten to fifteen minutes.

Although there is a fifteen minute break noted on the detailed work schedule prepared by Mr. Montgomery, Petitioner testified that she would usually work through this break and only take a half hour break for dinner after she finished taking out the trash and locking the doors.

Following her dinner break, Petitioner would then return upstairs to dust mop the hallways, clean the drinking fountains and take out any remaining trash. This task would take another fifteen to twenty minutes.

She would then do light vacuuming, dusting, general cleaning and wiping down tables where needed and picking up and emptying trash in the Computer Lab and IMC, Title I/Resource room, Psych/Soc office and the PE instructor's office. Each of these five offices would take approximately five to ten minutes to perform these tasks or, in total, approximately one hour.

She would then sweep the gym floor with a dust mop (fifteen to twenty minutes) and clean the boys' and girls' restrooms in the gym (approximately five minutes each), so the gymnasium area would take approximately one half hour to clean.

Although not listed on her work schedule, Petitioner testified that she also cleans the multi-purpose room which serves as both a cafeteria and gym. This is indicated on the site plan as Petitioner's assigned area and Craig Montgomery confirmed that this is part of Petitioner's area she cleans. Petitioner testified that it takes approximately ten minutes to dust mop the tile floor in the multi-purpose room and then she goes back over the floor with a floor scrubber for forty five minutes each night. In other words, according to the Petitioner, she spends approximately one hour in the multi-purpose room every night.

Petitioner then dust mops the hallways on the lower level, pulls down shades where appropriate, locks the classroom doors, and takes out the trash before checking all the outside doors again to make sure they are locked before she ends her shift around 11:30 pm.

Petitioner testified that the vacuum and auto scrubber caused vibration in her hands. She said that her hands cramped up when she used the spray bottle and dust mop.

Petitioner also testified that during the summer months when school is not in session that the hallways and bathroom floors at Sugar Creek Elementary get buffed with what she described as a side-to-side buffer to scrub and remove the top coating of wax and then the custodians reapplied a new coat of wax with a wet mop. Since the classrooms and commons area are carpeted, the floor buffer is not used in those area, only in the hallways and bathrooms. Petitioner testified that this work to buff the tile floors would take one to two weeks in the summer to perform. She testified that the floor buffer vibrates and irritated her carpal tunnel symptoms.

Regarding the specific vacuuming activity and use of the floor scrubber, Craig Montgomery, the director of custodians for the district, testified that he has performed these tasks as well as all the other cleaning tasks performed by his custodians at Unit 5. Mr. Montgomery actually timed the work and testified that it would only take fifteen minutes to clean each classroom and six to seven minutes to vacuum the carpeting in each of the classrooms, half the time Petitioner said it takes her to vacuum. In addition to vacuuming the carpeting in the classrooms, Petitioner testified that her use of the floor scrubbing machine in the multi-purpose room/cafeteria irritated her carpal tunnel symptoms due to the vibration from the machine and would cause her hands to go to sleep. She testified that she used the floor scrubber for forty five minutes every day to clean the floor in the multi-purpose room and cafeteria. Craig Montgomery testified

that it would take less than twenty minutes to clean the floor of the multi-purpose room with the floor scrubber, again only half the time Petitioner said it would take to scrub the floor of the multi-purpose room.

Craig Montgomery testified regarding Petitioner's work for Respondent and specifically as it pertains to her use of the various pieces of equipment, including the floor scrubber. Pictures of the floor scrubber are included in Respondent's group Exhibit 7 (specifically 7A, 7B, and 7C) and a job video was submitted as Respondent's Exhibit 3 which included a depiction of the floor scrubber actually in use in the multi-purpose room and cafeteria. Both Craig Montgomery and Respondent's examining physician, Dr. James Williams (who is shown in the video actually operating the floor scrubber), both testified that the floor scrubber and vacuum emit little to no vibration.

Craig Montgomery testified that there are two to three custodians that work at Sugar Creek Elementary during the summer months that all participated in this work and it generally would only take one to two weeks to complete this work during the summer. However, this did not involve straight use of a floor buffer by Petitioner for the entire one to two week period. Buffing of the floors is a multi-step process. First, the custodians will dust mop the floors to remove any debris. Then the floor buffer is used to buff small sections of the hallway at a time. The custodians alternate the work. The wet chemicals that are first applied to the floor surface provide a lubricant so that the use of the floor buffer emits very little vibration to the custodian's hands while operating the buffer. Mr. Montgomery specifically testified that the use of this floor buffer does not require any sustained, forceful gripping to operate and very little vibration to the hands. This work and use of the floor buffer and wet vac is observed in the video submitted as Respondent's Exhibit 9. Again, the video shows how little force is required to operate this equipment as the video depicts the operator only using one hand to control the floor buffer.

When reviewing the Petitioner's testimony, the written work schedule and the site plan for the school where Petitioner works, the amount of time Petitioner says she spends vacuuming every night (four to five hours) just doesn't add up. Even if she spends fifteen minutes vacuuming in each of the eight classrooms she cleans upstairs, fifteen minutes vacuuming the upstairs commons area, and perhaps fifteen to twenty minutes vacuuming the five offices downstairs, that would only equate with two hours and fifteen minutes of total time vacuuming throughout her eight hour shift.

Regardless of that discrepancy, the vacuuming activity is not performed for two hours (or even four hours) continuously. According to Petitioner's testimony on cross-examination, she cleans one classroom at a time so the vacuuming might take fifteen minutes at most (according to Petitioner) before she moves on to clean the next classroom so the vacuuming activity is broken up among the variety of other tasks performed.

Petitioner first sought medical treatment for her alleged condition on November 20, 2012 with Dr. Paige Holt, she presented with a ganglion cyst on the left wrist, and occasional bilateral hand numbness and tingling. Dr. Holt's office notes indicate that she suspected bilateral carpal and cubital tunnel, along with the ganglion. (PX A)

It was not until after Dr. Holt discussed the EMG findings with the Petitioner on the next office visit on January 4, 2013 that the Petitioner stated that she was continuing to have problems with her hands, left worse than right, particularly when using a spray bottle with her left hand at work and when using a walk-behind auto scrubber. Dr. Holt also noted that the Petitioner had been away from work for the previous fifteen days, and noticed a reduction in her symptoms. She diagnosed bilateral carpal tunnel, the left greater than the right.

Dr. Holt subsequently performed bilateral carpal tunnel releases and removal of the left ganglion cyst. The left carpal tunnel surgery and removal of the cyst on the left hand was performed on February 5, 2013. The right carpal tunnel release was performed on March 5, 2013. Dr. Holt testified that the left ganglion cyst is definitely not related to the Petitioner's work for Respondent.

Following surgery, the Petitioner obtained good relief of her carpal tunnel symptoms. As of April 8, 2013 when last seen by Dr. Holt, the Petitioner was doing well and her carpal tunnel symptoms had resolved and the Petitioner was released

from care with a note to return to work without restriction. Petitioner has returned to work full duty since that time as a custodian for Respondent. Dr. Holt testified that she would not expect the Petitioner to have any long term disability arising out of her carpal tunnel condition.

Dr. Holt was provided with a hypothetical work history for the first time by Petitioner's counsel during her evidence deposition upon which she based her opinion on causation. The hypothetical question posed to Dr. Holt asked her to assume the following:

> Over the last five years in the winter, Petitioner worked five days a week for Respondent and used a floor scrubber to clean floors for forty five minutes a day, she vacuumed carpets four to five hours a day, she would spray and wipe down desks and whiteboards (spraying with her left hand and wiping with her right hand), she would mop thirty minutes a day, and during the summer months when school was not in session she would clean desks and furniture with rag and soapy water, use a hand-held scrubber (or floor buffer) on the tile floors about two weeks during this time, then she would mop the wax back onto the floors, and she would use a carpet cleaning machine in the classrooms. (See Petitioner's Ex. F, pp. 17-19; See also Dr. Keller's deposition, Ex. G, pp. 8-10, for a similar hypothetical provided to Dr. Keller).

Based upon the aforementioned hypothetical, Dr. Holt testified that this "repetitive use" of the hands and vibration from the vacuum and floor scrubber may aggravate her carpal tunnel condition. Dr. Holt did not believe the work activity described caused the carpal tunnel condition, but she felt that Petitioner's job aggravated her symptoms of carpal tunnel.

Petitioner's counsel also sought an IME opinion from Dr. Brett Keller at Central Illinois Orthopedic Surgery. Given a similar hypothetical work history, Dr. Keller could only say that he felt the work described may have "irritated" the Petitioner's carpal tunnel condition and thereby produced the symptoms of which she complained. Dr. Keller did not feel that the work caused the underlying carpal tunnel condition, only that it irritated her symptoms. Dr. Keller opined that one must have sustained exposure to forceful gripping or vibration in order for the activity to be causative. With respect to using the vacuum, he said it would depend on the size of the equipment and the force required to push it. With respect to using the spray bottle, he said that repetitive squeezing would be more likely causative than occasional squeezing. He said that if the Petitioner engaged in activities described in the hypothetical, it would be sufficient to be a causative factor. However, he said that if the activities were broken up where one would employ a different grip or use different muscles on each task, then it would be less likely to contribute to her condition. (PX G at 41,42)

Respondent's examining physician, Dr. James Williams from Midwest Orthopedic in Peoria, testified that use of the vacuum cleaner and floor scrubber could not have caused or aggravated the Petitioner's carpal tunnel condition. First, operating the vacuum cleaner and floor scrubber required very little effort to operate. Second, the operator's hands are in a relatively neutral position when holding the vacuum cleaner, floor scrubber or when using the other custodial equipment (mops, brooms, toiler cleaners, and other items used to clean with). Third, they do not require any sustained, forceful gripping and the vibration felt to the hands is minimal and insignificant.

Regarding the vacuum, Dr. Williams testified that the motion of guiding and pulling the vacuum is not going to cause any damage to the carpal tunnel ligament no matter how long you used it. Dr. Williams touched upon the repetitive trauma concept in his evidence deposition submitted as Respondent's Exhibit 6 testifying that the standard for repetitive trauma as set forth by The National Institute for Occupational Safety and Health (NIOSH), particularly in cases involving carpal tunnel condition, requires one specific activity placing a stressful force on the hands and wrists that is done with a cycle time of less than thirty seconds for greater than fifty percent of the day. See Respondent's Ex. 3, p. 8. Dr. Williams also testified that the type of trauma necessary would require sustained, forceful gripping or vibration as one would experience when using a jackhammer, chipper or grinder, not a vacuum cleaner.

The Petitioner worked for the Respondent for fifteen years as a custodian performing a variety of job tasks using her hands and arms. However, she has the burden of proving the work was a causative factor in the development of carpal tunnel syndrome. The Arbitrator believes she has failed to meet that burden, and her claim is denied.

All three of the medical witnesses testified that vibration and repetition were two factors which could be causative with respect to the condition. Both Dr. Keller and Dr. Williams said that those factors must have been done in a sustained manner. The lack of proof of work in a sustained manner is fatal to the claim. The arbitrator is persuaded by the Respondent's witnesses that the fifteen to twenty minute daily use of the floor scrubber in the multi-purpose room at Sugar Creek Elementary by the Petitioner or vacuuming the carpet in the classrooms for ten minutes at a time, as well as the other, varied cleaning activities and tasks she performs as a custodian for Respondent, did not cause or aggravate her underlying condition and therefore finds that her work for Respondent is not a contributing factor. For Petitioner's work to be a component, or a contributing factor, of her alleged condition it must be determined that her work involved sustained, forceful gripping or vibration of the hands and the evidence simply does not support this proposition.

Neither Dr. Holt nor Dr. Keller have ever operated the floor buffer in question, have no idea how much if any vibration is emitted by the machine, they have never even visited the Petitioner's school where she works to observe the floor buffer in use and, therefore, have no firsthand knowledge regarding the machine's use in order to base their causation opinion. Dr. Williams, on the other hand, spent an hour going through Sugar Creek Elementary where the Petitioner works and observed and performed many of the Petitioner's custodial tasks as is depicted in Respondent's Exhibit 3. Dr. Williams is shown in the video performing many of the Petitioner's job tasks and operating the vacuum cleaner and operating the floor scrubber with one hand and merely guiding and directing the floor scrubber as it is pretty much self-propelled and requires very little effort to operate other than controlling the direction of the machine which can be done with one hand.

Dr. Williams testified very clearly and persuasively that none of the Petitioner's work tasks could have contributed to or aggravated her underlying carpal tunnel condition because none of the work tasks required sustained, forceful gripping, vibration or stressful use of the hands. Dr. Williams testified that Petitioner's condition was more likely due to her biologic risk factors (being middle age, increased body mass index, post-menopausal) and/or being idiopathic in nature. Dr. Williams further testified that sixty to seventy percent of the population with carpal tunnel syndrome develop the condition idiopathically where the origin is simply unknown which accounts for the great majority of carpal tunnel cases. Both Drs. Holt and Keller agreed that most carpal tunnels are idiopathic in origin.

Given the findings above, the work activities described by the Petitioner and Respondent's witnesses do not support the level of activity required for Petitioner's work to be a causative factor in her carpal tunnel condition.

Based upon the above, the arbitrator finds that Petitioner's work for the Respondent did not cause or aggravate her bilateral carpal tunnel condition, and therefore this claim is denied. All other issues pertaining to her medical bills, temporary total disability, and permanent partial disability are thereby rendered moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Stanley Newell,

Petitioner,

vs.

NO: 10 WC 41772

Sysco Foods,

16IWCC0265

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, employment, temporary total disability, causal connection, permanent partial disability, medical, prospective medical, wage rate, penalties, statute of limitation 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, 2015 is hereby affirmed and adopted.

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

DATED: APR 19 2016

MB/mam
o:4/14/16
43

Maria Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NEWELL, STANLEY
Employee/Petitioner

Case# **10WC041772**

16IWCC0265

SYSCO FOODS
Employer/Respondent

On 7/30/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0000 STANLEY NEWELL
1108 S AUSTIN BLVD
OAK PARK, IL 60304

0766 HENNESSY & ROACH PC
GUY E DiTURI
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

16IWCC0265

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Stanley Newell
Employee/Petitioner

v.

Sysco Foods
Employer/Respondent

Case # **10** WC **41772**

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 cities of **Wheaton** and **Geneva**, on **December 5, 2014 and January 16, 2015,** respectively. 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. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **July 23, 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 to the right side of the head only.

Timely notice of an accident to the left side of head or left eye ***was not*** given to Respondent.

Petitioner's current condition of ill-being of the right side of the head only ***is*** causally related to the accident

In the year preceding the injury, Petitioner earned $**57,633.16**; the average weekly wage was $**1,108.33**.

On the date of accident, Petitioner was **51** years of age, ***single*** 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 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 paid $**41,927.64** in non-occupational indemnity disability benefits to Petitioner.

ORDER

Respondent shall pay Petitioner disfigurement benefits of $**664.72**/week for **3** weeks, because the injuries sustained caused the disfigurement of the right side of Petitioner's head, as provided in Section 8(c) of the Act.

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

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

Brian T. Cronin

Signature of Arbitrator

July 27, 2015
Date

JUL 30 2015

16IWCC0265

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE WORKERS' COMPENSATION COMMISSION OF ILLINOIS

STANLEY NEWELL,

Petitioner,

v.

SYSCO FOODS,

Respondent.

NO. **10 WC 41772**

Introduction:

On October 28, 2010, the Petitioner filed an Application for Adjustment of Claim in which he alleged that on August 1, 2009, he injured his head and left eye while working. At that time, Robert N. Schlemmer of the law firm Cohn, Lambert, Ryan & Schneider represented Petitioner.

On March 21, 2011, the Petitioner filed an Amended Application for Adjustment of Claim in which he changed the date of accident.

On January 25, 2013, Arbitrator Carlson granted a motion for withdrawal of attorney, which Patrick J. Ryan of the law firm Cohn, Lambert, Ryan & Schneider filed.

Petitioner later retained the services of Samuel J. Ruffolo of the law firm Baum, Ruffolo & Marzal, Ltd.

On August 14, 2014, the undersigned arbitrator granted Samuel J. Ruffolo's motion for withdrawal of attorney.

During the pendency of this claim, Petitioner had the benefit of being represented, sequentially, by two different attorneys.

Petitioner represented himself at a subsequent pre-trial.

Petitioner represented himself at trial on December 5, 2014 and January 16, 2015.

FINDINGS OF FACT:

Petitioner's Testimony:

Mr. Stanley Newell, the Petitioner, testified that he worked for Sysco as a delivery driver. Mr. Newell testified that on July 23, 2009, while making a delivery, he was loading a hand truck and when he got up, he struck the right side of his head on the corner of the open latch side of a freezer door on a trailer. The Petitioner testified that he then struck the left side of his head and temple.

The Petitioner testified that he was transported to the hospital (St. Anthony Medical Center) from the location of the incident. With respect to the laceration on the right side of the head, the Petitioner only received treatment for this condition on July 23, 2009 from St. Anthony Medical Center.

The Petitioner testified that after receiving treatment at the hospital, he returned to work that day. When making another delivery, the Petitioner testified, he removed a case of chicken and dropped it on a defective hand truck. As a result, the handle of the hand truck struck him in the left eye.

The Petitioner testified that he then got on the phone to Shannon, told her what had happened and recommended that she give him another hand truck the next day.

The Petitioner testified that after work, he went to the gas station to get some Tylenol and went home. The next day, he felt better but was sore around the eyes. He noticed that if he touched the eye, it hurt. However, he went to work that day.

The Petitioner testified that he went to work on Monday, met with his supervisor, Ken Barnes, and filled out an accident report for his head and eye that day. The Petitioner further testified that as time went by, he still had pain, he was still taking Tylenol and his eye was black and blue at that time.

The Petitioner testified that on August 7, 2009, when he was driving down the road, he noticed that his left eye was very blurry and had difficulty seeing out of the eye.

The Petitioner testified that he called Arbor Eye Care, but that he did not have an opportunity to see them right away because he was making deliveries.

The Petitioner testified that on August 8, 2009, he was dizzy and had his brother drive him to Arbor Eye Care. Dr. Chris Albanis saw him. He asked Dr. Albanis if he could get a second opinion. At some point, he saw Dr. Stephen Rheinstrom for a second opinion. He treated with Dr. Rheinstrom up to December 24, 2009 at which time Dr. Rheinstrom "dismissed" him.

The Petitioner testified that from July 23, 2009 through December 23, 2009, he did not lose any time from work as a result of these accidents.

The Petitioner testified that on December 24, 2009, he went on vacation to Florida. The Petitioner testified that on January 1, 2010, while still on vacation, he sustained an injury to the left eye when he struck it on a nightstand. While still on vacation, the Petitioner underwent left eye surgery. The Petitioner testified that since that time, he has not returned to work for Sysco due to the left eye injury.

The Petitioner testified that based on CDL regulations, he was and is unable to drive a truck due to the loss of vision in his left eye. The Petitioner testified that he is not able to find employment.

The Petitioner testified that he does have keratoconus in both eyes. Also, he takes medicine every day for glaucoma in his left eye. The Petitioner further testified that he is seeing Dr. Tu, whom he has seen since 2010. The Petitioner testified that he scheduled an appointment to see Dr. Lubeck at Arbor Eye Care and that Dr. Lubeck did not issue a letter.

The Petitioner testified that, presently, he has a total loss of vision in his left eye. He wears a contact lens in his right eye for keratoconus and can see perfectly. Without the contact lens in his right eye, he can see "less than normal" with the right eye. Based on that and his allergic reaction to the contact lens, the Petitioner testified, he is no longer able to work. So, he does volunteer work when he can, which would include working elections, at churches and at homeless shelters.

On cross-examination, the Petitioner testified that in order for him to drive a car, he must wear the contact lens in his right eye. The Petitioner further testified that he signed and dated a document entitled "Sysco Food Services of Chicago

Employee Incident/Injury Report" on July 25, 2009. (RX 1) With respect to this document, the Petitioner certified "that the above is a true and correct statement of fact, and that I made such statement of my own free will." With respect to this report, it was certified by the Petitioner that there was a work accident on July 23, 2009 in which he sustained an injury to the side of his head due to rising up and hitting the corner of the open latch side of the freezer door of the trailer. (RX 1)

In addition, with respect to this document, there was a page with a drawing of two skeletons that depict the right side and left side of the body. The Petitioner was asked to place an "X" where he felt pain. The Petitioner testified that he placed an "X" on the right side of the head. Furthermore, the Petitioner testified that with respect to the left side of the head, he made no marks. The Petitioner signed the page with the skeleton drawings on July 25, 2009.

Next, on cross-examination, the Petitioner testified that he signed a document entitled "Sysco Foods Services-Chicago, Inc. Post Injury Training Verification Form." This document was signed by the Petitioner on August 10, 2009. (RX 2) The Petitioner testified that he did not complete any of the information in the document but acknowledged that he did sign the document in the box labelled "Statement of Acknowledgement." With respect to this document, it notes that on July 23, 2009, the Petitioner "hit right side of head on side freezer door (corner)." (RX 2) The Petitioner testified that there was no documentation of a left eye injury on such form.

The Petitioner testified that on July 23, 2009, he received treatment at St. Anthony Medical Center. (RX 3) In this record, it indicates that the Petitioner sustained a puncture wound and an abrasion to his head. It also indicates that the Petitioner was discharged at that time.

Next, the Petitioner testified that he signed a Zurich Dismemberment Claim Form on February 2, 2010. (RX 4) Under the section entitled "To Be Completed By Claimant", it notes that the Petitioner sustained a left eye injury on January 1, 2010. It also notes that "upon me awakening in bed, I turned in the bed and hit my eye on the corner of night table next to the bed. (Hyatt Regency Hotel, Miami, FL)." The Petitioner testified that he did not fill out any of this document. The Petitioner testified that this information was accurate and that he last worked for Sysco on December 24, 2009, which was also noted in the form.

At trial, the Petitioner was shown a document entitled "Hartford Life and Accident Insurance Company, Application for Long Term Disability Income Benefits." (RX 5) Under Section 1 of this Application (i.e. Employer's Section), this was completed by Teresa Miserendino who is an HR Generalist for Sysco. Ms. Miserendino dated this document April 16, 2010. It notes that the Petitioner's last day of work was December 24, 2009 and that he was scheduled to go on vacation. It notes that the Petitioner stopped working because of loss of vision and it further notes that a claim had not been filed with workers' compensation.

Under Section 2 of this Application (i.e. Employee's Statement), it indicates that Mr. Newell signed and dated this section on April 7, 2010. Mr. Newell testified that he signed a blank version of this document, however, Mr. Newell testified that above his signature was the following language: "The statements contained in this application for Long Term Disability Income Benefits are true and complete to the best of my knowledge and belief." (RX 5) With respect to Section 2 of this Application, it indicates that the Petitioner first noticed his symptoms after he hit his eye on a table. On page 5 of this document, it indicates that the Petitioner "hit eye on corner end table, left eye." It also indicates that a physician first treated the Petitioner for this injury on January 1, 2010.

In Section 4 of this Application (i.e. "Attending Physician Statement of Disability") it identifies Dr. Stephen Rheinstrom as the treating physician (ophthalmologist). The attending physician signed this on April 7 (year not noted). (RX 5) The primary diagnosis identified is left eye injury. The Petitioner first treated for this condition on January 12, 2010. The doctor that this illness or injury was not a work-related. (RX 5)

On cross-examination, the Petitioner testified that he treated at Arbor Centers for Eye Care on February 8, 2012. (RX 6) The Petitioner testified that there was a quote in this report that read "I need to know that the injury in 2009 caused my sight to go. I still think the injury caused my eye problem." The Petitioner testified that at the bottom of this report it states that the doctor documented that he could not state that the vision loss was related to an injury.

Furthermore, on page 2 of Respondent's Exhibit 6, it states, in relevant part, the following:

Spoke with pt today wants a letter stating injury to eye is work related. Injury was July 23, 2009 disability is going to run out if doesn't get letter sent in pt stated had 2 injuries to eye same day both work related

At the bottom of this document, the provider wrote "No more letters. can refer to previous". (RX 6)

The Petitioner testified that Dr. Chris Albanis was his eye doctor at Arbor Centers. Dr. Albanis authored a letter to the Petitioner that is dated August 6, 2012. (RX 6) Dr. Albanis wrote that she examined the Petitioner one time on August 8, 2009. At that examination, she found significantly elevated eye pressure and "hand motion" vision in the left eye. Dr. Albanis opined that whether or not the Petitioner's history of prior trauma caused a significantly elevated eye pressure on 8/8/2009 is something she cannot determine at this time.(RX 6) The Petitioner agreed that this is what Dr. Albanis wrote.

On cross-examination, the Petitioner was also shown Respondent's Exhibit 7, which was Dr. Elmer Tu's June 19, 2012 medical report. (RX 7) In this report, it was noted that in terms of whether the Petitioner's injury was due or not due, Dr. Tu did not have the old records and these questions were probably handled through the managing physician, Dr. Stephen Rheinstrom.

On cross-examination, the Petitioner was shown Respondent's Exhibit 8, which was a document entitled "Work & Well Request for FMLA or Medical Leave." The Petitioner testified that he signed this document but did not fill out any of the information. The document indicates that the Petitioner's last day of work was December 24, 2009 and that he underwent eye surgery on January 1, 2010. It was noted the Petitioner's first day off of work for this condition was documented as January 4, 2010. It was also noted that this condition was not caused by the Petitioner's work. The Petitioner testified that he disagreed with such statement. Above the signature line in such document are the following statements: "I certify that I was/am unable to work during the period for which I am claiming benefits. I also certify that all the above information provided by me on this form is true. I realize that the law provides penalties for making false statements in order to claim benefits." (RX 8)

The Petitioner testified that he worked in a full-duty, no restriction capacity from July 23, 2009 through December 24, 2009.

Debbie Valleskey's Testimony

Ms. Debbie Valleskey testified that she is the Occupational Health Manager for Sysco Chicago and has worked in that position for over 5-1/2 years. Ms. Valleskey testified that one of her job duties entails handling employee's reporting of work related accidents.

Ms. Valleskey testified that she knew the Petitioner and was familiar with him as he was a former employee of Sysco who reported a work accident on July 23, 2009. Ms. Valleskey testified that she was familiar with the facts of the July 23, 2009 work accident as she prepared an Occupational Wellness Nursing Notes report. (Rx 9) On July 23, 2009, Ms. Valleskey testified, she spoke to the Petitioner and even documented the Petitioner's cell phone number on the report. With respect to the details of the incident, it was noted that the Petitioner was pulling a ramp out and a door fell on the top of his head in which he sustained a cut. Ms. Valleskey testified that she quoted the Petitioner: "bleeding pretty bad" and "Chef is driving me to St. Anthony." In the report, Ms. Valleskey documented that the Petitioner reported the incident that day. (RX 9)

Ms. Valleskey testified that the Petitioner only received treatment for the cut on the right side of the head as documented in the report. Ms. Valleskey testified that a work dispatcher would not go to meet an employee to investigate an accident as that is not one of the dispatcher's duties. Ms. Valleskey indicated that a safety manager or supervisor would go to meet an employee to investigate an accident.

Ms. Valleskey testified that the Petitioner never reported a left eye work injury. Ms. Valleskey noted that if Sysco were aware of an employee having blurry vision, they would not allow him to continue working based on DOT rules. She testified that an employee would be required to pass a medical examination before returning to work if he did have eye issues.

Ms. Valleskey testified as to the Petitioner's Timecard for 2009. (RX 11) Ms. Valleskey indicated that this document accurately represents the Petitioner's work hours for each day of work. With respect to July 27, 2009, the Timecard reflects "SBP-personal". (RX 9) Ms. Valleskey confirmed that this code

means that on July 27, 2009, the Petitioner took a personal day and did not work. Moreover, the Timecard does not indicate the times the Petitioner went in and left work that day.

Finally, Ms. Valleskey confirmed that she reviewed the Petitioner's employment file and found there was only documentation that addressed a cut to the right side of the head. Ms. Valleskey testified that there was no documentation regarding a left eye work accident. Ms. Valleskey testified that if the Petitioner ever reported a work-related, left eye injury, she or a colleague would have been prepared a report similar to the report she prepared for the cut to the right side of his head.

On cross-examination, Ms. Valleskey agreed with the Petitioner that she did not meet with him on July 23, 2009, but spoke with him on the phone. She testified that on direct examination, she did not state that the Petitioner punched in and punched out of work. She further testified that RX 11 reflects the hours that the Petitioner worked and did not work. Ms. Valleskey testified that she is aware that the Petitioner worked out of the Chicago Heights yard.

CONCLUSIONS OF LAW:

In support of his decision with regard to issue (C)"Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator concludes as follows:

The Arbitrator finds that the Petitioner sustained a laceration to the right side of his head as a result of the July 23, 2009 work accident. This finding is based upon the stipulation of the parties regarding the cut to the right side of the head, as well as the documentary evidence and testimony of Ms. Valleskey.

With respect to an alleged work-related accident to the left side of the head on July 23, 2009 as well as a work-related accident to the left eye on July 23, 2009, the Arbitrator finds that the Petitioner failed to meet his burden by a preponderance of the evidence that an accident to the left side of the head and an accident to the left eye occurred on July 23, 2009.

The Arbitrator finds that the Petitioner is not credible in asserting that on July 23, 2009, he struck the left side of his head after sustaining a laceration to the right side of his

head. The Petitioner completed and signed numerous forms and reports in which there is no documentation for an injury to the left side of the head. Furthermore, on July 25, 2009, the Petitioner marked the skeleton drawing by placing an "X" on the right side of the head. He did not place an "X" anywhere else. (RX 1)

In addition, there is no medical evidence that establishes an injury occurred to the left side of the head. As such, the Arbitrator finds that the Petitioner did not sustain an accident to the left side of his head on July 23, 2009.

Next, the Arbitrator finds that the Petitioner has failed to meet to his burden by a preponderance of the evidence that he sustained an accident on July 23, 2009 to the left eye. The Petitioner completed an Employee Incident/Injury Report for Sysco in which he signed and dated this document on July 25, 2009 (two days after the alleged accident to the left eye). (RX 1) In this document, the Petitioner reported that he sustained an injury to the right side of his head after he struck it on a corner of the open latch side of the freezer door of the trailer.

With respect to the drawing of the two skeletons, the Petitioner only marked an injury on the right side of the head and did not indicate an injury to the left side of the head or left eye. (RX 1) The Arbitrator finds that the Petitioner is not credible when he testified that he signed a blank report, i.e., a report in which none of the requested information was supplied, and that he sent this signed, blank report to Sysco for them to complete. Furthermore, the Arbitrator notes that when the Petitioner signed this report, his signature is below a statement that reads: "I, Stanley Newell (Name of injured employee), the undersigned herewith certify that the above is a true and correct statement of fact, and that I made such statement of my own free will". (RX 1)

The Arbitrator also notes that the Petitioner signed and dated the section with the skeleton drawings on July 25, 2009.(RX 1)

Next, the Arbitrator notes that the Petitioner signed a Sysco post-injury training verification form on August 10, 2009 in which it was notes that the Petitioner "hit right side of head on the side freezer door (corner)". The Arbitrator points out that there is no documentation about a left eye injury in this form. Once again, the Arbitrator finds that the Petitioner

is not credible when he testified that he signed this document before any of the information requested was supplied.

The Arbitrator also notes that the Petitioner testified that from July 23, 2009 through December 24, 2009, he lost no time from work and continued to work in a full-duty, no restriction capacity. The Arbitrator notes that when the Petitioner went on vacation, he sustained an injury to his left eye, which resulted in emergency left eye surgery in Miami, Florida.

The Arbitrator notes that there is no medical documentation of a left eye, work-related injury from July 23, 2009 through the date on which the Petitioner sustained a left eye injury while on vacation in Florida.

The Arbitrator notes that the Petitioner signed a Zurich Dismemberment Claim Form on February 2, 2010 in which the Petitioner confirmed a left eye injury after striking his left eye on the corner of a night table while on vacation. (RX 4)

The Arbitrator also notes that the evidence contains an Application for Long Term Disability Income Benefits with Hartford Life Insurance Company. (RX 5) Under the employee statement of this Application that was signed by the Petitioner on April 7, 2010, he asserted: "The statement contained in this application for Long Term Disability Income Benefits are true and complete to the best of my knowledge and belief". (RX 5) Under the employee's statement, the Petitioner noted that his left eye symptoms first began after striking his left eye on the corner of an end table and that he was first treated on January 1, 2010 in Florida. The Arbitrator notes there was no mention of left eye symptoms prior to the Florida injury.

With respect to Respondent's Exhibit 5, the treating physician offered a primary diagnosis of left eye injury and noted that this injury was not work-related. The report also indicates that the onset of this condition was in January 2010 when the Petitioner injured his left eye while on vacation in Florida. (RX 5)

The Arbitrator notes that the Petitioner testified that he reported the alleged July 23, 2009 left eye work accident to Ken Barnes while he was at work on July 27, 2009. The Petitioner testified that while at work on July 27, 2009, he and Mr. Barnes completed an injury report that documented a left eye work accident.

The Arbitrator finds that the Petitioner is not credible in this assertion for two reasons. First, the Petitioner submitted no documentary evidence that identifies an alleged work accident in which he injured his left eye work on July 23, 2009. Second, the Arbitrator finds the testimony of Ms. Debbie Valleskey to be credible. She testified as to the veracity of the Petitioner's 2009 Timecard. (RX 11) Ms. Valleskey testified that the Petitioner's Timecard for 2009 was a true and accurate representation of the days he worked and did not work. The Timecard revealed numerous days in which the Petitioner began and ended work. (RX 11) Ms. Valleskey testified that the Timecard revealed that on July 27, 2009, the Petitioner took a personal day and did not work that day. (RX 11) As such, the Timecard refutes the Petitioner's assertion that he was at work on July 27, 2009 and reported a left eye work accident to Kenneth Barnes. The Petitioner offered no evidence to refute the veracity of Ms. Valleskey's testimony or the veracity of the Timecard.

Furthermore, Ms. Valleskey testified that she spoke with the Petitioner on and after the July 23, 2009 accident with regard to a cut on the right side of his head. Ms. Valleskey testified that the Petitioner never reported a left eye work accident and that if he did, she would have documented it as she did with respect to the cut to the right side of his head. (RX 9) Furthermore, Ms. Valleskey testified that there is no documentation regarding an alleged left eye accident on July 23, 2009 because such an accident did not occur.

Based upon all of the evidence as outlined in this Decision, the Arbitrator finds that the Petitioner failed to prove by a preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment on July 23, 2009 with respect to the left side of the head and the left eye. Accordingly, the Petitioner's claims for benefits to the left side of the head and the left eye are hereby denied.

In support of his decision with regard to issue (F)"Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator concludes as follows:

Based upon the Arbitrator's determination as to accident, the Arbitrator finds that the Petitioner sustained a laceration to the right side of the head as a result of the July 23, 2009 work accident.

Based upon the Arbitrator's determination as to accident, the Arbitrator finds that any current condition of ill-being of the left side of the Petitioner's head is unrelated to an injury at work.

Based upon the Arbitrator's determination as to accident, the Arbitrator finds that the Petitioner's current condition of ill-being for the left eye is unrelated to an injury at work. Furthermore, even if the Arbitrator were to have found that the Petitioner sustained a work-related accident to the left eye on July 23, 2009, the Arbitrator still would find that the Petitioner's current condition of ill-being for the left eye is unrelated to an alleged work accident for multiple reasons. First, there is no evidence to indicate that the Petitioner received any treatment for the left eye from July 23, 2009 to the unrelated injury he sustained while he was on vacation in Florida. The Arbitrator notes that the Petitioner was only unable to return to work for Sysco after he sustained the left eye injury (for which he underwent surgery) while on vacation in Florida. It is apparent that the injury in Florida was the cause of his current condition of ill-being of the left eye.

Furthermore, the Arbitrator notes that the Petitioner's treating physicians were unable to causally relate his left eye current condition of ill-being to an alleged left eye work accident of July 23, 2009. Respondent's Exhibit 6, the records from Arbor Centers for Eye Care, indicates that the Petitioner contacted that facility. The document indicates: "I need to know that the injury in 2009 caused my sight to go". A handwritten note on the February 8, 2012 medical document indicates that the doctor was unable to state that the Petitioner's vision loss was related to an injury.

Furthermore, the Arbor Centers documented a telephone call with Petitioner on June 19, 2012 in which he requested a letter from them that states his left eye injury was related to a work accident and that his disability was going to run out if he does not receive a letter from them. The provider indicated that there would be no more letters. (RX 6)

Moreover, the Arbitrator notes that on August 6, 2012, Dr. Chris Albanis authored a letter to the Petitioner in which he opined that whether or not Petitioner's history of prior trauma caused the Petitioner's significantly elevated eye pressure was not something she could determine at that time.

Additionally, on June 19, 2012, Dr. Elmer Tu indicated that he also cannot address whether the Petitioner's left eye

condition was related to a work accident and such questions should be handled by Dr. Rheinstrom. (RX 7) Dr. Rheinstrom confirmed the left eye condition was not work-related. (RX 5)

In support of his decision with regard to issue (J)"Were 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 concludes as follows:

Based upon the Arbitrator's determination as to accident and causation, the Arbitrator finds that the Petitioner failed to prove entitlement to medical benefits/bills. In addition, the Arbitrator notes that even if the Arbitrator would have found for the Petitioner on the issues of accident and causal connection regarding the left side of the head or the left eye, on the stipulation sheet, the Petitioner did not claim that the Respondent was liable for payment of unpaid medical bills. Accordingly, the Petitioner's claim for same is hereby denied.

In support of his decision with regard to issue (K)"What temporary benefits are in dispute? TTD", the Arbitrator concludes as follows:

Based upon the Arbitrator's determination as to accident and causation, the Arbitrator finds that the Petitioner failed to prove his entitlement to temporary total disability benefits. Accordingly, the Petitioner's claim for same is hereby denied.

In support of his decision with regard to issue (E)"Was timely notice of the accident given to Respondent?", the Arbitrator concludes as follows:

Based on the evidence, the Arbitrator finds that the Petitioner gave timely notice of an accidental injury to the right side of his head, but did not give timely notice of alleged accidental injuries to the left side of his head and/or left eye.

In support of his decision with regard to issue (L)"What is the nature and extent of the injury?", the Arbitrator concludes as follows:

Based upon the Arbitrator's determination as to accident and causation, the Arbitrator finds that the Petitioner did sustain a laceration to the right side of the head as a result of the July 23, 2009 accident. The Arbitrator notes that the Petitioner testified that he lost no time from work as a result of the laceration to the right side of the head. The evidence only shows treatment for this laceration on July 23, 2009 at St. Anthony Medical Center. The Petitioner did not testify as to any disability he has sustained as a result of the laceration to the right side of the head. Therefore, based upon these factors, the Arbitrator finds that the Petitioner is entitled to disfigurement benefits pursuant to Section 8(c) of the Illinois Workers' Compensation Act for 3 weeks. Using the appropriate statutory maximum PPD rate of $664.72, the Arbitrator calculates the disfigurement award to be $1,994.16.

Based upon the Arbitrator's determination as to accident and causation, the Arbitrator finds that the Petitioner failed to prove his entitlement to permanent partial disability benefits for an alleged injury to the left side of the head. Accordingly, his claim for same is hereby denied.

Based upon the Arbitrator's determination as to accident and causation, the Arbitrator finds that the Petitioner failed to prove his entitlement to permanent partial disability benefits, wage differential benefits or permanent and total disability benefits for an alleged left eye injury. Accordingly, his claim for same is hereby denied.

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

Denise Erickson,

Petitioner,

vs.

NO: 12 WC 31761

16IWCC0266

Southern Illinois University
Carbondale,

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, 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 5, 2015, is hereby affirmed and adopted.

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

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

DATED: APR 18 2016
TJT:yl
o 4/4/16
51

Thomas J. Tyrrell

Ruth W. White

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ERICKSON, DENISE
Employee/Petitioner

Case# **12WC031761**

SIU CARBONDALE
Employer/Respondent

16IWCC0266

On 8/5/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LEE, MARK N LAW OFFICE
ALLEN C MUELLER
1101 S 2ND ST
SPRINGFIELD, IL 62704

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
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CARBONDALE, IL 62901

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

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

AUG 5 - 2015

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

16IWCC0266

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

Denise Erickson
Employee/Petitioner

v.

SIU Carbondale
Employer/Respondent

Case # **12** WC **31761**

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 **June 10, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 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 $**29,172.64**; the average weekly wage was $**561.01**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

Petitioner was temporarily totally disabled from **11.15.11** through **1.16.12** and **1.29.13** through **3.31.13**, a period of **17 6/7 weeks.** Petitioner has received **$6,678.68** in temporary total disability benefits.

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

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$336.61/week** for **86 weeks**, because the injuries sustained caused the **40% loss of the left leg,** as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued between **October 15, 2011** and **June 10, 2015** and shall pay the remainder of the award, if any, in weekly installments.

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 27, 2015
Date

ICArbDec p. 2

AUG 5 - 2015

Denise Erickson v. SIU Carbondale, 12 WC 31761

Finding of Facts and Conclusions of Law

Petitioner has filed an Application for Adjustment of Claim alleging an injury to her left knee on October 15, 2011. At the time of hearing the disputed issues were accident, causal connection, temporary total disability (TTD) overpayment/credit, and nature and extent. The parties stipulated that this case solely concerns an alleged injury to Petitioner's left knee.[1](AX 1)

The Arbitrator finds:

Medical records pre-dating Petitioner's alleged accident of October 15, 2011 were admitted into evidence. They reflect that on August 1, 2006, Petitioner had x-rays taken of her bilateral knees. The x-rays were within normal limits. (PX2).

On August 14, 2006, Petitioner presented to Dr. John Wood at the Orthopaedic Institute of Southern Illinois. Petitioner reported bilateral knee pain, the left more so than the right which she attributed to squatting and arising at work. Petitioner indicated that her left knee hurt after squatting to clean sinks at work. Petitioner indicated that she had similar problems in the past when her left knee would lock, but that had not happened for a couple of years. Petitioner further reported having some soreness all summer but noticing increased pain on July 4, 2006. Petitioner described feeling like her knee was getting "stuck" when she squatted. Since then she was experiencing pain off and on with activities. Petitioner noticed occasional swelling and occasionally used a wrap but its help was "minimal." Dr. Wood noted Petitioner smoked a pack of cigarettes a day and had a family history of arthritis, cancer, and heart disease. Petitioner was noted to be five foot three inches tall and weighed 200 pounds. Dr. Wood reviewed the x-rays of Petitioner's knee and indicated the radiographs showed "arthritic changes noted subpatella [and] a patella tilt." (PX 2, p. 10) Dr. Wood assessed Petitioner with retropatellar pain syndrome and recommended physical therapy and anti-inflammatories. Petitioner was also given a cortisone injection. (PX2).

On September 11, 2006, Petitioner followed-up with Dr. Wood. Petitioner complained of continued pain and indicated she had no long-term improvement following the cortisone injection. Dr. Wood ordered an MRI of Petitioner's left knee. (PX2).

On October 6, 2006, Petitioner underwent an MRI of her left knee. The MRI revealed a tear involving the posterior horn of the medial meniscus, grade 2 signal change throughout the lateral meniscus, a suggestion of a osteochondral loose body just posterior to the posterior cruciate ligament, and moderate sized joint effusion with suprapatellar bursa plica. (PX2).

On October 20, 2006, Petitioner followed-up with Dr. Wood. (PX2). Petitioner complained of continued pain and swelling. Dr. Wood reviewed the MRI and informed Petitioner

[1] Dr. Wood also treated Petitioner during pertinent time periods for bilateral shoulder injuries and same were discussed during his deposition.

of the risks and benefits of proceeding with surgery. Dr. Wood specifically advised Petitioner that "operating in the face of anterior knee pain does not lead to great results." Petitioner indicated she wished to proceed with surgery. Dr. Wood indicated he would get pre-approval with workers' compensation. (PX2).

On November 2, 2006, Petitioner underwent surgery by Dr. Wood. The diagnoses were left knee loose body, left knee medial meniscus tear, grade II/III chondromalacia, medial femoral condyle, and grade I chondromalacia, patellofemoral joint. The procedures performed were excision of a loose body, partial medial meniscectomy (33%), and a cortisone injection. Dr. Wood noted that it was unlikely Petitioner would ever be at 100%. Grade II (bordering Grade III) chondral changes on the lateral aspect of the medial femoral condyle were noted. Petitioner was given a note indicating she could return to work on November 6, 2006 with restrictions of standing four hours and sitting four hours. (PX2).

On November 13, 2006, Petitioner followed-up with Dr. Wood. Petitioner indicated she was still having some discomfort and pain, but it was more stiffness and soreness instead of sharp-like pain as before. Petitioner was given prescriptions for physical therapy and anti-inflammatories. Petitioner was also given work restrictions. (PX2).

On November 30, 2006, Petitioner followed-up with Dr. Wood. Petitioner indicated that she was doing "very well" and ready to return to work. On physical examination, Petitioner had full range of motion and her strength was 5/5. Petitioner was instructed to continue physical therapy three times a week for two more weeks and to take Ibuprofen as needed. Petitioner was released to return to work without restrictions as of December 6, 2006. (PX2).

Thereafter, Petitioner underwent no further treatment to her left knee until January 15, 2010. During that time, however, Petitioner did undergo treatment with Dr. Wood in 2007 for left carpal tunnel syndrome. In a Patient Questionnaire dated June 18, 2007 Petitioner reported occasional swelling in her left knee and swelling and painful joints in her knees and fingers. She was taking Tramadol as needed. Dr. Wood noted a history of left knee arthritis. Petitioner returned again to Dr. Wood in February of 2008 for left thumb pain and again completed a Patient Questionnaire. She indicated swelling and painful joints in her left knee, left thumb, and right shoulder. (PX 2)

On January 15, 2010, Petitioner presented to Dr. Ana Migone at the Center for Medical Arts. Petitioner complained of left knee pain including decreased mobility, difficulty going to sleep, instability, limping, locking, night pain, night-time awakening, numbness, popping, swelling, tenderness, and weakness. Petitioner indicated that she had an old work injury to her left knee in 2006, but that her current complaints were not workers' compensation. Dr. Migone ordered an MRI. (PX2).

On January 26, 2010, Petitioner underwent an MRI of her left knee. (PX2). The impression was: 1) minimal blunting of the free edge of the medial meniscal body with 6 mm extrusion of the medial meniscus body. The meniscal tissue extended into the inferior recess as a result. There was also an intermediate signal throughout the body and posterior horn of the medial meniscus which abutted the inferior articular surface at the level of the central and middle thirds with minimal articular surface irregularity at that site, thought to represent a degenerative

type tear versus the sequela of her prior meniscal surgery at the site and careful correlation with details of surgery was recommended. However there was a 2.1 X 0.9 X 0.3 cm T2 hyperintense lesion along the margin of the medial meniscus at that level which is concerning for a parameniscal cyst related to an underlying meniscal tear/retear. Clinical correlation was suggested; 2) Intermediate signal abutting the free edge and inferior articular surface of the lateral meniscus at the body/posterior horn junction which might represent degenerative fraying versus fibro vascular scar related to prior surgery at the site or the presence of a chronic undersurface tear. Clinical correlation was suggested; 3) Low grade sprain of the medial collateral ligament with associated medial collateral ligament bursitis; 4) Tri-compartmental osteoarthritis with most severe changes of the medial compartment; and 5) Small joint effusion with evidence of low-level synovitis. (PX2).

On February 1, 2010, Petitioner returned to Dr. John Wood. Petitioner complained of left knee pain of a "10/10" on a "1/10" scale, and described it as sharp, burning, achy, and throbbing. Petitioner also reported swelling. Petitioner indicated that the left knee pain started "a few months ago." Petitioner indicated that there was no injury and that this was not a workers' compensation claim. Dr. Wood noted that he performed surgery on Petitioner's left knee in 2006 and that Petitioner had a meniscal tear and grade III chondromalacia at that time. Petitioner reported doing well after her surgery "until recently." Ninety percent of her pain was described as constant aching. Occasionally if Petitioner "misstepped," she felt a sudden sharp pain in the medial joint line. Petitioner also described a burning sensation distally to the knee joint, some night pain but minimal night time wakening. Petitioner reported "Being on it hurts." On physical examination, Dr. Wood noted Petitioner walked with a limp, was five foot three inches tall and weighed 204 pounds. Petitioner displayed full range of motion of the left knee, and a minimally positive McMurray's test. (PX2). X-rays revealed narrowing of the medial compartment suggesting degenerative arthritis and tricompartmental osteoarthritis, particularly in the medial compartment. Dr. Wood diagnosed Petitioner with left knee pain consistent with degenerative arthritis and he recommended a cortisone injection both pes bursa as well as medial compartment, anti-inflammatories, glucosamine and physical therapy to work primarily on the pes anserine bursitis. (PX2).

Petitioner underwent no further treatment until October 18, 2011.

On October 18, 2011, Petitioner presented to the office of Dr. Sandhya Grandhi at the Center of Medical Arts. Petitioner indicated that three days earlier she had hit her foot on a wheel at the bottom of a table, causing pain in her left knee. Petitioner reported she kept going after the accident but the pain got worse. She had been off work Monday and Tuesday. The doctor's notes reflect, "[Patient] has a history of torn meniscus in left knee and arthritic pains, she wears a brace on left knee had it before." Petitioner described her left knee pain as aching and sharp. It was relieved by bracing/splint which she worse when waling or sleeping. She also reported difficulty going to sleep. Dr. Grandhi ordered x-rays of Petitioner's left knee and gave Petitioner a prescription for Norco. (PX3).

On October 20, 2011, Petitioner filled out a Workers' Compensation Employee's Notice of Injury. (RX1). Petitioner indicated that on October 15, 2011 she was "cooking French toast went to turn away from table foot caught a wheel and felt a sharp shooting pain in left knee." (RX1). Petitioner indicated there were no witnesses to the alleged accident. (RX1).

On October 25, 2011, Petitioner followed up with Dr. Grandhi complaining of left knee pain. Petitioner reported trying to go back to work on the 24th but being unable to stay there all day long. Petitioner was given an injection into her left knee. X-rays of Petitioner's left knee were discussed, showing Petitioner had moderate degenerative joint disease. (PX3).

On November 2, 2011, Petitioner followed up with Dr. Grandhi for her left knee reporting that she had tried to go back to work the previous week but experienced such great knee pain she couldn't put weight on her leg. She had not started physical therapy but had undergone one knee injection. Dr. Grandhi ordered an MRI of Petitioner's left knee. (PX3).

On November 9, 2011, Petitioner underwent an MRI of her left knee. (PX2). The impression was: 1) tricompartmental osteoarthritis with most severe changes of the medial compartment. There has been an interval increase in extent of subchondral edema within the medial tibial plateau as compared to the previous study as well as overall increase on extent of cartilage thinning/fissuring of the patellofemoral compartment; 2) Diminished size of the medial meniscal body with blunting of the free edge which may be related to previous partial meniscectomy or a degenerative type tear as previously described with extrusion of the body and meniscal tissue extending just into the inferior and superior recess. There was also minimal blunting of the free edge of the anterior horn and posterior horn with a question of a small undersurface tear/retear at the level of the posterior horn. 1.7 X 1.3 X 0.9 cm T2 hyperintense lesion along the margin of the body and anterior horn/body junction was concerning for a parameniscal cyst. Correlate clinically and consider further evaluation with MR arthrography if clinically warranted; 3) Intrasubstance degeneration/minimal degenerative fraying involving the lateral meniscus; 4) Minimal medial collateral ligament bursitis; 5) Small joint effusion with evidence of synovitis; and 6) Thinning of the medial patellar retinaculum suggesting the sequela of an old injury. No significant subluxation of the patella was noted. (PX2).

On November 16, 2011, Petitioner followed up with Dr. Grandhi. Petitioner reported that she had not returned to work due to her restrictions and ongoing pain. Petitioner reported pain with minimal exertion and that Celebrex helped with the pain in her hands and knees. Petitioner reported knee flare-ups with corners and shifting of her weight. The doctor's note further states that Petitioner had been taken off work October 18, 2011 through October 24, 2011 and then returned to work that day but saw the doctor on October 25, 2011 and was off work that day. Petitioner also reported that she had returned to work on October 26, 2011 and worked for a week noting her pain worsened. The doctor then saw her on November 2, 2011 and took her off work until November 7, 2011 at which time she was told she could return to work with restrictions; however, Respondent would not allow her to return. Petitioner was told to remain off work until November 28, 2011 and then she could return to work full duty. Dr. Grandhi assessed Petitioner with severe osteoarthritis and referred Petitioner to an orthopedic surgeon. (PX3).

On November 29, 2011, Petitioner filled out a Patient Questionnaire indicating that she had injured her left knee when she caught her foot on a wheel and her knee twisted. Petitioner's chief complaint was extreme pain and the inability to put weight on her left knee. She attributed the symptoms to her accident on October 15, 2011. She acknowledged similar problems or complaints in the past. Associated symptoms included swelling, giving way, fatigue, numbness,

and radiating pain. The length of the pain varied and her symptoms were made worse with a lot of walking, lifting, carrying, pushing, "etc." Petitioner indicated that the severity of the pain was a "3/10" and up to a "10/10" when doing a lot. (PX2).

On November 30, 2011, Petitioner returned to Dr. John Wood. (PX2). Petitioner indicated that she had been experiencing achy discomfort in her left knee over the past several months that had required a brace. Petitioner indicated that on October 15, 2011, she was wearing the brace on her left knee when she was working behind a cart and her toe caught on one of the wheels, twisting her knee. Petitioner reported that if she twisted, turned, or pivoted she would experience a sudden severe pain in her knee and it would catch and want to give away. She tried to return to work but her knee swelled after a day or two and the pain was too great. On physical examination, Dr. Wood noted Petitioner was five foot three inches tall and weighed 190 pounds, Petitioner ambulated with a slow, but steady gait with a limp on the left side. Petitioner's strength was down, McMurray's was uncomfortable but there was no definitive palpable pop, and Petitioner had slight swelling of the left knee as compared to the right. X-rays taken that day revealed moderate degenerative changes of the left knee with a decrease in the medial joint space, early osteophyte formation, and some moderate patellofemoral degenerative changes. Dr. Wood reviewed Petitioner's MRI and noted "it is difficult to ascertain whether these are new changes or old chronic changes from her prior surgery. She also has tri-compartmental degenerative changes." Dr. Wood's impression was a medial meniscal tear of the left knee and moderate degenerative joint disease of the left knee. Dr. Wood recommended physical therapy and gave Petitioner a cortisone injection. Petitioner was given work restrictions and told to follow up in three weeks. (PX2).

On December 16, 2011, Petitioner returned to Dr. Grandhi complaining of left knee pain. Petitioner reported knee pain since October 15, 2011, that she was going to physical therapy, was wearing her knee brace, taking her Celebrex, and had been put back on restrictions. (PX3). Petitioner was given a prescription for Norco, Celebrex, and Tramadol. (PX3).

On December 21, 2011, Petitioner followed-up with Dr. Wood. Petitioner continued to complain of left knee pain and indicated she was not ready to return to work. On physical examination, Petitioner had full range of motion, no effusion, a negative McMurray's test, and normal stability. Dr. Wood indicated in his office note:

> Patient has significant degenerative arthritis involving her left knee. This pre-existed her injury of 10/15/11 and may simply be an aggravation of a pre-existing condition. She is really a candidate for Supartz based on the level of pain she is having at this point. We are going to have to get that approved through work comp. This is clearly an aggravation of a pre-existing condition. At this point, given the lack of mechanical symptoms, I do not recommend arthroscopic surgery. (PX 2, p. 77)

Petitioner described most of her pain as achy. Dr. Wood also continued Petitioner's physical therapy for four more weeks and indicated he would see her back in February. Dr. Wood released Petitioner to return to work full duty on January 17, 2012. (PX2).

On January 20, 2012, Petitioner returned to Dr. Wood for her first Supartz injection in her left knee. (PX2).

On January 26, 2012, Petitioner returned to Dr. Wood for her second Supartz injection in her left knee. (PX2).

On February 1, 2012, Petitioner followed up with Dr. Grandhi. (PX3). Petitioner complained of mild to moderate, constant and fluctuating left knee pain for approximately four months. Petitioner described her pain as aching and reported difficulty initiating sleep, along with joint instability and tenderness. Petitioner had been back to work for two weeks and was waiting for knee shots. Petitioner reported she was still having problems at the end of the day and she had been undergoing her therapy for the last two months. Petitioner was given a refill of Vicodin. (PX3).

On February 2, 2012, Petitioner returned to Dr. Wood for her third Supartz injection in her left knee. (PX2). Dr. Wood indicated Petitioner was to return in three to four weeks for follow up.

On March 1, 2012, Petitioner followed up with Dr. Wood. (PX2). Petitioner indicated that there was still some pain present, but she was doing better. Petitioner did report continued "giving way." (PX2). Dr. Wood noted Petitioner had degenerative arthritis, had undergone a prior knee scope five years earlier and had returned for progressive knee pain in 2010. Dr. Wood further noted that it was "simply a progressive problem." (PX2). On physical examination, Petitioner walked without evidence of a limp, had full range of motion of the left knee, and had no significant swelling. Dr. Wood indicated Petitioner had responded well to conservative treatment and he would see her back on an as needed basis. Petitioner was to continue full duty with no restrictions at work. (PX2).

On March 2, 2012, Petitioner followed up with Dr. Grandhi for her left knee. Petitioner reported ongoing aching and sharp pain in her left knee aggravated by prolonged standing. She again reported worse pain at the end of the day. Dr. Grandhi noted Petitioner was under the care of Dr. Wood. Dr. Grandhi refilled Petitioner's prescription of Ultram. (PX3).

On March 28, 2012, Petitioner returned to Dr. Grandhi complaining of right knee pain[2]. She reported she was wearing her knee brace when walking or sitting. Petitioner was given a prescription for Tramadol. (PX3).

On July 30, 2012, Petitioner returned to Dr. Wood. Petitioner was given a steroid injection and Ortho Visc injection in her left knee. Petitioner was to monitor for symptom relief and continue to work full duty. (PX2).

On August 13, 2012, Petitioner returned to Dr. Wood for her second Ortho Visc injection in her left knee. (PX2).

[2] The Arbitrator reasonably infers this is a typographical error on the doctor's part given the remainder of the records.

On August 20, 2012, Petitioner returned to Dr. Wood for her third Ortho Visc injection in her left knee. Petitioner was to continue to work full duty. (PX2).

Petitioner signed her Application for Adjustment of Claim on September 7, 2012 alleging a left knee injury "during the course of her employment" on October 15, 2011. (AX 2)

On September 10, 2012 Dr. Grandhi re-examined Petitioner and she reported bilateral knee pain with "one worse than the other." Petitioner was noted to be "borderline for a knee replacement." Petitioner was doing home therapy for her knees. The doctor refilled her prescriptions and told Petitioner to keep wearing her knee brace and working full duty. (PX 3)

On September 12, 2012, Petitioner followed-up with Dr. Wood. On physical examination, Petitioner had a slight limp, swelling of the left knee as compared to the right, and discomfort. Dr. Wood reviewed he natural history of arthritis with Petitioner and told her to return in six to eight months. At that time, he and Petitioner would consider another round of injections versus a total knee replacement based upon her symptoms. Petitioner was to continue working full duty. (PX2).

On September 10, 2012, Petitioner followed up with Dr. Grandhi complaining of bilateral knee pain. Dr. Grandhi refilled Petitioner's Tramadol and instructed Petitioner to continue seeing Dr. Wood. (PX3).

On October 5, 2012, Petitioner returned to Dr. Wood complaining of left knee pain. Dr. Wood wrote:

> The patient has been suffering with more pain. She has known degenerative arthritis. She has been through a scope back in 2006 for the left knee. This has all been work comp. She has had viscosupplementation on a couple of occasions, the last was last month. It simply is not holding her. She cannot live like this. She is having difficulty working. She had to call in for several days last week. After work, she simply has to go home and sit because the knee is so painful. Saturdays and Sundays are recuperation days. Monday, she is feeling better but by the end of the week, she simply cannot continue to push through it. She works food service at SIU. She is doing anti-inflammatories, Tylenol, fish oil. She has tried glucosamine and it did not really seem to help. She is also taking narcotics from her primary care [physician.] she is having a hard time sleeping. She is simply sick and tired of this. She is looking for more help. (PX 2, p. 96)

Dr. Wood went on to note that all arthritis was multifactorial but "there is no question that the type of work she does in food service on concrete all day long has aggravated her situation, so will plan to proceed." Dr. Wood discussed the risks and benefits of proceeding with surgery and Petitioner wished to proceed. Petitioner was to continue to work full duty without restrictions

until the time of her surgery as he wanted her to keep her leg strong, flexible, and limber. (PX2, p. 97)

On October 19, 2012 Dr. Wood received a call from "Dr. Levine" wanting to pre-certify Petitioner for "work comp." Dr. Wood wrote,

> After a lengthy discussion, the bottom line is that patient had pre-existing disease for a long period of time prior to her work comp injury in 2011. I think that this is the majority of the reason for her current need for arthritis, however, the injury certainly aggravated her condition and was the proximal cause for needing a knee replacement. It sounds as if they are going to preapprove it through work comp. If not, we will try and go through regular insurance. (PX 2, p. 100)

On January 3, 2013, Petitioner returned to Dr. Wood who noted Petitioner's knee replacement had been approved. Petitioner complained of continued left knee pain, worse when working or any kind of activity. Petitioner indicated that she could no longer live with the pain and wanted to proceed with surgery. Dr. Wood indicated Petitioner could return to work approximately three months after surgery. (PX2).

On January 17, 2013, Petitioner returned to Dr. Grandhi for a pre-operative physical and medical clearance to undergo surgery. Petitioner was told to have an echo prior to knee surgery. The echo was performed, and Petitioner was medically cleared for surgery. (PX2).

On January 29, 2013, Petitioner underwent a left total knee arthroplasty. Petitioner's pre-operative and post-operative diagnosis was left knee arthritis. X-rays taken showed a total left knee prosthesis in satisfactory position alignment, a drainage catheter was present, skin staples anteriorly, gas within the superficial soft tissues following surgery. The impression was a left total knee arthroplasty. (PX2).

On February 18, 2013, Dr. Wood prescribed physical therapy for Petitioner two to three times a week for four weeks. (PX2).

On February 20, 2013, Dr. Wood noted Petitioner could drive again. (PX2).

On February 28, 2013, Petitioner followed-up with Dr. Wood. Petitioner indicated that she was doing extremely well. On physical examination, Petitioner had range of motion of zero to 100 degrees and excellent stability. X-rays showed excellent alignment and good position of the prosthesis. Dr. Wood noted he would release Petitioner to return to work without restrictions on April 1, 2013 and told to return to Dr. Wood in three months. Petitioner was to continue physical therapy. (PX2).

On May 6, 2013, Petitioner followed-up with Dr. Wood. Petitioner indicated that she still had some pain, but was doing well and had returned to work full duty on April 1, 2013. On physical examination, Petitioner walked without evidence of a limp, range of motion was zero to 95 degrees, and her stability was excellent. X-rays showed good position of components with no

evidence of loosening or malposition. Dr. Wood noted Petitioner was to follow-up one year from the date of surgery and anticipated that would be the date of maximum medical improvement. (PX2).

On February 3, 2014, Petitioner followed-up with Dr. Wood. Petitioner indicated that she was doing well and working but she was having difficulty with some activities. On physical examination, Petitioner walked without evidence of a limp, had adequate quad tone and strength, good motion with full extension and 120 degrees of flexion, and no instability. X-rays of petitioner's left knee showed good positioning and alignment with no signs of loosening. Dr. Wood noted Petitioner was to return in two years for "surveillance follow-up. (PX2).

On May 1, 2014, Petitioner underwent a Section 12 examination with Dr. Luke Choi regarding her left knee. A written report followed in which Dr. Choi noted Petitioner was a 53 year old woman employed as a kitchen helper at Southern Illinois University Carbondale and outlined the medical records he reviewed. At the time of Dr. Choi's examination, Petitioner was over a year out from her total left knee replacement. Petitioner indicated that she had made significant improvements in terms of pain relief. Petitioner indicated that she still had occasional discomfort with certain activities, but was overall pleased with her surgery. Physical examination revealed no soft tissue swelling or joint effusion, full extension with pain, flexion to approximately 115 degrees, and no medial or lateral joint line tenderness. Dr. Choi opined Petitioner had advanced left knee osteoarthritis based on her history, physical examination, and radiographs including MRI of the left knee. Dr. Choi further opined:

> In terms of causation regarding specifically the work-related injury that occurred on 10/15/2011, it is my opinion to a degree of medical certainty that the work related injury did not cause, substantially aggravate, or accelerate her pre-existing osteoarthritic condition. Specifically, Ms. Erickson's mechanism of injury is more consistent with a temporary exacerbation rather than a permanent aggravation of her pre-existing severe left knee arthritis. (RX4).

Dr. Choi's opinion was based upon his review of the medical records, including the November 9, 2011 MRI, Petitioner's long-standing left knee pain for several years prior to October 15, 2011, Petitioner's recent treatment for her left knee prior to October 15, 2011 including wearing a knee brace, and Petitioner's admission of chronic knee pain. Dr. Choi opined Petitioner would have needed a total left knee replacement regardless of the October 15, 2011 injury due to her underlying condition. Dr. Choi opined Petitioner had reached maximum medical improvement from her temporary exacerbation of her underlying left knee osteoarthritis, no further medical treatment was necessary, and Petitioner was capable of working without restriction. (RX4).

No further medical records regarding Petitioner's left knee were admitted into evidence.

Dr. John Wood testified via evidence deposition on February 24, 2015. (PX1). Dr. Wood testified that he began treating Petitioner for left knee pain in 2002 for retropatellar pain syndrome. (PX1, p. 5). Dr. Wood testified that this is common and could represent early arthritis. (PX1, p. 6). Dr. Wood testified that retropatellar pain syndrome is difficult to treat and is often chronic. (PX1, p. 6). Dr. Wood testified that he again saw Petitioner in 2006 when she returned complaining of bilateral knee pain. (PX1, p. 7). Dr. Wood testified that the examination of the

left knee was different as Petitioner had medial joint line pain. (PX1. P. 7). Dr. Wood testified that he performed a left knee scope to for a meniscal repair and excised a loose body from unknown origin. (PX1, p. 7). Dr. Wood testified that Petitioner did well following surgery, but was not symptom free. (PX1, p. 8). Dr. Wood testified that Petitioner returned again in February 2010 complaining of left knee pain. (PX1, p. 9). Dr. Wood testified that Petitioner's x-rays and MRI revealed arthritis in Petitioner's left knee. (PX1, p. 10). Dr. Wood further testified that the films taken in 2010 were markedly worse than those in 2006. (PX1, p. 10). Dr. Wood testified that in 2010 he discussed the progression of treatment for arthritis with Petitioner including anti-inflammatories, injections, physical therapy, weight loss, visco-supplementation, and the ultimate treatment is knee replacement surgery. (PX1, p. 13). Dr. Wood testified that Petitioner then returned in November 2011 and indicated she injured her left knee on October 15, 2011 when she caught her toe on a wheel and her knee twisted. (PX1, pp. 13-14). Dr. Wood testified that a twisting injury could cause further meniscal damage and aggravate arthritis. (PX1, p. 15). He explained that it was difficult to tell with the prior surgery what changes on the films were degenerative, which were acute. What were more important to him were the symptoms. According to Dr. Wood, the twisting motion Petitioner described could either cause or aggravate cartilage damage. (PX1, p.15)

Dr. Wood testified that Petitioner may have also had a meniscus tear; however, it was impossible to tell on the MRI due to Petitioner's previous surgery. (PX1, p. 17). Dr. Wood testified that there was no way to know if Petitioner's meniscus was torn at the time of the total knee replacement as that was not something he would typically make note of during a replacement procedure. (PX1, p. 41). Dr. Wood testified that in March 2012, Petitioner was doing well and he did not see her back until July 2012. (PX1, p. 19). Dr. Wood testified that he believed the October 15, 2011 injury aggravated Petitioner's arthritic condition. (PX1, p. 21). Dr. Wood testified that he believed Petitioner would have needed a knee replacement regardless of the October 15, 2011 injury, but that her need for the knee replacement was accelerated by the October 15, 2011 injury. (PX1, p. 22). He explained:

> Her arthritis was progressive. I think we've recognized that through talking about this today. She had tolerated the arthritis well. She had an injury. The symptoms increased. Had she not had that injury would she have needed a knee replacement at some time? Probably. Would she have needed the knee replacement at that time? Probably not. So because of the symptoms being increased by the injury, that was the proximate cause for the need for the surgery that we did. (PX1, p.22)

On cross-examination, Dr. Wood testified that the x-rays of Petitioner's left knee taken in 2006 showed arthritic changes and was a common progression from Petitioner's retropatellar syndrome she was diagnosed with in 2002. (PX1, pp. 34-35). Dr. Wood also testified that Petitioner's meniscal tear in 2006 could accelerate the arthritic changes to her left knee. (PX1, p. 35). Dr. Wood testified that when he saw Petitioner in 2010 she indicated that she had been experiencing symptoms for a few months and he admitted that he would expect that from someone who had arthritic changes in 2006. (PX1, p. 35). Dr. Wood testified that Petitioner's 2010 MRI revealed Grade III chondromalacia, which he considered significant. (PX1, p. 36). Dr. Wood testified that Petitioner had pain in her knee for several months prior to October 15, 2011 that required her to use a brace. (PX1, p. 37). When asked if there were significant changes between the MRIs taken of Petitioner's left knee in 2010 and 2011, Dr. Wood admitted that he

did not know as he had not compared the two. (PX1, p. 37). Dr. Wood testified that he discussed the importance of weight loss for the health of the knee with Petitioner throughout her treatment with him. (PX1, p. 39). Dr. Wood admitted that Petitioner weighed approximately 200 pounds throughout her treatment with him, putting her in the obese category, and that obesity can affect arthritis in the knees. (PX1, p. 40). Dr. Wood also admitted that a person with osteoarthritis could experience a temporary exacerbation or a twisting injury and return to their baseline. (PX1, p. 40).

Dr. Luke Choi testified via evidence deposition on August 13, 2014. (RX5). Dr. Choi is a board certified orthopedic surgeon with a specialty of sports medicine. (RX5, pp. 4-5). Dr. Choi testified that Petitioner told him she injured her left knee on October 15, 2011 when her left foot got caught in a portal stove causing her to twist her knee. (RX5, p. 10). Dr. Choi testified that Petitioner reported that she had chronic left knee pain since 2006 and that she had required the use of a knee brace for her left knee. (RX5, pp. 10-11). Dr. Choi testified that he did not see any evidence of an acute pathology in Petitioner left knee on the 2011 MRI. (RX5, p. 12). Dr. Choi testified that Petitioner's diagnosis prior to her left knee arthroplasty was left knee osteoarthritis. (RX5, p. 13). Dr. Choi testified that the October 15, 2011 injury did not substantially aggravate or accelerate her arthritic condition. (RX5, p. 13). Dr. Choi testified that Petitioner sustained a left knee strain and irritation from the October 15, 2011 injury that was a temporary exacerbation of her underlying condition. (RX5, p. 13). Dr. Choi testified that Petitioner would have needed a total left knee replacement regardless of the October 15, 2011 injury and that her knee replacement was not related to said injury. (RX5, pp. 14-15). On cross-examination, Dr. Choi testified that it was possible that a person who twisted their knee and then experienced joint catching could be indicative of a possible meniscal injury. (RX5, pp. 21-22). Dr. Choi also testified that it was possible that a twisting injury could aggravate a degenerative knee or make a previous meniscal injury worse, but that was not probable in the Petitioner's case. (RX5, p. 22).

Petitioner's case proceeded to arbitration on June 10, 2015. Petitioner testified at arbitration that she has been employed at Southern Illinois University Carbondale since February 29, 2004. During her tenure with Respondent Petitioner has held various jobs in "Housing." Most of her work was in and around the kitchen. Petitioner testified that she had a previous work injury to her left knee in 2006 when she squatted down to clean underneath a sink. Petitioner testified that her knee hurt for a few days but the pain never went away and she ultimately had surgery for a medial meniscus tear. Petitioner testified that she ultimately had surgery for a medial meniscus tear for that injury. Petitioner testified that she was paid temporary benefits and her medical bills were paid by workers' compensation for that injury. Petitioner testified that she returned to work full duty after that injury. Petitioner further testified that she did not file a claim for the 2006 injury.

Petitioner acknowledged that after she returned to work in December 2006, she still had problems with her knees as it would swell and hurt if she worked too hard.

Petitioner testified that she returned to Dr. Wood in February of 2010 due to increasing left knee pain. Petitioner testified that in 2010 she occasionally experienced "missed steps" followed by sharp pain on the inside of her knee and had problems with her knee locking and catching. Petitioner testified that Dr. Wood ordered an MRI and gave her injections into her left

knee that helped for a little while. She acknowledged that her knee bothered her "a little" prior to October 15, 2011. Petitioner also believed she might have missed a day or two of work.

Petitioner testified on October 15, 2011, she was working as a kitchen helper making French toast at a portable table when she turned to get a pan and her foot caught a wheel on the portable table, causing her body to turn, but not her foot. Petitioner testified that she experienced worse pain after that. Petitioner testified that she then had episodes where her knee felt like it was going to give out on her; however, she testified that she never fell. Petitioner testified that after this incident her knee "really hurt" and her knee felt much worse than it ever had before. Petitioner felt like she tore something and didn't want to put weight on it. Petitioner described her pain as a "10/10." She described a sharp pain on the medial side of her left knee. Petitioner reported the accident a couple of days later and initially sought treatment with Dr. Grandhi who referred her back to Dr. Wood.

Petitioner testified that when she went to Dr. Wood she explained that her knee was wanting to "give out" since the accident and that it felt like her knee would buckle on her and so she would put more weight on her right leg. Petitioner had also continued working for about one month after the accident and she explained that her knee hurt every day and by the end of the week it would hurt the most.

Petitioner testified that Dr. Wood provided injections and she tried working but her knee never returned to how it was before the accident.

Petitioner testified she underwent a total knee replacement on January 29, 2013. Petitioner testified that after the surgery, she still experienced some pain, but nothing like it was before. Petitioner testified that she returned to work to her regular job and is currently still working full duty. Petitioner testified that she is treating with Dr. Wood for her shoulder and when she sees him for her shoulder he does not look at her knee or inquire as to how it is doing. Petitioner testified that she currently has difficulty squatting and cannot get down on her hands and knees to scrub her floor. She utilizes a mild crate which keeps her knee bent more than half of her work day. Petitioner also sleeps with a pillow between her legs and occasionally requires use of a "grabber" to get things underneath the bed. Petitioner explained that she always needs to make sure there is something nearby to help her get up if needed. When climbing steps without a railing Petitioner takes one step at a time. Petitioner also has some difficulty with stairs. Petitioner testified that she did have some of these problems sometimes, but not to the same extent, prior to October 2011.

Petitioner testified that she currently works as "extra help" for the summer in the janitorial department.

On cross-examination, Petitioner admitted that her left knee had been bothering her just prior to October 15, 2011 and that she had been occasionally wearing a knee brace on her left knee. Petitioner testified that she had responded well to the injections Dr. Wood gave her after October 15, 2011. Petitioner further testified that on March 1, 2012, Dr. Wood released her to return as needed, and that she did not return to him until July 30, 2012, nearly five months later. Petitioner testified that she is working full duty and has been doing so since April 1, 2013. Petitioner testified that she has not had any complaints regarding her quality of work and that her

last performance evaluation was good. Petitioner testified that she still participates in her hobbies including hiking, flower gardening, and crafting. Petitioner testified that the last time she saw Dr. Wood was February 3, 2014 for her one year follow-up and at that time she was doing well and released from care. Petitioner testified that she has not made any appointments for her knee since that time. Petitioner testified that she does not take any medications for her knee nor does she wear any protective device or brace.

On redirect examination Petitioner testified that in the period between March and July of 2012 her knee was still bothering her and she was working her regular job but in a modified manner. She also testified that she was never symptom free before returning to Dr. Wood in July.

The Arbitrator concludes:

1.Issue (C) Accident.

Petitioner sustained an accident on October 15, 2011 that arose out of and in the course of her employment with Respondent. Petitioner's testimony regarding an accident on October 15, 2011 was unrebutted. Respondent's own exhibits 1 through 3 reflect that the accident was promptly reported and contain a description of injury consistent with the medical records and Petitioner's testimony at trial. Petitioner was a very credible witness being forthright in her testimony concerning her prior left knee problems and treatment. She endeavored to answer all questions very candidly.

2.**Issue (F) Causal Connection.**

Petitioner's current condition of ill-being in her left knee is causally related to her October 15, 2011 accident. In so concluding the Arbitrator relies upon the opinions and testimony of Dr. Wood over those of Dr. Choi and Petitioner's credible testimony regarding the difference in how her left knee felt before and after October 15, 2011. There is no question that Petitioner had a significant pre-existing arthritic condition in her knee. In this particular case, Dr. Wood was in the unique position of having treated Petitioner both before and after her work accident. Dr. Wood had the benefit of following Petitioner over a period of years prior to 2011 for her left knee, as well as the benefit of having all films available for review and comparison. Dr. Choi, on the other hand, did not have pre-2011 medical records, and apparently did not have Dr. Wood's initial consultation report after the October 15, 2011 accident (November 30, 2011 visit). Dr. Choi was of the opinion that Petitioner's accident did not significantly aggravate her knee condition; however, that is not the standard in Illinois. Furthermore, on cross-examination he acknowledged that a twisting injury could aggravate a degenerative knee condition. The Arbitrator has not overlooked the four month gap in treatment between March and July of 2012; however, Petitioner credibly testified that while she worked full duty during that time she modified the manner in which she performed some of her duties. That testimony was unrebutted. While Dr. Wood acknowledged that Petitioner had significant pre-existing arthritis in her left knee and probably would have needed a total knee replacement at some point in time, he further testified that the October 15, 2011 accident accelerated the need for the knee replacement. (PX1, p.22; PX 1, p.100) To be entitled to compensation for an injury, Petitioner need not prove that her injury was the sole causative factor in her subsequent treatment and disability, but only that it was a causative factor. If a pre-existing condition is aggravated, exacerbated, or accelerated by an

accidental injury, the employee is entitled to benefits. Rock Road Construction v. Industrial Commission, 37 Ill.2d 123, 227 N.E.2d 65, 67-8 (1967) Petitioner's accident on October 15, 2011 was a cause of her need for the total knee replacement and, thus, in light of applicable governing law, Petitioner has met her burden of proof on causal connection.

Accordingly, the Arbitrator concludes that Petitioner's October 15, 2011accident aggravated her pre-existing condition of ill-being in her left knee, resulting in the need for treatment after that date, including the total knee replacement.

3. **Issue (N): Is Respondent due any Credit?**

Petitioner and Respondent stipulated that Petitioner was paid TTD benefits of $6,678.68 from November 15, 2011 to January 16, 2012 and January 29, 2013 to March 31, 2013. Respondent claims a credit for overpayment of same based upon its liability defense. As the Arbitrator has found liability in Petitioner's favor and determined that her total left knee replacement was causally related to the October 15, 2011, Respondent shall not be given a credit for overpayment of total temporary benefits in the amount of $6,678.68.

4. Issue (L) – Nature and Extent.

Since Petitioner's accident herein occurred after September 1, 2011, Section 8.1(b) of the Act applies. As neither party presented an AMA rating, the Arbitrator gives no weight to that factor and relies on the remaining four factors: (i) the occupation of the injured employee; (ii) the age of the employee at the time of the injury; (iii) the employee's future earning capacity; and (iv) evidence of disability corroborated by the treating medical records. With regard to those factors, the Arbitrator notes the following:

(i) Occupation: Petitioner is employed in "housing" for Respondent. While she is currently working within the janitorial department and not the kitchen, no evidence was presented suggesting this job was outside of "housing." The Arbitrator gives weight to this factor and notes Petitioner was able to return to work for her employer on a full duty basis without any restrictions. Her job does, however, require her to be on her legs/knees a significant portion of her work day regardless of her specific duties. Petitioner testified that she still has difficulty squatting and traversing stairs and cannot get down on her hands and knees to scrub her floor. However, Petitioner is still able to work in her labor intensive position as a kitchen helper and testified that she is better than she was. She uses a crate to sit on rather than kneeling on her knee. Petitioner's credible testimony regarding her modifications in how she performs her job was unrebutted.

(ii) Age: Petitioner was 50 years old at the time of her injury and may reasonably be expected to continue working and living with the effects of her injury for the foreseeable future. The Arbitrator gives some weight to this factor.

(iii) Earning Capacity: There is no direct evidence of diminished future earning capacity in the record. The Arbitrator gives no weight to this factor.

(iv) Disability as corroborated by the treating medical records: Petitioner's testimony regarding her ongoing difficulties was corroborated by the records of Dr. Wood. Petitioner underwent two series of injections (3 each) before undergoing a total knee replacement. She made a very good recovery from surgery and returned to full duty work for Respondent. She does, however, modify the manner in which she performs some aspects of her janitorial duties. She takes no medication and she requires no assistive devices. She has not been back to see Dr. Wood since their last visit.

Based upon the foregoing, the Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 40% loss of use of her left leg. Respondent shall pay Petitioner permanent partial disability benefits of $336.61/week for 86 weeks, because the injuries sustained caused the 40 % loss of use of her left leg as provided in §8(e) of the Act.

****

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

Tom Auth,
Petitioner,

vs.

NO: 12 WC 38675

16IWCC0267

University Of Illinois,
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 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 13, 2015, is hereby affirmed and adopted.

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

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

DATED: APR 20 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

AUTH, TOM
Employee/Petitioner

Case# 12WC038675

13WC013923

16IWCC0267

UNIVERSITY OF ILLINOIS
Employer/Respondent

On 8/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LEE, MARK N LAW OFFICE
KEVIN MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
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CHAMPAIGN, IL 61820

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

AUG 13 2015

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

16IWCC0267

STATE OF ILLINOIS)
)SS.
COUNTY OF ADAMS)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Tom Auth
Employee/Petitioner

v.

University of Illinois
Employer/Respondent

Case # 12 WC 38675

Consolidated cases: 13 WC 13923

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 William R. Gallagher, Arbitrator of the Commission, in the city of Quincy, on July 1, 2015. By stipulation, the parties agree:

On the date of accident, November 16, 2009, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $55,630.12; the average weekly wage was $1,069.81.

At the time of injury, Petitioner was 50 years of age, married, with 2 dependent child(ren).

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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. The parties stipulated that all TTD and maintenance benefits were paid in full.

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 permanent partial disability benefits of $641.89 per week for 10 weeks because the injury sustained caused the two percent (2%) 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

August 10, 2015
Date

AUG 13 2015

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment for Respondent. In case number 12 WC 38675, the Application alleged a date of accident of November 16, 2009, and that "During the course of employment" Petitioner sustained an injury to his right shoulder (Arbitrator's Exhibit 2A). In case number 13 WC 13923, the Application alleged a date of accident of February 14, 2013, (the parties stipulated at trial that the date of accident was February 13, 2013) and that while throwing a "floor tile during the course of employment", Petitioner sustained an injury to his right shoulder (Arbitrator's Exhibit 2B). At trial, Petitioner's counsel made an oral motion that the cases be consolidated which the Arbitrator granted.

In regard to both cases, the parties stipulated that all medical, temporary total disability benefits and maintenance had been paid in full. Accordingly, the only disputed issue in both cases was the nature and extent of disability.

Petitioner testified that he worked as a construction laborer for approximately 36 years and that he began working for Respondent in 2001. Petitioner described the job duties of a construction laborer which included operating a jackhammer, carrying asphalt, digging ditches, various construction work, etc. The job was very physically demanding.

Petitioner testified that on November 16, 2009, he was in the process of climbing up a rack to remove a pipe when he "pulled" his right shoulder. On November 16, 2009, Petitioner was seen by Dr. Philbert Chen, an occupational medicine specialist, who diagnosed Petitioner with a right shoulder strain (Petitioner's Exhibit 1).

Dr. Chen ordered an MRI scan which was performed on December 8, 2009. The MRI revealed an accumulation of fluid, but was otherwise normal. Dr. Chen imposed work/activity restrictions and ordered physical therapy.

When Petitioner was seen by Dr. Thomas Sutter (a physician associated with Dr. Chen) on February 16, 2010, Petitioner's right shoulder condition was improved. Dr. Sutter noted that the range of motion was full and that there was no instability. He discharged Petitioner from care and authorized him to return to work without restrictions (Petitioner's Exhibit 1).

Petitioner testified that he returned to work to his regular job on February 16, 2010, and that he worked in that capacity for approximately three years until he re-injured his right shoulder on February 13, 2013. During that period of time, Petitioner was able to perform all of his job duties, but he noted some weakness in his right shoulder.

Conclusions of Law

The Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of two percent (2%) loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner sustained a right shoulder strain as a result of the accident of November 16, 2009. Petitioner was able to return to work to his regular job, but still has complaints of weakness in the right shoulder.

William R. Gallagher, Arbitrator

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

Tom Auth,
Petitioner,
vs.

NO: 13 WC 13923

16IWCC0268

University Of Illinois,
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 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 September 25, 2015, is hereby affirmed and adopted.

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

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

DATED: APR 20 2016
o040716
DLG/mw
045

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

AUTH, TOM
Employee/Petitioner

Case# 13WC013923

12WC038675

UNIVERSITY OF ILLINOIS
Employer/Respondent

16IWCC0268

On 8/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.24% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1727 LEE, MARK N LAW OFFICE
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0498 STATE OF ILLINOIS
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CHAMPAIGN, IL 61820

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

AUG 13 2015

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

16IWCC0268

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
NATURE AND EXTENT ONLY

Tom Auth
Employee/Petitioner

v.

University of Illinois
Employer/Respondent

Case # 13 WC 13923

Consolidated cases: 12 WC 38675

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 William R. Gallagher, Arbitrator of the Commission, in the city of Quincy, on July 1, 2015. By stipulation, the parties agree:

On the date of accident, February 13, 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 $61,387.04; the average weekly wage was $1,180.52.

At the time of injury, Petitioner was 53 years of age, married, with 2 dependent child(ren).

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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. The parties stipulated that all TTD and maintenance benefits were paid in full.

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 permanent partial disability benefits of $708.31 per week for 175 weeks because the injury sustained caused the 35% 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

August 10, 2015
Date

AUG 13 2015

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment for Respondent. In case number 12 WC 38675, the Application alleged a date of accident of November 16, 2009, and that "During the course of employment" Petitioner sustained an injury to his right shoulder (Arbitrator's Exhibit 2A). In case number 13 WC 13923, the Application alleged a date of accident of February 14, 2013, (the parties stipulated at trial that the date of accident was February 13, 2013) and that while throwing a "floor tile during the course of employment", Petitioner sustained an injury to his right shoulder (Arbitrator's Exhibit 2B). At trial, Petitioner's counsel made an oral motion that the cases be consolidated which the Arbitrator granted.

In regard to both cases, the parties stipulated that all medical, temporary total disability benefits and maintenance had been paid in full. Accordingly, the only disputed issue in both cases was the nature and extent of disability.

Petitioner testified that he worked as a construction laborer for approximately 36 years and that he began working for Respondent in 2001. Petitioner described the job duties of a construction laborer which included operating a jackhammer, carrying asphalt, digging ditches, various construction work, etc. The job was very physically demanding.

Petitioner testified that on February 13, 2013, he was in the process of throwing a bag of asbestos floor tiles into a receptacle when he felt a "pop" in his right shoulder. Petitioner initially sought medical treatment on February 18, 2013, from Dr. Nicole Patino, an occupational medicine specialist. Dr. Patino diagnosed Petitioner with a right shoulder strain and ordered physical therapy (Petitioner's Exhibit 4).

Petitioner's condition did not improve and Dr. Patino ordered an MRI which was performed on April 17, 2013. The MRI revealed a tear of both the supraspinatus and infraspinatus tendons, joint effusion and mild degenerative arthritis of the AC joint. Dr. Patino referred Petitioner to Dr. Robert Gurtler, an orthopedic surgeon.

Dr. Gurtler evaluated Petitioner on April 25, 2013, and reviewed the MRI scan. At that time, Dr. Gurtler opined that Petitioner had sustained a "massive rotator cuff tear" and that surgery was indicated. Because the tear was so extensive, Dr. Gurtler noted that it might not be repairable. He also stated that an option of a reverse total shoulder replacement might be indicated (Petitioner's Exhibit 4).

Dr. Gurtler performed rotator cuff surgery on June 10, 2013. Because the tear was so extensive, Dr. Gurtler was only able to perform a partial surgical repair. When he saw Petitioner on June 25, 2013, he noted that Petitioner would never be able to perform overhead work again (Petitioner's Exhibit 4).

Dr. Gurtler ordered physical therapy which Petitioner received for several months. When Dr. Gurtler saw Petitioner on January 16, 2014, he opined that Petitioner was at MMI and discharged him from care; however, Dr. Gurtler imposed significant and permanent work/activity restrictions. Dr. Gurtler stated that Petitioner could not lift anything overhead more than five pounds and not repetitively and was not able to perform any repetitive work at all. Dr. Gurtler specifically noted

Petitioner's age and was concerned about the possibility of re-injury (Petitioner's Exhibit 4). Petitioner testified that, at that time, Respondent was unable to offer him work that conformed to Dr. Gurtler's restrictions.

Petitioner was again seen by Dr. Gurtler approximately one year later, on January 20, 2015. Dr. Gurtler noted that Petitioner's right shoulder condition had worsened. On examination, Dr. Gurtler noted that the range of motion was substantially less than what it was previously and that the shoulder was considerably weaker. Dr. Gurtler opined that the surgical repair may have failed or come apart. At that time, Dr. Gurtler imposed permanent work restrictions of no overhead work and no lifting, pushing or pulling over two and one-half (2 ½) pounds. He ordered another MRI scan (Petitioner's Exhibit 5).

The MRI was performed on January 27, 2015. The radiologist noted that there were findings consistent with a failed rotator cuff repair. Dr. Gurtler evaluated Petitioner on February 12, 2015, and reviewed the MRI scan. He noted that there was thinning of the rotator cuff tissue and some superior migration of the humeral head. He opined that Petitioner's shoulder was at risk of completely retearing the cuff. Dr. Gurtler then imposed permanent restrictions of no lifting, pulling or pushing over five pounds, no lifting overhead and no ladder climbing. He also stated that there was still a chance that Petitioner may ultimately need a reverse total shoulder replacement (Petitioner's Exhibit 5).

At trial, Petitioner testified that he has not received any treatment since he last saw Dr. Gurtler on February 12, 2015. Petitioner conducted an extensive job search and applied for a variety of positions (Petitioner's Exhibit 9). Petitioner also received a number of responses from prospective employers (Petitioner's Exhibit 10). Petitioner further stated that Respondent provided him with a vocational counselor. Petitioner complied with all of the directions given to him by the counselor, but the counselor was still unable to find employment for Petitioner.

Shortly after Petitioner had completed his job search, Respondent offered him employment as a Building Maintenance Coordinator. This job is primarily a clerical position and Petitioner has received some training in the use of a computer. A "Position Description" was tendered into evidence at trial and the job includes reviewing and assigning work to craft/trade shops, preparing reports on work/projects, organizing meetings with supervisors, foreman and management/project coordinators (Respondent's Exhibit 1).

Petitioner accepted Respondent's job offer and, at trial, was working in that capacity. Petitioner agreed that his current rate of pay is based on the rate of pay for a construction laborer; however, it does not include overtime. Petitioner's wage statement from February, 2012, to February, 2013, was received into evidence. For that period of time, Petitioner earned $61,387.04 for regular time, but his total earnings including overtime and double overtime amounted to $78,582.20. (Petitioner's Exhibit 11). Petitioner testified that overtime was not available for his current position; however, he admitted on cross-examination that he never made an inquiry of Respondent whether overtime was available are not.

Petitioner stated that he still has significant complaints in regard to his right shoulder. The range of motion of the right shoulder is extremely limited and it is sore all of the time. Petitioner has difficulties just performing simple tasks with his right arm such as opening doors and carrying groceries.

Conclusions of Law

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 35% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner sustained a rotator cuff tear as a result of the accident of February 13, 2013, which required surgery.

Neither Petitioner nor Respondent tendered into evidence an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner's occupation at the time of the accident was a construction laborer. This was an extremely physically demanding job and, because of Petitioner's right shoulder injury, he can no longer work as a construction laborer. Petitioner's current job is a Building Maintenance Coordinator which is primarily a clerical position. The Arbitrator gives this factor significant weight.

Petitioner was 53 years old at the time he sustained the injury. Petitioner has significant permanent restrictions which he will have to live with for the remainder of his working and natural life. The Arbitrator gives this factor significant weight.

Petitioner was not able to return to work as a construction laborer, but returned to work for Respondent as a Building Maintenance Coordinator at the same rate of pay. In the year preceding the accident of February 13, 2013, Petitioner earned $17,195.16 in overtime ($78,582.20 minus $61,387.04). Petitioner testified that he has not received any overtime since he began working as a Building Maintenance Coordinator; however, he acknowledged that he had not inquired about whether overtime was available or not.

The base rate of pay for both Petitioner's past and current positions are the same. Accordingly, whether Petitioner's future earning capacity will be affected by the injury he sustained depends on whether overtime is available to Petitioner or not. Based on the preceding, the Arbitrator can only note that no overtime has been offered to Petitioner, but is unable to determine whether or not overtime will be offered to him in the future. The Arbitrator gives this factor minimal weight.

Dr. Gurtler opined that Petitioner sustained a very serious rotator cuff injury and imposed very stringent permanent restrictions on Petitioner's use of the right shoulder. Petitioner's complaints are consistent with the injuries he sustained and there is no question that this injury has had a significant effect on both his ability to work and participate in activities of daily living. The Arbitrator gives this factor significant weight.

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

16IWCC0269

Clark Powell,
Petitioner,
vs.

NO: 13WC 25709

Toenjes Brick Contracting, Inc.,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section §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 May 13, 2015, is hereby affirmed and adopted.

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

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

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 21 2016
o041316
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

16IWCC0269

POWELL, CLARK
Employee/Petitioner

Case# **13WC025709**

TOENJES BRICK CONTRACTING INC
Employer/Respondent

On 5/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1239 KOLKER LAW OFFICES PC
JASON R CARAWAY
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BELLEVILLE, IL 62223

0734 HEYL ROYSTER VOELKER & ALLEN
TONEY J TOMASO
102 E MAIN ST SUITE 300
URBANA, IL 61801

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

16IWCC0269

CLARK POWELL
Employee/Petitioner

v.

TOENJES BRICK CONTRACTING, INC.
Employer/Respondent

Case # **13 WC 25709**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **March 11, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6/25/2013**, 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 alleged 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 $**44,478.55**; the average weekly wage was $**946.35**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** children under 18.

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

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

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

ORDER

Petitioner failed to prove he sustained an accident on June 25, 2013 that arose out of and in the course of his employment or that his condition of ill-being was causally related to his alleged injury or employment duties with Respondent. Petitioner's claim for compensation is denied and no benefits are awarded.

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

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

Nancy Lindsay
Signature of Arbitrator

May 5, 2015
Date

MAY 13 2015

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner alleges repetitive trauma injuries on June 25, 2013 as a result of his duties as a HOD carrier for Respondent. At the time of arbitration the disputed issues included accident, causal connection, medical bills, temporary total disability benefits, and prospective medical care. Two witnesses testified at the hearing: Petitioner and Respondent's representative at trial, Dan Toenjes.

The Arbitrator finds:

Petitioner began working for Respondent in September of 2004.

Petitioner's medical records with Belleville Family Medical were admitted into evidence as Respondent's Exhibit 2. Contained within those records are visits from January of 2008 through August 29, 2011. Petitioner was seen on five occasions during that time period but none of them involved complaints regarding his hips, legs, arms, elbows, hands/wrists, or shoulders. Of note, on January 15, 2008 Petitioner was seen regarding neck pain and headaches. Petitioner reported he worked operating a forklift and was constantly hyperextending his neck. The doctor felt the headaches were due to cervical strain. (RX 2)

Petitioner was seen at Belleville Family Medical on October 17, 2012 at which time he reported he was "doing well." There was no mention of any arm, shoulder, hip, back or leg complaints. (PX 2)

Petitioner was seen at St. Elizabeth's Hospital complaining of bilateral shoulder pain on November 1, 2012, when he was seen by Nurse Practitioner Ms. Susan Drabing (PX1, RX3, Bates Stamp ##221 - 224). Nurse Drabing noted the Petitioner was involved in a rollover motor vehicle accident two months earlier. Petitioner also reported that after the accident he had been examined and told he had no fracture. (RX 3, Bate Stamp #236) Petitioner went on to report to Nurse Drabing that he had begun to experience and develop severe pain intermittently in his shoulders approximately one month earlier. The Petitioner noted that "starting today" the pain became so severe that he could not lift his arms. The Petitioner went on to note that he carried bricks all day long at a construction site. Nurse Drabing diagnosed a muscle strain and recommended two days off from work along with the use of medication (PX1, RX3, Bates Stamp ##221 - 224).

Thereafter, Petitioner followed up and was seen at St. Elizabeth's Hospital on November 21, 2012, by Dr. James Thomas, complaining of left hip pain. Petitioner noted his left hip pain had awaken him. He further indicated he had experienced "similar episodes in the past." Petitioner did not provide any known history of trauma. Petitioner denied any back pain. He was unsure of the exact cause but felt it was worse with movement. The x-rays showed "minimal degenerative changes at the left hip" and the diagnosis was left hip pain of "etiology uncertain" along with a degenerative lumbar spine. Petitioner was told to follow up with his family physician, Dr. Wallace Abel (PX1, RX3, Bates Stamp ##186 - 190).

As instructed, Petitioner was examined by Dr. Edward Wolff (also part of Belleville Family Medical Associates) on November 23, 2012 (PX2, RX2, Bates Stamp ##97 - 98). Petitioner was complaining of moderate to severe pain in his left lumbar spine and left hip area which was radiating down his left lower extremity. Petitioner was using a walker. Petitioner's job in heavy labor was noted. It was noted Petitioner had been seen in the emergency room and x-rays revealed mild degenerative arthritis of the left hip. Petitioner had a left-sided positive straight leg test. Dr. Wolff recommended objective testing in the form of an MRI at the

lumbar spine, as well as the left hip, and then to follow up with Dr. Abel in order to review the findings, as well as a recommendation to use medication and remain off-work between November 23 and November 30, 2012 "due to injury." (PX2, RX2, Bates Stamp ##97 - 98).

Petitioner was hospitalized in early December of 2012 regarding potential heart issues. (PX 2)

Petitioner followed up with Dr. Abel on December 12, 2012, as it related to his recent hospitalization and left hip. Dr. Abel noted in his report the following: "He [Petitioner] says that he carries 200 pounds up a ladder carrying HOD. He will do this 200 pounds at a time." The report went on to note the Petitioner "believes" he injured his left hip at work, it is very painful, and he is required to use a walker. Dr. Abel went on to report the left hip MRI showed a labral tear and, as a result, a referral was made for an orthopedic consultation (PX2, RX2, Bates Stamp #95). Petitioner was to be referred to Dr. Rushford.

Dr. Rushford did not examine Petitioner as he did not treat hip conditions. A second referral was made to Dr. King; however, his office required scheduling through Respondent's workers' compensation adjuster. A third attempted referral was made to Dr. Clohisy who did not treat patients in workers' compensation cases. In a note from Dr. Abel's office dated December 21, 2012 it was documented that Petitioner was aware of the situation with Dr. King's office but he was having trouble with work comp, "will handle." (PX 2) In his referral letters to the doctors, Dr. Abel noted Petitioner carried up to 200 pounds up a time up and a ladder and "believes" he injured his hip at work. (PX 2)

Petitioner called Dr. Abel's office on June 21, 2013 advising that workers' compensation had approved a visit with Dr. Mall. (RX 2, Bate Stamp #174).

Petitioner presented to Dr. Mall on June 25, 2013 (PX. 4) He presented with the chief complaints of bilateral hip pain, shoulder pain, and hand numbness, worsening recently, especially at the end of the day while driving home. Petitioner told Dr. Mall that he "worked as a HOD carrier in which he lifted bricks and mortar to masons as they are doing the brick work." Petitioner further stated, "He is up and down a HOD ladder all day long." Petitioner was described as short with the mortar mixers being fairly tall and on wheels. Petitioner had to lift 80# bags of mortar up and over his shoulder to get to the mixers. Dr. Mall described this as "significant overhead work."

Upon physical examination, Dr. Mall noted a positive right-sided O'Brien's test with regard to Petitioner's right shoulder as well as significant pain with palpation. Further, Dr. Mall noted bilateral positive flexion compression tests in Petitioner's wrists. In addition Dr. Mall noted positive Tinel's tests and flexion compression tests in both elbows. Dr. Mall also examined Petitioner's left hip which revealed significant pain with flexion, rotation and abduction with positive impingement signs. (PX. 4)

Dr. Mall opined there were multiple diagnoses present including:

1. Right shoulder biceps tendinitis, moderate to severe;
2. Left shoulder biceps tendinitis and rotator cuff tendonitis, mild;
3. Right shoulder rotator cuff tendonitis, moderate;
4. Left hip impingement, possible labral tear;
5. Left hip trochanteric bursitis, moderate to severe;
6. Right hip trochanteric bursitis, mild;
7. Bilateral carpal tunnel syndrome;
8. Bilateral cubital tunnel syndrome.

With regard to causation regarding these diagnoses Dr. Mall opined, "Mr. Powell does do significant manual labor of which most people would not be able to do. He does a lot of repetitive work as well as working with vibrational tools, both of which have been shown to be significantly associated with carpal and cubital tunnel syndromes. While we cannot say what necessarily causes these symptoms to occur, it definitely does aggravate these problems and likely makes the patient a higher risk of developing these problems. Based on the fact that he does not do any aggravating activities at home, I do believe that his carpal and cubital tunnel syndromes should at least be evident on EMG and nerve conduction study and are causally related to his work." (PX. 4)

In discussing causation for Petitioner's bilateral shoulders, Dr. Mall opined repetitive type overhead lifting activities easily can cause biceps tendonitis, AC joint irritation, rotator cuff tendonitis and possibly rotator cuff tears. (Id.)

In discussing causation for Petitioner's hip complaints, Dr. Mall opined that repetitive hip flexion maneuvers could cause irritation and labral tears. Dr. Mall ordered an MRI Arthrogram of Petitioner's left hip and performed a left hip injection. Petitioner was noted to have CAM impingement anatomy on his bilateral hips. While not work-related it was noted as an anatomical factor. In addition an EMG/NCS was ordered. (Id.) Dr. Mall placed Petitioner on significant work restrictions which included avoiding constant use of either upper extremity, no overhead reaching or work, no squatting, kneeling, use of ladders, stairs or climbing, no lifting over 30 lbs. to waist level and no lifting over 20 lbs. from floor to waist. (Id.)

Petitioner also signed his Application for Adjustment of Claim in this matter on June 25, 2013, alleging bilateral arm and leg injuries due to repetitive trauma. (AX 2)

Petitioner returned to Dr. Mall on July 9, 2013 after the imaging and tests were performed. (PX. 4, p. 7) The MRI arthrogram of the left hip revealed a left hip labral tear. Imaging of the right shoulder revealed a right sided subscapularis tear and biceps tear. Imaging of the left shoulder revealed a rotator cuff tear and biceps tendonitis. The EMG/NCS contained a note of an eight month history of bilateral hand complaints. The test revealed right-sided carpal and cubital tunnel and left-sided cubital tunnel syndrome. (PX. 4) At this visit Dr. Mall injected Petitioner's left hip and right shoulder. Dr. Mall further ordered physical therapy and anti-inflammatories and prescribed a resting night splint for Petitioner's right elbow and wrist. (PX 8) Petitioner's restrictions were continued.

Petitioner underwent physical therapy at the Pain Institute from July 29, 2013 through September 30, 2013. (PX. 9) In his initial evaluation report it indicates Petitioner's right shoulder problem began about two years earlier and was of gradual onset. Petitioner noted that he couldn't lift his head overhead and had to keep it close to his side to be comfortable. He also had pain in the area of the olecranon process. After Petitioner's pain had progressed for about a year he sought medical care with Dr. Able. His pain then worsened to the point of having difficulty shifting his vehicle so he was seen by Dr. Mall. He denied any traumatic cervical incidents. With regard to his left hip, Petitioner also attributed his problem to a gradual onset with no singular trauma being recalled. He denied any loss of strength in his legs noting he could walk his dog two to three blocks every day but sitting for a couple of minutes was difficult and he would need to stand/change positions. Getting in and out of his truck or camper also increases his pain. Petitioner denied using any assistive device although he had thought about it. When asked about his employment, Petitioner indicated he was a HOD carrier and carried brick and mortar and block for masons and had been so engaged for 26 years. His loads could weigh between 65 and 130 lbs. He would carry them up/down ladders, stairs, scaffolds, on uneven surfaces, and upon uneven terrain. His work day varied from 9 to 10 hours per day. His "last consistent days on the job" were back in

November of 2012 and he had tried to go back to work a couple of months earlier but could not lift anything overhead. Petitioner's hobbies included fishing, camping, playing Frisbee, and car shows. Petitioner reported difficulty with shoulder pain when casting while fishing and throwing the Frisbee. Upon discharge not all of his therapeutic goals had been met. (PX 9)

Petitioner last saw Dr. Mall on August 9, 2013. (PX. 4) Petitioner's pain in his left hip and right shoulder had somewhat improved. Petitioner noted increased difficulty holding onto objects and continued to experience numbness and tingling into his hands. Dr. Mall again causally connected his diagnoses to Petitioner's work and recommended a right-sided ulnar nerve transposition, a right-sided carpal tunnel release, a right rotator cuff repair with debridement, a right- sided biceps tenodesis and a left hip injection. (PX. 4) Petitioner's current restrictions were to avoid constant repetitive use of the right upper extremity, primarily one handed work, no reaching overhead or overhead work, no use of vibratory hand tools, no squatting, kneeling, climbing ladders or stairs, no lifting over 10 lbs. from floor to waist and no above chest lifting over 5 lbs. (Id.)

Petitioner underwent a cardiac catheterization on September 27, 2013. (RX 2)

At Respondent's request, Petitioner attended an independent medical examination with Dr. Richard Lehman on February 11, 2014. Dr. Lehman was given a history of how long Petitioner worked with Respondent, the seasonal nature of Petitioner's job, the job duties required of a HOD carrier as identified in RX5, Petitioner's allegations of a repetitive trauma claim arising out of an alleged injury date of June 25, 2013, and the medical records between November 2012 and September 2013, including objective films in the form of lumbar spine MRI (November 30, 2012), and MRI films of the bilateral hips (November 30, 2012). Dr. Lehman also had access to the EMG/NCV testing performed by Dr. Daniel Phillips on July 9, 2013 (PX7). At the time of the IME with Dr. Lehman, Petitioner's main complaints involved his left hip, right shoulder, right elbow and right hand. Dr. Lehman offered opinions wherein he noted there was no clear history of an accident or injury relating the Petitioner's complaints to an acute trauma at work. The only thing noted in the medical records was a rollover motor vehicle accident from September 2012. Dr. Lehman was of the opinion, based upon his examination of the Petitioner and review of the objective films, that Petitioner's shoulder condition, as well as neuropathic pain and complaints at the right upper extremity (carpal tunnel and cubital tunnel) were of a longstanding nature and pre-dated the June 25, 2013 alleged accident date (RX1B, Bates Stamp ##76 - 83). Dr. Lehman refuted a causal relationship between Petitioner's job and rotator cuff pathology, ulnar nerve entrapment, median nerve entrapment, and the degenerative process noted at the left hip. Dr. Lehman noted there was significant pre-existing, degenerative findings on objective exams and given the fact Petitioner had a pre-accident rollover motor vehicle accident, with no clear history of a work injury (repetitive trauma or otherwise) that led Dr. Lehman to the ultimate opinion refuting causation in this matter. Further, Dr. Lehman carefully noted most, if not all, of Petitioner's complaints were bilateral in nature which coincided with his opinion that Petitioner's degenerative process was equal on both sides, and, therefore, clearly pre-existing and degenerative in nature (RX1B, Bates Stamp ##76 – 83).

Petitioner amended his Application for Adjustment of Claim on March 24, 2014 to also allege repetitive trauma injuries to his hands. (AX 2)

Dr. Lehman was deposed on October 29, 2014. (PX. 12) Dr. Lehman is a board certified orthopedic surgeon. He is also board certified in sports medicine. (PX. 10 at 7) At the time of his evaluation of Petitioner, Dr. Lehman was aware of the September 2012 motor vehicle accident. (PX. 7 at 14) Petitioner told Dr. Lehman that his pain complaints came on over time while working for Respondent. (PX. 7 at 16) Dr. Lehman noted that Petitioner suffered from long term chronic changes in his left hip, including his labrum. (PX. 7 at 17)

Dr. Lehman performed a physical examination of Petitioner. (PX. 7 at 18) His physical exam revealed complaints of pain with full forward flexion of his right shoulder. (PX. 7 at 19) Petitioner also exhibited right shoulder pain with overhead movement. (Id.) Dr. Lehman also noted left hip pain with flexion and internal rotation. (Id.) Dr. Lehman further examined Petitioner's wrists finding bilateral positive Phalen's tests. (PX. 7 at 22) In addition, Dr. Lehman found a positive Tinel's finding in Petitioner's right elbow. (Id.) Ultimately, Dr. Lehman opined Petitioner's subjective complaints were supported by the objective evidence in his possession. (PX. 7 at 28)

Dr. Lehman opined that Petitioner suffers from bilateral carpal tunnel syndrome and "some element of ulnar nerve neuropathy". (PX. 7 at 28) He later acquiesced that Petitioner had bilateral cubital tunnel syndrome. Dr. Lehman diagnosed Petitioner's left hip condition to be degenerative arthritis and cam impingement syndrome. (PX. 7 at 30) Dr. Lehman did not believe any of these diagnoses had a causal connection to Petitioner's work for Respondent. (Id.)

Dr. Lehman also opined there was no causal connection between Petitioner's work and his current shoulder conditions. (PX. 7 at 32) Dr. Lehman believed any shoulder problems Petitioner had were related to his September 2012 motor vehicle accident. (PX. 7 at 33)

With regard to pending treatment, Dr. Lehman believed only conservative treatment was required going forward with regard to Petitioner's right shoulder. (PX. 7 at 35) Dr. Lehman also believed only conservative treatment was warranted for Petitioner's left hip condition. (PX. 7 at 36)

On cross-examination, Dr. Lehman opined that lifting heavy bags of mortar could cause or aggravate a supraspinatus tear in a shoulder. (PX.7 at 41) Dr. Lehman opined with regard to Petitioner not undergoing potential right shoulder surgery, "I think these people do as well, if not better, because they don't get the weakness from the surgery with therapy, et. cetera..." (PX. 7 at 44) Before authoring his report and his deposition, Dr. Lehman was in possession of Respondent's job description of a HOD carrier. (PX. 7 at 51)

Dr. Lehman was asked if Petitioner had worked as a Wal-Mart greeter or a HOD carrier, whether Petitioner would be in the same physical condition. (PX. 7 at 54) Dr. Lehman ultimately answered, opining Petitioner's work as a HOD carrier was not a factor in, or related in any way to, Petitioner's current state of ill-being. (PX. 7 at 56)

The Arbitration Hearing

Petitioner testified that he began his employment with Respondent in September of 2004 (see also PX5). Petitioner was hired as a HOD carrier by Dan Toenjes. His job was a seasonal position wherein HOD carriers would serve as helpers for brick masons, providing them with what they needed to do their jobs. It was understood that once the weather became too cold to actually conduct brick and mortar work, then both the brick masons and HOD carriers were laid off for the season. Thereafter, both would begin to collect unemployment benefits. Generally speaking, the season would end around November of any given year, and then start back up in the spring/summer of the following year.

Petitioner testified that he worked as a HOD carrier before beginning his employment with Respondent in September 2004. Petitioner admitted he was working as a HOD carrier for approximately 23 – 26 years before coming to work for Respondent. Further, he had also previously operated his own roofing company and worked as a roofer. Petitioner admitted this was a heavy-duty job and he actually did the roofing activities

himself. Petitioner also admitted the activities of a HOD carrier in the 1980s and 1990s would be considered heavy-duty in nature.

Petitioner recalled working in November 2012 finishing up his job duties for the season at the Oakville High School project with Respondent. This ended on or about November 24, 2012. Petitioner explained he was having a difficult time performing his job and he sought medical attention because he was no longer able to conduct his essential job duties. Petitioner testified he couldn't walk, reach out and grab any tools, pick up anything, or squat. Petitioner briefly attempted to return to work for Respondent in the spring of 2013, but could not clearly recall if it was working on a job for a car dealership in O'Fallon, Illinois. While not completely certain what job he returned to, Petitioner explained that he was unable to adequately perform his job due to his physical condition. Between November 2012 and the spring job, Petitioner did not "think" he worked in any capacity.

Petitioner testified he worked four to five days a week, eight hours per day for Respondent. Petitioner also indicated there were periods of time due to inclement weather when jobs were not available and that he would apply for unemployment.

Petitioner testified a HOD carrier is a mason tender. It was his job to make sure the masons didn't have to wait for any materials and to make sure the job was run effectively. In performing these job duties Petitioner was required to lift mortar bags over his head. The weight of these mortar bags varied between thirty, forty, and ninety pounds. Petitioner lifted these bags over his head in order to put the bags into a mortar mixer. Petitioner testified he was five feet tall and the mixers were six to seven feet off the ground.

Petitioner testified in detail regarding his job duties. He was given a copy of Respondent's Exhibit 5 at hearing, which purported to be a job description of his work. (RX. 5) Petitioner agreed with the "general job description" on the document, with one addition. Petitioner agreed his job included making mortar, building scaffolding and performing clean up, but added he was also responsible for stocking scaffolding with materials.

Petitioner also agreed with the document's listing of the tools he used with one addition. The Respondent provided job description (ie. RX 5) listed forklifts, wheel barrows, brick carts and shovels. Petitioner added he also used brick tongs while employed by Respondent. Petitioner testified that brick tongs were used to carry multiple bricks at one time to other laborers on a project. The tongs could hold up to eleven bricks at a time. Petitioner testified he was right hand dominant and used his right hand and arm to when lifting and delivering bricks with the brick tongs.

Respondent's Exhibit 5 listed seven categories of types of physical activities Petitioner was required to perform for Respondent. (RX. 5) The first category was "twisting". Petitioner agreed with the job description in that his job required twisting but testified he disagreed with the job description's listing of twisting as "minimal". Petitioner testified that approximately eighty percent of his material handling job duties involved twisting in an effort to supply the materials to the masons.

The second category was squatting. Petitioner disagreed with the job description's allegation that his job as a HOD carrier did not involve squatting. Petitioner testified his job required him to squat in order to pick up material off scaffolding, move materials and to stock materials.

The third category was kneeling. The job description alleged Petitioner did not have to kneel in order to perform his job as a HOD carrier. Petitioner disagreed, testifying that when he worked with electric scaffolding

he was forced to kneel in order to get the material on the scaffold without injuring masons. He further indicated he had to kneel when placing material on the scaffold to keep his balance.

The fourth category on the job description was crawling. Petitioner agreed with the job description that his job as a HOD carrier did not involve crawling. The fifth category was climbing ladders. The job description indicated Petitioner only climbed ladders minimally in his job. Petitioner agreed with this assessment. The sixth category was climbing stairs. Petitioner agreed with the job description that climbing stairs was a minimal requirement of his job.

The last category listed was walking on uneven ground. The job description alleged this activity was minimally required. Petitioner testified whether he had to walk on uneven ground varied from job to job, but that on jobs where trucks had traversed the job site, he did in fact walk on uneven ground.

The last section of the job description alleged to detail the amount of hours per day Petitioner was required to perform certain activities. (RX. 5) Petitioner agreed with all ten categories except the first. Thus, Petitioner agreed with Respondent that his job as a HOD carrier required him to:

1. lift 10-25 lbs., three to four hours per day;
2. lift 25-50 lbs., one to two hours per day;
3. lift over 50 lbs., one to two hours per day;
4. carry under 10lbs., three to four hours per day;
5. carry 10-25 lbs., one to two hours per day;
6. carry 25-50 lbs., one to two hours per day;
7. carry over 50 lbs., one to two hours per day;
8. reach above shoulder height., one to two hour per day;
9. reach below shoulder height., one to two hours per day.

The only disagreement Petitioner had with this section of the job description was that he lifted under 10 lbs. more than three to four hours per day.

Petitioner confirmed he was involved in a motor vehicle accident in September of 2012, wherein his vehicle rolled over when a couple of deer jumped out, causing the Petitioner to veer into a ditch. Petitioner explained he went to the emergency room following the accident, was checked out, but believed he was not hurt. Petitioner recalled missing some time at work, and his car being totalled as a result of the accident Petitioner also noted he was traveling somewhere between 50 and 60 m.p.h. at the time of the accident.

Petitioner was asked what caused him to see active treatment in November of 2012 and he replied that he couldn't take the pain anymore. Petitioner testified to a high degree of pain tolerance and he recalled his doctor previously telling him that he was getting older, worked in a strenuous job, and was going to feel aches and pains so he "dismissed it" for three to four years but it got worse and worse.

Petitioner openly admitted on cross-examination that he did not carry 200 pounds up a ladder and he was not required to do so as a HOD carrier. Petitioner admitted that this was an inaccurate history and he was not sure how Dr. Abel accumulated this information because according to Petitioner he never provided such a history.

Petitioner returned to Dr. Abel's attention on February 11, 2013, noting that he was having "migrating joint pains" and had been having same since October 2012 involving bilateral shoulders, right hand, right elbow, bilateral hips, and bilateral knees (PX2, RX2, Bates Stamp #94).

Petitioner testified that he continues to complain of pain and difficulties wherein he has not been able to return to work since June of 2013. Petitioner has alleged he is owed temporary total disability benefits between June 25, 2013, up and through March 11, 2015, representing 89 and 1/7 weeks of benefits. Petitioner and Respondent agree there is no such thing as light-duty for a HOD carrier.

Petitioner's current complaints involve pain and popping of his left hip, a painful right shoulder, terrible right elbow pain, a painful left elbow, terrible pain at the right wrist with the inability to lift anything with it, and lastly a painful left hand. Dr. Nathan Mall has recommended surgery on the right shoulder as well as release of the right-sided carpal tunnel, a release of the right-sided cubital tunnel, and injections at the left hip based upon a labral tear. Petitioner testified he desires to move forward with the surgery which has been recommended by Dr. Mall.

Dan Toenjes was called as a witness at hearing by Respondent. Mr. Toenjes is the owner of Tonenjes Brick Contracting. Mr. Toenjes testified that HOD carriers, just as his other employees, worked when weather permitted. Mr. Tonjes indicated HOD carries, just his other employees worked on average 1,600 hours per year, with 2,080 hours constituting a full year of work. With regard to Petitioner lifting heavy bags of mortar overhead, Mr. Toenjes agreed that on occasion Petitioner would be required to lift the bags as he described.

Mr. Toenjes recalled hiring Petitioner in 2004. He testified that Petitioner told him working as a roofer was more physical demanding than the job of a HOD carrier. Petitioner did not share any specific pain complaints with Mr. Toenjes when he was hired in 2004. Mr. Toenjes testified that the use of mechanical devices has lessened the physical demand put on HOD carriers over time.

Mr. Toenjes agreed that he could not hire someone as a HOD carrier that could not perform the duties listed in the job description. Mr. Toenjes agreed HOD carriers on occasion were required to squat. Mr. Toenjes agreed Petitioner would utilize brick tongs on occasion. Mr. Toenjes agreed that Petitioner stocked scaffolding.

Mr. Toenjes was also asked about Petitioner's motor vehicle accident with the deer. He recalled Petitioner's car rolling over. He could not recall how much time Petitioner lost from work or if he ever said he was fine.

Both Petitioner and his boss, Mr. Dan Toenjes, testified there was a difference in the duties and activities performed by a HOD carrier when comparing the 1980s/1990s and those same HOD carrier activities in the 2000s. Specifically, in the early 2000s, the HOD carriers began using machines to assist them in their lifting obligations such as electronic scaffolding, forklifts, and mortar silos. These devices alleviated the burden of the HOD carriers doing the manual lifting, but rather turned over the lifting duties to these machines which were used on a majority, and close to all, of the jobs Toenjes Brick worked on in the 2000s.

The Arbitrator concludes:

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

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

Petitioner has alleged a repetitive trauma claim with a date of loss of June 25, 2013. In a repetitive trauma case, the issues of accident and causal connection are closely intertwined. The burden is on Petitioner to prove all of the elements of his case. In this case, Petitioner has failed to meet his burden of proof on the issues of accident and causal connection. The Arbitrator bases her conclusions on the following.

It is Petitioner's recollection of events that the last full season he worked, and the last job he worked on, ended around November 24, 2012. Petitioner testified with specificity as to why he could no longer perform his job at that time. He also referred to a prior discussion(s) with his doctor three to four years earlier (there is no corroboration for this conversation in the record). Petitioner returned for a very brief stint with Respondent in the spring of 2013. While there was some disagreement at trial as to where and when, the parties were in agreement Petitioner did not work very much during 2013 (at the beginning of the new season). Furthermore, the physical therapy records (PX 9) from July 29th 2013 allude to an unsuccessful attempt to return to work a couple of months earlier which would coincide with spring time. Petitioner's initial treatment (two emergency room visits) took place in November 2012, and soon thereafter he had several visits with his family doctor. Dr. Abel. Petitioner re-initiated treatment beginning in June 2013 with Dr. Nathan Mall after undergoing conservative treatment approximately six months prior with his family physician, Dr. Wallace Abel. What is striking to this Arbitrator are two things. First, none of Petitioner's medical records in November and December of 2012 mention the detailed work difficulties Petitioner described at his hearing (the inability to walk, reach, pick anything up, and/or squat). Second, is the fact that Petitioner was essentially off for the season and not working as a HOD carrier between November 24, 2012 and June 25, 2013. There was nothing significant Petitioner was doing as far as work duties were concerned which should have caused him problems or difficulties prior to seeing Dr. Mall. Furthermore, Petitioner never gave a history of symptoms that would correlate with his work time line. For instance, he never told a doctor, especially Dr. Mall, that he was having trouble with work duties but that they got better during "off season" only to return again when he returned to work. Instead there are inconsistent comments regarding when the symptoms began and no real explanation whatsoever for why he began treatment again in June of 2013. While Petitioner claimed at trial that his problems were due to work, the Arbitrator notes another inconsistent history in that he told the physical therapist in July of 2013 that he sought treatment with Dr. Mall because he was having trouble shifting his vehicle. (PX 9)

In sum, Petitioner provided inconsistent histories as to the cause and onset of his various upper extremity complaints. Secondly, there is a gap in treatment during which Petitioner didn't really work as a HOD carrier followed by the resumption of medical treatment but, again, for unclear reasons. In the end, Petitioner was not a credible witness as there were too many inconsistent and unanswered issues raised by his testimony.

Furthermore, Petitioner's treatment in November of 2012 and December of 2012 following his motor vehicle accident is of some concern. The Arbitrator notes that Petitioner was traveling at a high rate of speed (50 – 60 m.p.h.) when he avoided a collision with a deer and had a rollover incident into a ditch, which totalled the vehicle being driven by Petitioner. The Arbitrator is troubled by the failure of Petitioner to introduce the medical records from the hospital he was examined at following his accident. They could have corroborated his testimony regarding the relative benign nature of the accident. Their absence, combined with the history given to the hospital when Petitioner presented in November of 2012, is very troubling.

Another troubling aspect of Petitioner's claim pertains to his alleged bilateral carpal and cubital tunnel syndromes. There is no indication of any gradual progression or onset of complaints which Petitioner attributed to his work duties found in the records prior to his EMG/NCS with Dr. Phillips. At that time

Petitioner gave a history of an eight month history of bilateral hand complaints. That would coincide with January of 2013. There was no reference to work. Petitioner wasn't working for Respondent at that time. The Belleville Family Medical records contain no mention of any such complaints. Indeed, as of October 17, 2012 Petitioner was telling his doctor he was doing "quite well."

Additionally, while Petitioner told Dr. Abel he "believed" he injured his left hip at work, it was only a belief and Petitioner did not provide any testimony with sufficient specificity to explain why he believed he injured his hip at work. Petitioner's testimony that the history regarding his HOD activities given to Dr. Abel was incorrect makes the additional history at that visit equally suspicious.

Third, there is the problem with causal connection.

In a repetitive trauma case, the parties generally rely upon the opinions of medical doctors to establish the requisite causal connection. In this instance Petitioner relies upon the opinions of Dr. Mall as contained in his office notes and Respondent relies upon the opinions of Dr. Lehman, its examining physician. The Arbitrator is not persuaded by the opinion of Dr. Mall in this instance as it was not based upon a full, accurate, and clear understanding of Petitioner's job duties, his medical history (including the motor vehicle accident in 2012), and/or an understanding of Petitioner's work history both generally and specifically. Petitioner acknowledged that Dr. Mall did not have an accurate understanding of his job.

Dr. Richard Lehman provided testimony (RX1, Bates Stamp ## 17 - 18) as it pertains to Petitioner's alleged injury of June 25, 2013. The testimony is as follows:

> "Q. And did Petitioner ever describe to you how his accident occurred? Did he tell you what specific act caused the injury he was complaining about on 6/25/2013?
>
> A. Well, I don't think Mr. Powell - - I mean, Mr. Powell didn't have an injury, and I don't think Mr. Powell ever alleged that he had an injury. I think he basically said, 'Over a period of time from work, I've had these complaints,' so more of a repetitive trauma complaint and complaints referable to working over a period of time as opposed to an incident or an injury or a certain activity. So by his history, his main complaints appear to have occurred over a prolonged period of time."

Dr. Lehman was fully aware of Petitioner's allegation of repetitive trauma and took that allegation into consideration when offering his final opinions regarding accident and medical causal connection as it relates to this alleged injury involving multiple body parts.

Dr. Lehman explained during his testimony, Petitioner had objective signs of impingement syndrome at the left hip, along with a labral tear. Dr. Lehman also noted objective evidence of long-term or congenital changes, both at the femur and the acetabulum which predisposes Petitioner to development of labral tears and degenerative changes in the hip. Dr. Lehman further explained the congenital makeup of Petitioner's hips, and in particular his left hip, predisposed Mr. Powell to early degenerative problems with that hip, which is exactly what Dr. Lehman noted when examining the patient and reviewing objective films (RX1, Bates Stamp ##24 – 25).

Along these same lines, Dr. Lehman also opined Petitioner was predisposed to suffering nerve compression diseases as a result of his smoking history (RX1, Bates Stamp #26). Dr. Lehman also pointed out Petitioner has a family history of diabetes, which is another aggravating factor which can

predispose an individual to nerve compression disease (such as carpal tunnel and cubital tunnel syndrome), as well as neuropathy at the shoulders (RX1, Bates Stamp ##26 – 28).

As evidence of Dr. Lehman's conclusions regarding Petitioner's predisposition to nerve compression diseases is the fact the objective findings, specifically the July 2013 EMG test, shows Petitioner suffers from peripheral demyelinative disease. This disease is identified at every nerve location as it relates to the bilateral hands/wrists and bilateral elbows. Dr. Lehman explains this is evidence of an underlying factor causing the nerve entrapment versus acute injury or repetitive trauma injury (RX1, Bates Stamp ##27 – 30).

Dr. Lehman refuted medical causal connection between Petitioner's complaints and his alleged repetitive trauma injury (RX 1, Bates Stamp ##30 – 31). Dr. Lehman is of the opinion the Petitioner's complaints predated June 25, 2013. The pre-existing conditions were already present prior to 2004 and would not have been exacerbated by his job working with Respondent (RX1, Bates Stamp ##30 – 32).

Dr. Lehman was of the opinion Petitioner's complaints regarding his shoulder came about during a time sequence which would reasonably lead to the opinion and medical conclusion the complaints are related to the September 2012 motor vehicle accident, and not as a result of any workplace duties (RX1, Bates Stamp ##33 – 34).

Dr. Nathan Mall provided a contradictory opinion on the issue of causation in comparison to Dr. Richard Lehman's opinions noted above. Dr. Mall relied upon the treatment records from Dr. Wallace Abel, as well as the information provided by Petitioner. Petitioner openly admitted during testimony the histories noted in both Dr. Abel's and Dr. Mall's records were inaccurate. Therefore, the ultimate opinion rendered by Dr. Mall, wherein he found there was a causal relationship between Petitioner's workplace duties as a HOD carrier with Respondent and his myriad of complaints regarding his upper extremities and left hip, cannot be given weight. Finding Dr. Mall's opinion unpersuasive, Petitioner has failed to meet his burden of proof.

The Arbitrator finds Petitioner failed to meet his burden of proof and establish his alleged repetitive trauma claim, with a June 25, 2013 accident date, arose out of and in the course and scope of his workplace duties and activities with Respondent. Therefore, Petitioner's claim for compensation is denied.

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

These issues are rendered moot, given the Arbitrator's determination on accident and causal connection.

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

****

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jennifer Lolling,

Petitioner,

vs. NO: 12 WC 2853

16IWCC0270

State of Illinois Fox Developmental Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, 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 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.

16IWCC0270

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2014, is hereby affirmed and adopted.

DATED: APR 21 2016
TJT:yl
o 4/11/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LOLLING, JENNIFER
Employee/Petitioner

Case# **12WC002853**

SOI/FOX DEVELOPMENTAL CENTER
Employer/Respondent

16IWCC0270

On 11/13/2014, 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:

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

NOV 19 2014

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

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

Jennifer Lolling,
Employee/Petitioner

v.

State of Illinois/Fox Developmental Center,
Employer/Respondent

Case # **12** WC **02853**

16IWCC0270

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 **10/2/14**. 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

16IWCC0270

FINDINGS

On **6/21/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was 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 **$42,455.50**; the average weekly wage was **$816.45**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner failed to meet her burden of proof on the issues of accident, notice and causation. Accordingly, Petitioner's claim for benefits 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

11/11/14
Date

NOV 13 2014

FINDINGS OF FACT

This case involves a Petitioner claiming a repetitive trauma bilateral carpal tunnel syndrome injury to her right and left hands from her employment with the Respondent, the Fox Developmental Center, with an alleged accident date of June 21, 2010. [Arb. Ex. 3.] The issues in dispute are: 1) accident, 2) notice, 3) causation, 4) medical expenses, and 5) the nature and extent of the Petitioner's injury. [Id.]

The Petitioner's Testimony

The Petitioner testified that she has had two stints working as an Illinois Department of Human Services employee. She testified she worked for Lincoln Developmental Center from 1974 to 1981 as a Support Service Worker I. After working for several different employers from 1981 to 1999, the Petitioner returned to work at Lincoln Developmental Center as a Mental Health Technician II. She was a Mental Health Technician II at Lincoln Developmental Center from 1999 to 2000. In 2000, she elected to move to a different facility and worked as a Mental Health Technician II at Fox Developmental Center in Dwight, Illinois because the Lincoln Developmental Center was closing. The Petitioner has resided in Lincoln, Illinois for the past 43 years and would travel 90 miles one way to get to and from her job in Dwight.

As a Mental Health Technician II at Fox Developmental Center, the Petitioner testified that she would work with female individuals that were in wheelchairs in assisted living. A detailed description of the Petitioner's job duties and responsibilities is provided in Respondent's Exhibit 14, which the Petitioner testified is accurate. These individuals would need assistance to be taken to and from their beds and to and from their wheelchairs. The Petitioner would assist with rolling and moving individuals for changing their briefs and clothes, preparing them for transport, as well as bathing. The Petitioner testified that she was typically assigned to a group of eight individuals per day. The Petitioner testified that a lead worker would assist her at times with the individuals assigned to the Petitioner. The Petitioner testified that she worked the evening shift which started from 1:45 p.m. to 10 p.m.

The Petitioner would have to push wheelchairs, feed individuals, provide active treatment and assist individuals with activities, as well as bathe four individuals per night. The Petitioner testified that she would lift individuals either with the assistance of another Mental Health Technician or with the assistance of a Hoyer lift. The Hoyer lift is an assistive device used to lift individuals with a sling. The Petitioner would use her hands to put an individual in a Hoyer lift. The Hoyer lift had wheels and could be moved around as needed. It was shared with other Mental Health Technicians in the Petitioner's unit. It was Fox Developmental Center's policy that any lifting of individuals required either two people or the use of a mechanical lift. The Petitioner testified that individuals weighed between 100-140 pounds and that some individuals had stiff extremities and moved uncontrollably because they had cerebral palsy, making it difficult to put their clothes on. The Petitioner testified that she would use her hands and arms to roll individuals for changing their briefs as well as to lay individuals down in their beds for respites. The Petitioner approximated that she would have to change individuals' briefs between 5-6 times per day.

The Petitioner testified when she would start her shift that her individuals would typically nap until 4:30 p.m. She would assist with getting individuals changed and escort 6 individuals to the dining room for feeding and activities. After evening activities, the Petitioner would assist with bathing and clothing individuals in pajamas to get them ready for sleep at night. After putting individuals to bed, the Petitioner testified that she would do charting, which consisted of writing up a report of the events that occurred during the Petitioner's shift. Charting consisted of handwriting and did not exceed 45 minutes. The Petitioner did not do any typing as part of her job. The Petitioner testified that she sometimes worked overtime and double shifts but on cross-examination, she acknowledged that she volunteered to work overtime and was never required to do so. The Petitioner testified that her duties and responsibilities as a Mental Health Technician II required the continuous and forceful use of the hands.

The Petitioner has previously filed workers' compensation claims against Fox Developmental Center. She settled two claims involving injuries to her lower back (08 WC 20368 and 08 WC 20369) on January 27, 2009. [RX 6.] Having previously filed and settled workers' compensation claims against Fox Developmental Center, the Petitioner acknowledged that she knew how to fill out the necessary paperwork with Fox Developmental Center to provide written notice of her workers' compensation claims. The Petitioner also acknowledged that she understood that she needed to provide notice of her work-related accident within 45 days of her accident date. The Petitioner acknowledged that she understood that merely giving Fox Developmental Center notice of injury to her hands was not the same as notifying Fox Developmental Center that her hand injury was work related. The Petitioner testified that her notice of injury form filled out by her on February 27, 2012 was the first time she provided notice of her work-related injury.

The Petitioner testified that on or about June 21, 2010, the alleged accident date, she started to feel pain at night in both of her hands while she was trying to sleep.

The Petitioner's Medical Records

On June 21, 2010, the Petitioner presented to Dr. Koteswara Narla for an EMG of her hands. Dr. Narla's notes indicated that as of that date, the Petitioner had been experiencing tingling and numbness for about 4-6 months and in the last 2 months was having difficulty sleeping. [RX 4:25]. The Petitioner was waking up and having to shake her hands to regain feeling. The Petitioner acknowledged that Dr. Narla's note indicating she had been having symptoms for 4-6 months was accurate. Dr. Narla's note further indicated that the Petitioner "feels when she lifts the patients up she has some pain in the wrist..." [Id.] Dr. Narla's impression of the EMG results indicated a mild carpal tunnel compression of the median nerve at the right wrist involving sensory more than motor component; and minor carpal tunnel compression of the median nerve on the left side. [RX 4:26] The Petitioner appears to have already been using splints as Dr. Narla recommended she continue doing so. [Id.] Dr. Narla also indicated that if symptoms in the Petitioner's right wrist worsened, that she may need a consultation for surgical decompression. [Id.]

On December 21, 2010, Dr. Dennis Carroll, the Petitioner's primary care provider, evaluated the Petitioner for her hands as well as other medical conditions. [RX 1:283-84.] On that date, Dr. Carroll assessed the Petitioner with right carpal tunnel syndrome. [Id.] Dr. Carroll indicated that the Petitioner may have reached a point where she cannot continue conservative treatment. [Id.] Dr. Carroll prescribed the Petitioner a wrist splint to wear at night and advised the Petitioner to follow up with Dr. Tomasz Borowiecki, an orthopedic surgeon, for further evaluation if her symptoms persisted. [Id.]

On May 12, 2011, the Petitioner received a right carpal tunnel injection from Dr. Carroll. [RX 1:311-13.]

On May 17, 2011, the Petitioner presented to Dr. Borowiecki for pain in her left knee and with numbness and tingling of the entire right hand. [RX 1:319-21.] With regard to the right hand, Dr. Borowiecki recommended repeat EMG nerve conduction study because the Petitioner was starting to experience symptoms in the ulnar nerve. [Id.]

On January 13, 2012, the Petitioner presented to Dr. Borowiecki regarding her right carpal tunnel syndrome while again also being evaluated for her left knee injury (which was not work related). [RX 1:385-87.] The Petitioner presented with worsening symptoms in the right hand including numbness. [Id.] Dr. Borowiecki did not make any surgical recommendations as to her right upper extremity on this date as he was more focused on scheduling a left knee arthroplasty on the Petitioner. [Id.]
On January 26, 2012, the Petitioner filed her application for adjustment of claim relating to her bilateral carpal tunnel syndrome. [Arb. Ex. 4.]

On February 13, 2012, Dr. Narla performed a repeat EMG of the Petitioner's upper extremities. [RX 4:31-2.] Dr. Narla noted that the Petitioner was having tingling and numbness in the right wrist as well as some numbness in the left wrist. [Id.] Dr. Narla noted that the Petitioner has been dropping objects and the Petitioner has had these symptoms for years. [Id.] Dr. Narla's impression was that the Petitioner's upper extremities had more or less stayed the same since the Petitioner's most recent EMG on June 21, 2010. [Id.] Dr. Narla indicated there was no progression of the carpal tunnel compression and no evidence of ulnar entrapment neuropathy or large fiber peripheral neuropathy. [Id.] Dr. Narla opined that there was little choice but to have the Petitioner evaluated for decompression surgery of the right hand but was more guarded with regard to whether surgery would be needed for the milder left hand. [Id.] Dr. Narla noted that the Petitioner was complaining of a significant amount of pain which appeared to be unusual for carpal tunnel syndrome. [Id.]

On February 27, 2012, the Petitioner filled out a notice of injury regarding her bilateral carpal tunnel syndrome. [RX 8.] The Petitioner acknowledged in her testimony that this was the first time that she reported in writing to Fox Developmental Center of her alleged work-related bilateral carpal tunnel syndrome injury. The Petitioner testified that she previously notified a Residential Service Supervisor of going to see doctors to seek treatment for her hands. The Petitioner testified that she understood that she needed to provide notice of her work-related injury to her immediate supervisor to satisfy the notice requirement of her workers' compensation claim.

On March 2, 2012, Dr. Borowiecki performed a left total knee arthroplasty on the Petitioner. [PX 13.]

On April 4, 2012, the Petitioner's attorney sent the Petitioner a letter asking the Petitioner to discuss the type of work the Petitioner did as a Mental Health Technician II at Fox Developmental Center with Dr. Borowiecki to obtain a causal connection opinion from Dr. Borowiecki. [RX 1:422.] The April 4, 2012 letter asks the Petitioner to stress that her carpal tunnel syndrome symptoms began near August of 2011, which is contrary to the Petitioner's medical records described above. The Petitioner acknowledged in her cross-examination testimony that she received a copy of this letter from her attorney and that the address listed was her home address.

On April 13, 2012, the Petitioner presented to Dr. Borowiecki for a follow up of her left knee arthroplasty. [RX 1: 424-26.] Dr. Borowiecki indicated in his treating note that the Petitioner presented him with a letter from the Petitioner's attorney asking him to relate the Petitioner's carpal tunnel syndrome to her work activities. [Id. at 425.] When asked during cross-examination whether the Petitioner gave Dr. Borowiecki a copy of the April 4 letter, the Petitioner denied giving the letter to Dr. Borowiecki. The Petitioner's attorney stated on the record at hearing that she provided a copy of the April 4, 2012 letter to Dr. Borowiecki. [RX 1:422.] Regardless of who gave Dr. Borowiecki the April 4 letter, it appears that Dr. Borowiecki was provided a copy of the April 4 letter on April 13 because the letter was produced by Dr. Borowiecki pursuant to the Respondent's subpoena.

In his April 13, 2012 note, Dr. Borowiecki confirmed that the Petitioner's carpal tunnel syndrome had not dramatically changed between her June 21, 2010 EMG and her February 13, 2012 EMG, which were both performed by Dr. Narla. [RX 1 at 425.] However, Dr. Borowiecki noted that the Petitioner seemed to be getting clinically worse. [Id.] Dr. Borowiecki indicated that he did not think he could correlate the Petitioner's carpal tunnel syndrome to her work activities. Dr. Borowiecki indicated that the Petitioner could not name anything at work that dramatically aggravated her hand numbness, parasthesias and clumsiness. [Id.] Dr. Borowiecki also noted that the Petitioner had been off work for a long period of time, in part to recover from her March 2, 2012 total left knee arthroplasty, but that her symptoms had worsened at night and during the day. [Id. at 425-26.] In fact, the Petitioner's attendance records show, and the Petitioner testified, that she stopped working for the Respondent in early February 2012. [See RX 9.] As such, Dr. Borowiecki did not feel that he could relate the Petitioner's work activities to her carpal tunnel syndrome to a reasonable degree of certainty. [Id. at 426.] Dr. Borowiecki indicated that he explained this to the Petitioner and that "she seemed [] fine with that explanation and assessment." [Id.] Dr. Borowiecki indicated that the Petitioner wanted to schedule a carpal tunnel release and he recommended that the Petitioner follow up with him after her left knee had healed more following surgery. [Id.] On direct examination, the Petitioner testified that Dr. Borowiecki did not ask her about her work activities in rendering his opinion in his April 13 treating note, contrary to what is indicated in Dr. Borowiecki's April 13, 2012 treating note.

On June 22, 2012, the Petitioner underwent left carpal tunnel release performed by Dr. Borowiecki. [RX 2:116.]

On August 13, 2012, Dr. Carroll provided a letter opining that the Petitioner's bilateral carpal tunnel syndrome "is a result of repetitive motions that she encountered in the work place." [Id.] Dr. Carroll also wrote that "it is felt that Ms. Lolling's work activities contributed to her bilateral carpal tunnel which has required medical care and surgery." [Id.]

On September 21, 2012, Dr. Borowiecki performed a right carpal tunnel release on the Petitioner. [RX 2:126-27.]

On September 27, 2012, the Petitioner presented to Dr. Borowiecki following her right carpal tunnel release. [RX 1:464-66.] As of that date, Petitioner's right hand sensation was not back to 100%. Sutures were removed from the Petitioner's right wrist. [Id. at 466.]

On October 11, 2012, the Petitioner presented with some aching in her forearms and in the upper arm area. [RX 1:477-479.] Dr. Borowiecki could not reproduce any of the Petitioner's symptoms in the office and believed the Petitioner's muscles were just achy. [Id. at 479.] He released the Petitioner to see him on an as needed basis and did not schedule a follow up visit. [Id.]

On November 13, 2012, the Petitioner presented for a neurological consultation. [RX 1:492-96.] She complained of tremors in her hands and numbness in her hands and feet. [Id. at 492.] After examining the Petitioner, Dr. Claude Fortin's impression for the Petitioner was polyneuropathy. He also gave an assessment of idiopathic peripheral neuropathy. [RX 1:497.]

On January 4, 2013, the Petitioner presented to Dr. Fortin. [RX 1:513-17.] Following an EMG, the results confirmed polyneuropathy as well as demyelination. [Id. at 513.] The Petitioner again complained of numbness in her right hand and Dr. Fortin noted that the Petitioner was disillusioned that she was having symptoms of numbness and pain in her hands following carpal tunnel release surgeries. [Id.] Dr. Fortin noted that the Petitioner had paresthesias in the lower extremities as well as in the hands and gave an assessment of idiopathic peripheral neuropathy. [Id. at 515].

On June 26, 2013, the Petitioner was sent to Dr. James Williams for an IME on behalf of the Respondent. In his IME report, Dr. Williams indicated that the Petitioner had successfully undergone right and left carpal tunnel releases performed by Dr. Borowiecki. [RX 10.] Dr. Williams opined that the medical care the Petitioner received for her bilateral carpal tunnel syndrome was medically necessary and appropriate. However, Dr. Williams opined that the Petitioner's carpal tunnel syndrome was not related to her work duties. [Id.] In support of his opinion, Dr. Williams relied on the opinion of Dr. Borowiecki. Further, Dr. Williams specifically went over the Petitioner's medical records with the Petitioner where Dr. Borowiecki refused to provide a causal connection opinion. [Id.] Dr. Williams opined, "In no way is her work vibratory, in no way does her work contribute to and/or aggravate her condition of carpal tunnel syndrome." [Id.] Dr. Williams also based his opinion on the Petitioner continuing to have worsening symptoms even after the carpal tunnel releases and opined that the Petitioner's idiopathic peripheral neuropathy, her obesity, her hypertension, her bilateral CMS joint arthritis, her postmenopausal status, as well as her gender would be more likely to be related to the development and worsening of carpal tunnel syndrome than her work duties. [Id.]

The Petitioner testified at hearing that she was satisfied with the surgical procedures performed by Dr. Borowiecki including her left knee replacement and carpal tunnel releases and believes he is a good doctor. Dr. Borowiecki's credentials as a board certified orthopedic surgeon are more fully detailed in Respondent's Exhibit 12.

Due to the Petitioner's numerous health conditions and problems, the Petitioner testified that she has been off work since February 2, 2012, which is supported by the Respondent's attendance sheets. [RX 9.] The Petitioner testified that she has been on social security disability since that time. The Petitioner testified that her disability involves a myriad of health issues in addition to her bilateral carpal tunnel syndrome, including ongoing lower back pain, total knee arthroplasties in both of her knees [PX 13:37-8], and several surgeries to the Petitioner's ankles/feet. At hearing the Petitioner was seen ambulating with the use of a cane and the Petitioner's medical records indicate she has been diagnosed with bilateral tarsal tunnel syndrome in both the right and left feet. [See RX 3:146, 213, 215.]

At hearing, the Petitioner testified that she continues to have numbness in her fingers following her carpal tunnel releases. She testified that she continues to drop things. She testified that she used to have strong hands but feels as though she has lost strength in her hands.

The Deposition Testimony of Dr. Dennis Carroll

On December 18, 2013, the deposition of Dr. Dennis Carroll was taken. Dr. Carroll testified that he was board certified in family medicine. [PX 1, 4:18-19.] Dr. Carroll testified that the Petitioner has been a patient of his for at least 20 years. [Id. at 14:3-6.] Dr. Carroll testified that Dr. Borowiecki, the Petitioner's orthopedic surgeon, is a partner of his at Springfield Clinic and that he shares medical records with Dr. Borowiecki. [Id. at 7:5-10.] Dr. Carroll testified that he believed the nature of the Petitioner's work, including repeated lifting, contributed to the worsening of her carpal tunnel syndrome. [Id. at 9:3-14.] On cross-examination, Dr. Carroll testified that the Petitioner's work activities were a causative factor. [Id. at 44:24-45:7.] Dr. Carroll testified that the Petitioner had told him that she did a lot of lifting at work. [Id. at 24:11-25:6.] Dr. Carroll was told that the Petitioner lifted people on a regular basis, but was never told by the Petitioner how many times per day. [Id.] Dr. Carroll didn't recall what other activities the Petitioner told him she did at work which involved the use of her hands. [Id. at 25:7-10.] Dr. Carroll testified that he was involved in the Petitioner's conservative treatment for her carpal tunnel syndrome and that he referred the Petitioner to Dr. Borowiecki. [Id. at 46:21-47:8.] Dr. Carroll testified that he disagreed with Dr. Borowiecki's opinion that the Petitioner's work activities were not causally related to her bilateral carpal tunnel syndrome. [Id. at 49:23-50:4.] As his basis for disagreeing with Dr. Borowiecki, Dr. Carroll cited the history that the Petitioner gave him and his physical findings of the Petitioner. [Id. at 50:5-8.] Dr. Carroll acknowledged that as a family doctor, it is reasonable and typical for him to rely on a specialist when it comes to an area of medicine Dr. Carroll is not as familiar with. [PX 1, 36:23-37:5.] But here, Dr. Carroll disagreed with Dr. Borowiecki's opinion that the Petitioner's work activities were not related to her

bilateral carpal tunnel syndrome, despite Dr. Carroll being a family doctor and Dr. Borowiecki being the Petitioner's orthopedic specialist and surgeon. [Id. at 51:1-16.]

The Deposition Testimony of Dr. James Williams

On March 13, 2014, the deposition of Dr. James Williams was taken. In his testimony, Dr. Williams testified that carpal tunnel release is typically 95% successful where the patient has isolated carpal tunnel. [RX 10, 18:6-20.] Where a patient does not get better following carpal tunnel release, Dr. Williams opined that this indicates that something else is causing the symptoms. [Id. at 18:12-16.] Dr. Williams opined that the Petitioner's carpal tunnel syndrome can be attributed to her diagnosis of polyneuropathy given by Dr. Fortin on January 4, 2013. [See RX 1:513-17.] Dr. Williams opined that polyneuropathy is systemic nerve involvement which affects the nerves throughout the body. Dr. Williams opined that the Petitioner's carpal tunnel syndrome symptoms are due to a systemic cause, such as diabetes, or a polyneuropathy type cause. [Id. at 23:19-24:13.] His basis was that the Petitioner continued to by symptomatic following her releases and she is now complaining of nerve problems not only in her hands but also in her lower extremities. [See RX 1:513-17.] He also noted the fact that the Petitioner has been diagnosed with bilateral tarsal tunnel syndrome in both the right and left feet/ankles and has required tarsal tunnel decompression surgeries, suggesting that the Petitioner's problems in her upper and lower extremities are caused by an underlying systemic nerve problem. [See RX 3:146, 213, 215.]

Kim Hetherington's Testimony on behalf of the Respondent

At hearing, the Respondent had Kim Hetherington testify on its behalf. Hetherington testified that she has been a Fox Developmental Center employee for the past 27 years. She is currently the Assistant Unit Director, a position she has held since 2003. Hetherington testified that she served as a Mental Health Technician II from 1989-2000 and is familiar with the position. Hetherington testified that she currently oversees three units of mental health technicians. Hetherington testified that the Petitioner was a member of one of the units that Hetherington oversaw and that Hetherington was the Petitioner's immediate supervisor. Hetherington testified that a unit is comprised of 3-4 Mental Health Technician II's who are overseen by a Mental Health Technician III, which is also known as a lead worker. Hetherington testified that a Mental Health Technician II was assigned to no more than 8 individuals and was assisted occasionally by the lead worker. Hetherington testified that the Petitioner was assigned to assist with a group of females. Hetherington testified that it is Fox Developmental Center's policy that all mental health technicians under her direct supervision alleging a work-related accident must provide notice to her. Hetherington testified that this policy was stated in Fox Developmental Center's operational guide and a copy of the operational guide was made available to the Petitioner. Hetherington testified that the first time she became aware that the Petitioner was alleging a work-related accident involving her repetitive trauma bilateral carpal tunnel syndrome was when the Petitioner submitted her notice of injury form to Hetherington on February 27, 2012. [RX 8.]

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner failed to meet her burden of proof. Petitioner is claiming that she sustained injuries due to repetitive trauma. However, the evidence presented at Arbitration indicates that the Petitioner's job duties were varied in nature. The Arbitrator also notes the lack of any evidence indicating the frequency and forcefulness of each of Petitioner's activities and/or the repetitive nature of any of these activities. Furthermore, there is no indication in either the testimony or the medical records that the Petitioner had any complaints contemporaneously with any particular work activity. Given the lack of evidence on this issue, the Arbitrator finds that the Petitioner failed to prove she sustained an accident on June 21, 2010.

2. With regard to the issue of whether the Petitioner gave notice of the accident within the time limits stated in the Act, the Arbitrator finds that the Petitioner failed to provide timely notice. Pursuant to Section 6(c) of the Act, "notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c) (2014). The notice requirement applies to employees who suffer repetitive trauma injuries. White v. Ill. Workers' Comp. Comm'n, 374 Ill. App. 3d. 907, 910 (4th Dist. 2007). 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. (citing Peoria County Belwood Nursing Home v. Indus. Comm'n, 115 Ill. 2d 524, 531 (1987)). The Application for Adjustment of Claim indicates that the Petitioner's accident date was June 21, 2010 (the date on which the Petitioner's EMG with Dr. Narla

days after her June 21, 2010 accident). Further, "[w]hile notice may be given orally or in writing, mere notice to an employer of some type of injury is insufficient to satisfy the notice requirement. Rather, it is necessary that the employer be advised that the was positive for carpal tunnel syndrome). [Arb. Ex. 4.] The parties further stipulated to the accident date being June 21, 2010. [See Arb. Ex. 3.] As such, the Petitioner needed to have given notice to the Fox Developmental Center by August 5, 2010 (45 injury is in some way work related." Harmony's Corner v Ill. Workers' Comp. Comm'n, 2012 IL App (2d) 110852WC-U, ¶ 30 (citing White, 374 Ill. App. 3d at 911). The giving of notice under the Act is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. S & H Floor Covering, Inc. v. Ill. Workers' Comp. Comm'n, 373 Ill. App. 3d 259, 265 (4th Dist. 2007). Here, the Petitioner gave notice of her repetitive trauma bilateral carpal tunnel syndrome accident no earlier than on January 26, 2012, the date on which the Petitioner filed her application for adjustment of claim. [Arb. Ex. 4.] It should be noted that the Petitioner filled out and submitted her notice of injury form on February 27, 2012, after the application of adjustment had already been filed with the Commission. [See RX 8.] Hetherington credibly testified that February 27, 2012 was the earliest date on which she became aware of the Petitioner's alleged work-related accident. Hetherington credibly testified that she was the Petitioner's immediate supervisor and the Petitioner knew she needed to give notice of a work related accident directly to Hetherington. Also, Petitioner acknowledged she understood that she needed to provide notice of her work-related injury within 45 days of her date of accident. Where Petitioner failed to provide timely notice of her alleged work related injury by August 5, 2010, the Arbitrator finds the Petitioner is precluded from receiving benefits under the Act and the Petitioner's claim is denied in its entirety.

3. With regard to the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill-being is not causally related to her alleged work accident on June 21, 2010. The Arbitrator relies on the opinions of Dr. Borowiecki, the Petitioner's own orthopedic surgeon, as well as Dr. Williams, the Respondent's IME doctor – both of which agree that the Petitioner's bilateral carpal tunnel syndrome was not causally related to her work activities. The Arbitrator notes that the Petitioner remained symptomatic for carpal tunnel syndrome even after her June 22 and September 21, 2012 carpal tunnel releases, and more importantly, after the Petitioner had stopped working for the Respondent on February 2, 2012. This, in addition to the Petitioner's subsequent polyneuropathy with demyelination diagnosis calls into serious question whether the Petitioner's bilateral carpal tunnel syndrome was causally related to her work activities. That the Petitioner has subsequently had nerve decompression surgeries in both of her feet [see RX 3:146, 213, 215] strongly suggests that the Petitioner's bilateral carpal tunnel syndrome is attributable to a systemic cause as opposed to her work activities, namely, the Petitioner's polyneuropathy and demyelination [see RX 1:513-17]. Dr. Williams' IME report also cites the Petitioner's polyneuropathy and demyelination as a likely cause for the Petitioner's bilateral carpal tunnel syndrome. Dr. Carroll did not sufficiently address the Petitioner's polyneuropathy and demyelination in his deposition testimony such that they cannot be ruled out as causes for the Petitioner's bilateral carpal tunnel syndrome. Based on the above, the Arbitrator finds that the Petitioner has not sufficiently established causal connection between her alleged injury and her work activities.

4. Based on the Arbitrator's findings above, the remaining disputed issues are rendered moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jamil Khio,

Petitioner,

vs. NO: 12 WC 17803

Tempel Steel Company,

16IWCC0271

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 jurisdiction reverses the Decision of the Arbitrator and remands the matter to the Arbitrator for further findings, for the reasons stated below.

Findings of Fact

Petitioner, a 56 year old punch press operator, testified that he had worked for Tempel Steel for almost 37 years and that his current job title is Punch Press Operator 3. He noted that his job entails twisting up steel laminations and putting them in boxes. (T.14). Petitioner indicated that every coil takes an hour to an hour and a half to finish, and that when the laminations come out of the chute he would have to "... measure them up, take them out, put them in the tray, put a wire in it, take it with a left hand wire, twist it with the right one, take it with the left one, carry with both hands and put them in the box or pilots." (T.15-16). He stated that the laminations are steel and that they are used in electric fans, motors and pumps. (T.16). Petitioner was asked to demonstrate for the arbitrator the right wrist and hand motion he would use to twist the wire. (T.39). He noted that he would use the other hand sometimes if one got sore, but that he mostly used the right one. (T.39). Petitioner is right handed. (T.17).

Petitioner testified that he works eight hours a day with occasional overtime, and that the aforementioned job is the one he does throughout the work day. (T.16). He also indicated that he mostly works with another co-worker, given that most of the machines, or 80%, have two to three people working on them. (T.17). Petitioner testified that he had been performing the duties of an operator PO3 since 1/16/79, and that after about ten years of working at the company he was given the job of dye setter or setup man. (T.17). He noted that this job involves setting up the dyes, watching and starting the press and twist up, and that he performed this job for almost 24 years. (T.18). He indicated that in 2002 or 2003 there was a big layoff and all the dye setters were put "... back in the machine twisting up ..." (T.18).

When asked whether he had problems with his hands and wrists prior to 2012, Petitioner testified that "[he] did because they put [him] on a fast machines [sic], which is – [t]hey call it punch Press 83. It was real fast. It was like 300 stroke[s] per minute, and they put two mans [sic] in there; but they keep me in there every day for a few months. They don't keep the same person with me. They keep switching the peoples [sic] ..." (T.18-19). He noted that this machine was usually a three man machine, but that he was working "two mans [sic]." (T.19). When asked what he noticed about his hands and wrists while using this machine, Petitioner indicated that "... it was like I'm working a little fast. When I go home, I can't sleep, was all numb after I started working there." (T.19-20). He claimed that his "hands was [sic] good" before he worked on this machine, although he acknowledged that he had had previous problems with his hands in years past. (T.20). Petitioner testified that he "... ha[d] a problems [sic] like these problems before, but it was treated because [he] [saw] [Dr.] Andres Giraldo at Nora Medical Center. He sen[t] [Petitioner] to therapy for a few years. Then in the end, he g[ave] [Petitioner] [a] shot in [his] wrist – both wrists. It was okay. Then [Petitioner] start[ed] working overtime that times [sic], but the problem started in spring of 2012 when they put [him] in the fast machine." (T.20).

The record reveals that Petitioner has a prior history of complaints and treatment relative to his hands and wrists.

In handwritten office notes dated 12/13/02, Dr. Giraldo, Petitioner's family physician at the time, recorded "c/o B/L tingling/numbing sensation both hands. States on/off [depending] on exertion..." (RX3). Dr. Giraldo's assessment at that time included "B/L carpal tunnel (Pt. uses both hands a lot at work – punch press)." (RX3). Petitioner did not dispute these records, indicating that he complained of pain in both hands as well as numbness and tingling in his hands and wrists at that time. (T.35). He also did not disagree if this office note recorded that he used his hands a lot at work operating a punch press. (T.36).

On 1/24/03, Petitioner was seen at Saint Joseph Hospital Rehabilitative Services for a hand evaluation. (RX3). At that time, occupational therapist Charlene Horn noted complaints of numbness and tingling in both hands, a positive Phalen's and very mild soft tissue tightness. (RX3). Ms. Horn also noted that Petitioner agreed to a plan involving splinting, postural exercises, ergonomics education, median nerve gliding and tension stretch exercises. (RX3). Petitioner was to follow up in 2-3 weeks if his symptoms persisted. (RX3). Petitioner agreed that these records show he was diagnosed with bilateral carpal tunnel and was given splints to wear on his hands and wrists at that time. (T.36). He also noted that he believed he underwent therapy

with Dr. Giraldo during this period as well. (T.36).

In a hand written progress note dated 8/25/03, Dr. Giraldo recorded that Petitioner "[c]ontinues to have paresthesias B/L but does not wear splints given to him by OT. Ordered to wear them during sleeping. It's ok not to wear them at work since needs hands for labor. Works standing up for 8 hours." (RX3). Dr. Giraldo's assessment at that time included a diagnosis of bilateral carpal tunnel syndrome. (RX3). Petitioner agreed that these records show he was still having numbness and tingling in his hands and wrists at that time. (T.37). However, he could not remember if he told the doctor that he was not wearing the splints he had been given. (T.37).

In a hand written progress note dated 3/12/04, Dr. Giraldo recorded "c/o paresthesias B/L on/off (long term). Did not f/u use of splints." (RX3). Once again, the diagnosis included carpal tunnel, and Petitioner was referred to occupational therapy for splints. (RX3).

On 3/19/04, Petitioner was once again seen at Saint Joseph Hospital Rehabilitative Services for a hand evaluation. (RX3). At that time, occupational therapist Charlene Horn noted a history of CTS for two years on and off, presenting now with bilateral numbness and tingling for the past year, left greater than the right. (RX3). Ms. Horn recorded complaints of bilateral pain during sleep in the wrists and hands, bilateral soft tissue tightness, limited wrist extension on the right, subjective complaints of bilateral numbness, tingling of the fingertips, positive Phalen's bilaterally and positive Tinel's sign on the left. (RX3). Ms. Horn recommended splinting 24 hours a day for 3 weeks, tendon and nerve gliding and tension stretch exercises, postural training, ergonomic education, stretching, and a follow up in three weeks to re-evaluate. (RX3). When questioned on this note, Petitioner agreed that it shows he had been diagnosed with bilateral CTS for two years, left greater than the right. (T.38-39).

In a hand written progress note dated 7/29/06, Dr. Giraldo recorded a history of recurrent bilateral carpal tunnel syndrome and that he uses a splint when sleeping. (RX3). Petitioner agreed that he treated with Dr. Giraldo for recurrent bilateral carpal tunnel syndrome on that date, noting that "... he gives me shot and therapy. Was feeling good after that..." (T.40).

In a progress note dated either 3/20/08 or 3/20/09, Dr. Giraldo appears to reference complaints of bilateral numbness of the upper extremity, especially at night for three months, and that the patient does lots of twisting at work at a punch press machine. (RX3). Petitioner agreed with Dr. Giraldo's records along these lines showing a history of doing a lot of twisting at work on a punch press machine, noting that "... he asked me. I give him that – but I was feeling very well. I got lot of overtime at that time. It was okay." (T.40). It also appears that Dr. Giraldo ordered an EMG/NCV study at that time. (RX3).

An EMG performed on 7/2/09 was interpreted as revealing "... electrical evidence that is compatible with compression of the median nerve at the wrist, bilaterally, i.e. carpal tunnel syndrome, right worse than left." (RX3;RX4). It would appear that this is the first diagnostic study that was performed confirming a diagnosis of bilateral carpal tunnel syndrome.

In an office note dated 10/8/10, Dr. Giraldo recorded an assessment that included, among other diagnoses, carpal tunnel syndrome. (RX3). Dr. Giraldo's plan was to get a repeat EMG of both upper extremities. (RX3).

An EMG performed on 10/25/10 was interpreted as revealing bilateral carpal tunnel syndrome, left worst than right, due to both segmental demyelination and axonal degeneration. (RX3). It was also noted that "[t]his study has worsened when compared to a previous study of both upper limbs performed on 7-02-09 in that denervation potentials are now identified which were not seen on the prior study. Similar nerve latency slowing is seen in the bilateral median nerves..." (RX3;RX5).

Petitioner visited Dr. Giraldo on 11/12/10 at which time he was administered steroid injections to both hands. (RX3). The assessment was "[w]orsening of symptoms. Patient needs OT and eventually if nothing else works CT release surgery." (RX3). Petitioner was referred to an occupational therapist at that time. (RX3).

A Saint Joseph Hospital Rehabilitation and Fitness Center initial occupational therapy evaluation dated 11/26/10 noted that "[t]he patient reports a 5 year history of bilateral carpal tunnel syndrome. He has participated in occupational therapy and used splints in the past with good success. The patient now report[s] worsening symptoms (numbness, tingling and pain), and EMG reveals worsening carpal tunnel syndrome (left > right) compare[d] to last year. The patient received a cortisone injection per MD on 11/16/10 and reports some relief of pain." (RX6). This report also notes that "[t]he patient works full time as a punch press operator in a steel factory, and reports an increase in his symptoms with repetitive gripping and twisting motions of the wrist." (RX6). Petitioner could not remember giving a history on 11/26/10 of having bilateral CTS for five years and working full time as a punch press operator in a steel factory where he experienced symptoms with repetitive gripping and twisting motions. (T.42).

In an office note dated 9/20/11, Dr. Alsamman, Petitioner's current primary care physician, recorded that Mr. Khio presented "... with pain in both hands for years related to his work, he work[s] in a metal factory and was diagnosed with carpal tunnel syndrome[.] [H]ad EMG less then [sic] a year ago in October 2010 which showed worsening CTS, can not [sic] sleep without wrist support ..." (PX3). The diagnosis following this visit included, among other diagnoses, carpal tunnel syndrome. (PX3). Petitioner agreed that these records reference pain in his hands for years related to work. (T.43). He also agreed that Dr. Alsamman diagnosed him with bilateral CTS at that time. (T.49).

Petitioner visited Dr. Alsamman on 12/13/11 at which time it was recorded that Petitioner "... has more pain in the hands with numbness. [S]ometimes wake[s] up at night because of the pain." (PX3). The same reference to pain and numbness in the hands and waking at night can be found in the office note by Dr. Alsamman following visits on 12/20/11 and 12/27/11. (PX3). The diagnosis following these visits all included, among other diagnoses, carpal tunnel syndrome. (PX3).

Petitioner visited Dr. Alsamman on 4/17/12 at which time it was recorded that Petitioner "... came with pain in both hands for years related to his work[.] [H]e work[s] in a metal factory

and was diagnosed with carpal tunnel syndrome. [H]ad EMG less than a year ago in October 2010 which showed worsening CTS[,] had injections before in both wrists[,] can not [sic] sleep without wrist support." (PX3). Once again, the diagnosis included, among other diagnoses, carpal tunnel syndrome. (PX3). When asked if the records of Dr. Alsamman on this date were correct in showing that he reported pain in both hands and wrists for years relating to work, Petitioner responded: "I told him I have pain. I don't say for years. I explained to him I was being treated. I got a shot in my hand, both of them, after the therapy ... I said, feels very well. I work a lot of overtime. Now I started having that problem again after the fast job." (T.45). He denied that on that date Dr. Alsamman referred him to Dr. Silver for carpal tunnel syndrome. (T.46). However, Dr. Alsamman's note shows the plan as including "referral to Dr. Silver for CTS evaluation and treatment." (PX3).

With respect to his prior hand and wrist problems, Petitioner agreed that he treated for same in 2007 or 2008; however, he initially denied that he continued to have problems with his hands and wrist thereafter, noting that he "... start[ed] working a lot of hours overtime too." (T.35). When asked specifically whether he had problems with his hands and wrists between 2008 and 5/9/12, Petitioner testified as follows: "I don't have that much problem. After I start on Press 83, that's when I have a problem because that's a real fast press. They put two mans [sic] instead of three mans [sic]. Right now, it's been three [man] for a long time." (T.41-42). On re-direct, Petitioner indicated that he "... start[ed] working [on Press] 83 in the spring of 2012. [He] was there for a few months." (T.49). Petitioner also testified that he never underwent any surgeries for CTS prior to those in July and September of 2012, and that he did not lose any time from work for problems associated with his CTS prior thereto. (T.50).

Petitioner testified that as a result of his increase in symptoms after working on punch press 83, an "insurance lady" at work directed him to Dr. Jablon's office who in turn told him he needed surgery for both hands. (T.21). When asked whether he notified anyone at the company when he developed problems with his hands, Petitioner testified "[y]es. I went to the nurse. She's the one, I says, I see an orthopaedics doctor for my hand. I need surgery. Both of my hand[s] are real in bad situation ..." (T.21). He also claimed that he told Barry Cohen in personnel as well as his boss, who told him to see a doctor. (T.22-23).

Petitioner subsequently visited Dr. Michael Jablon. In a letter dated 5/9/12, the date of his initial visit (and the alleged date of manifestation), Dr. Jablon noted that Petitioner "... has been working on a punch press machine for over 30 years doing forceful grasping, repetitive motion activities by description. He has had severe nocturnal paresthesias significant enough to interrupt his sleeping patterns. He has had trouble for over eight years. About two years ago, he did have injections which gave him temporary relief. He has had electrophysiologic studies on two occasions, and each time he has had documented carpal tunnel syndrome." (PX1;RX8). On cross examination, Petitioner agreed that the history recorded by Dr. Jablon on 5/9/12 – namely, that he had worked on a punch press machine for over 30 years performing forceful grasping and repetitive motion activities – would seem correct. (T.46). He also would agree with those same records if they recorded complaints of numbness and tingling in his hands and wrists at that time. (T.47). In addition, Petitioner agreed that he had told Dr. Jablon that he had had trouble with both hands and wrists for over eight years, but claimed that he also told him that it recently was becoming worse. (T.47).

In his 5/9/12 letter, Dr. Jablon also noted that EMG studies from 10/25/10 were interpreted as revealing bilateral carpal tunnel syndrome, left worse than right, due to segmental demyelination and axonal degeneration, and that the study indicated worsening when compared to the prior study performed on 7/2/09, when the right was shown to be worse than the left, "... in that now denervation potentials were identified." (PX1;RX8). Dr. Jablon indicated that the patient "... noted that injections had helped in the past but [Petitioner] is wishing to have this condition corrected as he is disturbed by the sleep interruption with severe nocturnal parethesias." (PX1;RX8). Dr. Jablon noted the risks of surgery, including those associated with the fact that Petitioner "... has been on Plavix, has heart disease, and diabetes. Nonetheless, I believe this is work-related based on his work history as described to me today." (PX1;RX8).

On May 23, 2012, Petitioner filed an Application for Adjustment of Claim alleging injury to her right and left hands and a date of accident of 5/9/12, or the date of his initial visit to Dr. Jablon.

Petitioner subsequently underwent surgery on his left hand on 7/24/12 consisting of a left open carpal tunnel release. (PX1). In a "Work/School Status Report" dated 7/26/12, Dr. Jablon noted that Petitioner had been unable to work since 7/20/12. (PX1). On 8/9/12, Dr. Jablon removed the sutures and performed irrigation and debridement of a superficial wound infection. (PX1). On 9/11/12, Petitioner underwent surgery on his right hand in the form of a right open carpal tunnel release and right long finger trigger finger release. (PX1). In a progress note dated 9/13/12, Dr. Jablon recorded that "Mr. Khio informed me that triggering in his right long finger started with twisting of wires that he does at his work activities." (PX1).

In a progress note dated 9/27/12, Dr. Jablon indicated that "[l]eft hand progress would allow for light duty avoiding repetitive motion, forceful grasping, or lifting greater than 5 pounds; however, patient is restricted from work duties in view of his 16 days postop from right open carpal tunnel and trigger release." (PX1).

Petitioner testified that he stayed home and did not work until he finished surgeries for both hands. (T.25). Following his surgeries Petitioner underwent physical therapy. (T.33). When asked how his hands felt after physical therapy, Petitioner noted that "[i]t feels okay. It takes a little time, but feels very good, feels okay." (T.34). Petitioner indicated that he was only paid 20 hours "like a sick pay" and that workers' compensation started paying after his surgery on his right hand on 9/11/12. (T.26). He stated that he was paid until he returned to work at light duty for a few weeks, and then full duty. (T.26).

In a report dated 11/28/12, Dr. Jablon noted that Petitioner was "... still recovering from his more recent surgery with continued complaints of scar hypersensitivity. The plan will be to return to light duty, limiting lifting to 5 pounds for December 10, 2012. He will continue in therapy through the month of December and follow up in January 2013 for reevaluation and possible release to full work duties if appropriate." (PX1). In a subsequent report on 1/9/13, Dr. Dr. Jablon noted that Petitioner was still having some weakness in his right hand and that there was some concern about a skin lesion within the scar of the right palm. (PX1). Dr. Jablon recommended that Petitioner continue with light duty as well as home exercises/strengthening

with a recheck in four weeks in anticipation of returning to full work duties. (PX1). A similar recommendation to remain on light duty and continue with home exercises was made by Dr. Jablon following a visit on 2/6/13. (PX1). A separate "Work/School Status Report" by Dr. Jablon dated 2/6/13 noted that Petitioner could perform full duty work with no restrictions as of 4/8/13. (PX1).

In a report dated 4/3/13, Dr. Jablon noted that "Mr. Khio is now at MMI, but subjectively is complaining of discomfort in his palms associated with his work activities. Mr. Khio also expressed some concerns of the few degrees of flexion contracture in his long finger. He was reassured about his current condition and has been advised regarding his carpal tunnel symptoms and surgical treatment. He may now resume unrestricted work activities. It would be wise to start at easier positions and advance to more difficult positions as tolerated..." (PX1;RX14).

Petitioner testified that since returning to work, first in a light duty capacity for four to five weeks and then at full duty, which he has been doing for almost two years, "[e]verything is perfect." (T.30-31). He noted that his hands "feel very good, no numbing, no nothing. Right after [he] had the surgeries, everything was good." (T.31). He also noted that since his return to work his hands have not affected any other type of activities outside of work. (T.31). On cross, Petitioner agreed that everything is perfect with his hands and wrists now and that he has not seen Dr. Jablon since April of 2013. (T.33-34).

At the request of Respondent, Petitioner visited Dr. David J. Tulipan on three occasions for purposes of §12 evaluations. (T.31). In a letter to defense counsel dated 7/23/12, and following his examination and review of the record, Dr. Tulipan noted that Petitioner's diagnosis appeared to be bilateral carpal tunnel syndrome with a mild right long trigger finger and that he agreed with Dr. Jablon that surgery was necessary. (RX9). In response to counsel's written inquiries, Dr. Tulipan prefaced his remarks by noting that the etiology of carpal tunnel syndrome is multifactorial and "always difficult to state with medical and surgical certainty..." (RX9). Dr. Tulipan went on to opine that "... it would appear that [Petitioner's] long-standing diabetes is at least in part related to his carpal tunnel syndrome, but a component of his condition could be work-related as well." (RX9). Dr. Tulipan explained that "... if [Petitioner] is truly involved in the repetitive activities as he describes them and as demonstrated on the video, there is enough repetitive wrist flexion-extension activity that there could be a correlation between his current state of ill-being and his work. The majority of the repetitive activities are performed with the right hand, but there are some repetitive activities performed with the left as well. Therefore, it would seem possible that his carpal tunnel syndrome, and to a lesser degree trigger finger, could be related to the work of twisting wires on a repetitive basis with the right hand. The left hand is a little bit less clear as to the etiology but could be related to his repetitive activities as well." (RX9).

In an addendum dated 8/23/12, Dr. Tulipan noted that "[a]fter further review of the information provided [by defense counsel], it would appear to me that the activities that [Petitioner] performed with his left hand were not consistent with the production of carpal tunnel syndrome. As you know, I opined the activities performed by the right hand could be the cause of, or could exacerbate, his carpal tunnel syndrome. The video did not demonstrate any repetitive wrist flexion-extension activities on a significant basis that one would associate with

the production of carpal tunnel syndrome on the left and it would seem to me that his insulin-dependent diabetes is much more likely a cause of the carpal tunnel in that hand." (RX10).

In a letter to defense counsel dated 11/9/12, and following a re-evaluation of Petitioner on 11/8/12, Dr. Tulipan noted that since surgery Mr. Khio had "significantly improved" and that his current diagnosis was resolving bilateral carpal tunnel syndrome and right long trigger finger. (RX11). Dr. Tulipan indicated that "[t]he only additional treatment would be some continued therapy to try to improve strength and also for scar massage to decrease sensitivity." (RX11). In addition, Dr. Tulipan stated that "[a]s noted in previous evaluations and subsequent letter, I think that concerns on his right hand appear to be related to his work, but not so on the left hand." (RX11).

In an addendum dated 11/30/12, Dr. Tulipan clarified his prior report by noting that "[t]he restrictions that I imposed on him of five pounds are related to his most recent surgery which was performed on his right hand. The left hand surgery that was performed several months ago should essentially be at MMI. If one-handed duty were available there is certainly no reason Mr. Khio would not be capable of working." (RX12).

In a letter to defense counsel dated 2/27/13, and following a re-evaluation of Petitioner on 2/25/13, Dr. Tulipan noted that Mr. Khio was "demonstrating good function of his right hand" but "still has some subjective complaints of weakness and sensitivity", and that "[t]he only additional treatment for the work comp related injury (as addressed in previous evaluation) to the right hand would be a home exercise program." (RX13). Dr. Tulipan also felt that it was reasonable for Petitioner "... to continue on restricted duty and would leave final judgement [sic] up to Dr. Jablon, but I see absolutely no reason, based on today's examination, grip and pinch strength, that he should be capable [sic] of returning to regular duty based on previous job description evaluation." (RX13). Finally, Dr. Tulipan noted that "Mr. Khio was very upset about not including the left hand in his work comp issues. I deferred these discussions with him, but would reiterate that based on the evaluation from the materials provided to me that the right hand was much more highly involved in repetitive activities than the left hand, which only intermittently was involved in repetitive activities. Mr. Khio certainly disagrees with this, feeling that he performs repetitive activities with both hands. I have to base my evaluation regarding causality on the objective information provided to me." (RX13).

Petitioner testified that he currently does not work on machine press 83 but that once in a while he will work on that machine if his machine is undergoing repairs or something. (T.27). He indicated that when using this machine he uses his right hand more than his left, but that he uses his left hand to pick up the wire and lamination and pack it in the box. (T.27). He also indicated that this machine "goes really fast, 300 strokes per minute" and that it is not a job you can do with one hand. (T.27). Petitioner noted that in his 37 years with the company he has never been given a warning, written up or suspended for failing to keep up. (T.28).

Petitioner testified that other than another workers' compensation case wherein he cut a tendon in his hand and required surgery, he has not previously lost any time from work as the result of problems with his hands. (T.28-29). He also noted that he continued to work overtime during the period preceding his assignment to the press 83 machine. (T.29).

Petitioner indicated that he is a diabetic and that in 2012 he was taking medication for same; today he is on insulin. (T.24). He was initially treated by Dr. Giraldo at Nora Medical Center for this condition and later switched to Dr. Omar Alsamman. (T.24). The record also shows that he has treated for high cholesterol and coronary artery disease. (PX3). Petitioner has not seen any other physicians for his hands or wrists. (T.33).

Conclusions of Law

"By their very nature, repetitive-trauma injuries may take years to develop to a point of severity precluding the employee from performing in the workplace. ***An employee who discovers the onset of symptoms and their relationship to the employment, but continues to work faithfully for a number of years without significant medical complications or lost working time, may well be prejudiced if the actual breakdown of the physical structure occurs beyond the period of limitation set by statute***. Similarly, an employee is also clearly prejudiced in the giving of notice to the employer if he is required to inform the employer within 45 days of a definite diagnosis of the repetitive-traumatic condition and its connection to his job since it cannot be presumed the initial condition will necessarily degenerate to a point at which it impairs the employee's ability to perform the duties to which he is assigned. Requiring notice of only a potential disability is a useless act since it is not until the employee actually becomes disabled that the employer is adversely affected in the absence of notice of the accident." (Emphasis added.) *Oscar Mayer & Co. v. Industrial Commission*, 126 Ill.Dec. 41, 43, 176 Ill. App. 3d 607, 611, 531 N.E.2d 174, 176 (Ill.App.4 Dist.).

An employee who continues to work on a regular basis despite his own progressive ill-being should not be punished merely for trying to perform his duties without complaint. On the other hand, it is not this State's policy to encourage disabled workers to silently push themselves to the point of medical collapse before giving the employer notice of an injury." *Three "D" Discount Store v. Industrial Commission*, 144 Ill.Dec.794, 798, 198 Ill. App. 3d 43, 49, 556 N.E.2d 261, 265 (4th Dist. 1989). The facts must be closely examined in repetitive-injury cases to ensure a fair result for both the faithful employee and the employer's insurance carrier. *Three "D" Discount Store, 198 Ill. App. 3d at 49.*

As the appellate court noted, "***[t]o always require an employee suffering from a repetitive-trauma injury to fix, as the date of accident, the date the employee became aware of the physical condition, presumably through medical consultation, and its clear relationship to the employment is unrealistic and unwarranted***." (Emphasis added.) *Oscar Mayer, 176 Ill. App. 3d at 610.*

Based on the above, and the record taken as a whole, the Commission reverses the Arbitrator and finds that Petitioner's Application for Adjustment of Claim was filed within the three (3) year Statute of Limitations, based on a manifestation date of 5/9/12 and a filing date of 5/23/12, and as such did not violate §6(d) of the Act. Along these lines, the Commission finds that the Arbitrator erred in finding a manifestation date of 12/13/02, or the first mention in the records of complaints of numbness and tingling in both hands and the fact that Petitioner used his hands a lot at work on a punch press. (RX3). Instead, the Commission finds that the proper

manifestation date was the date of Petitioner's initial visit to Dr. Jablon on 5/9/12, or the date Mr. Khio was first prescribed surgery to address his worsening condition and after which he first began losing time from work.

The Commission notes that while it was suspected that Petitioner was suffering from bilateral CTS as early as 12/13/02, when Dr. Giraldo opined as much, he did not actually undergo diagnostic testing for same until 7/2/09, or almost seven (7) years later, when an EMG was interpreted as revealing electrical evidence compatible with compression of the wrists bilaterally. However, Petitioner continued to work throughout this period, including overtime hours, with no lost time and with only minimal treatment in the form of office visits and injections. Indeed, it was not until Petitioner began working on the faster "Press 83" machine in the spring of 2012 that he noticed an increase in his symptoms, including sleep interruption due to severe nocturnal paresthesias. It was at this point that Petitioner was seen by Dr. Jablon on 5/9/12 who for the first time recommended surgery on both wrists, noting that the EMG test performed on 10/25/10 revealed worsening of Petitioner's bilateral carpal tunnel syndrome in comparison to the prior study on 7/2/09. This evidence shows that Petitioner was able to work faithfully for Respondent, engaging in highly repetitive activities on a full-time basis, for almost ten (10) years, including overtime, without significant medical complications or lost time from work, until his worsening symptoms, induced by work on the faster "Press 83" machine, finally necessitated the need for surgery on both wrists – precisely the situation presaged by the court in *Oscar Meyer*, supra, and exactly the type of scenario that underscores the need for a more realistic and flexible interpretation of the date of manifestation in cases of repetitive trauma.

Furthermore, the medical records show that Petitioner's complaints relative to his hands and wrists were sporadic and not as constant as the arbitrator appears to believe, at least in terms of severity, as witnessed by the fact that he would sometimes go a year or more without seeking treatment for his condition. To say that Petitioner should have recognized a manifestation date as early as 12/13/02, and thus filed an Application for Adjustment of Claim by 12/13/05, even though he continued to work uninterrupted thereafter and had yet to even undergo diagnostic testing, let alone suffer disablement as a result of his condition, is simply unreasonable and unnecessarily punishes a stalwart worker for his dedicated performance.

As a result, the Commission reverses the Arbitrator's finding that Petitioner failed to file his Application within the three (3) year Statute of Limitations and vacates the Arbitrator's denial of Petitioner's claim for compensation. The Commission notes that in finding that the claim was barred, the Arbitrator ruled that the remaining issues were moot. To the extent that the Commission has not been presented with issues beyond the aforementioned question of jurisdiction, the matter is hereby remanded to the Arbitrator for a determination of the remaining issues in dispute.

16IWCC0271

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision denying compensation is vacated and the matter is remanded to the Arbitrator for further findings consistent with this decision on all remaining issues.

DATED: APR 21 2016

o: 2/22/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the Majority. I would affirm and adopt Arbitrator Simpson's decision. The Arbitrator's decision is thorough in its review of Petitioner's medical records and the findings are well grounded in both the evidence and the law. I would affirm this decision in its entirety.

Kevin W. Lamborn

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

Janice Downard,
Petitioner,

vs.

NO: 14 WC 16359
14 WC 16360
14 WC 28400

Cahokia School District #187,
Respondent.

16IWCC0272

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, 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 May 27, 2015, is hereby affirmed and adopted.

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

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

16IWCC0272

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 2 2016

Joshua D. Luskin

o-04/13/16
jdl/wj
68

Ruth W. White

Charles J. DeVriendt

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

DOWNARD, JANICE
Employee/Petitioner

Case# **14WC016359**

14WC016360
14WC028400

CAHOKIA DISTRICT 187
Employer/Respondent

16IWCC0272

On 5/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1239 KOLKER LAW OFFICES
DANIEL G BROOMBAUGH
9423 W MAIN ST
BELLEVILLE, IL 62223

5196 CLAYBORNE SABO & WAGNER
JENNIFER BARBIERI
525 W MAIN ST SUITE 105
BELLEVILLE, IL 62220

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)

Janice Downard
Employee/Petitioner

v.

Cahokia District 187
Employer/Respondent

Case # 14 WC 16359

Consolidated cases: 14WC16360, 14WC28400

16IWCC0272

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 **3/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Accident (3/25/14, 6/25/14), Causal connection, medical, TTD, prospective medical.**

16IWCC0272

FINDINGS

On the date of accident, **1/7/14, 3/25/14, and 6/25/14**, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did* exist between Petitioner and Respondent.

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

Timely notice of these accidents *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to these accidents.

In the year preceding the injury, Petitioner earned $**41,724.17**; the average weekly wage was $**802.39**.

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

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

Respondent shall be given a credit of $**11,157.12** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**11,157.12**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $47,449.27, listed in Petitioner's Exhibit 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.

Respondent shall pay Petitioner temporary total disability benefits of $534.93/week for 31 and 6/7 weeks commencing August 6, 2014 through March 17, 2015, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $11,157.12 for temporary total disability benefits that have been paid.

Respondent shall authorize and pay for, pursuant to the medical fee schedule, the treatment currently being recommended by Dr. Matthew Gornetas 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.

Signature of Arbitrator

5/11/15
Date

State of Illinois)

MAY 27 2015

)SS
County of Madison)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JANICE DOWNARD
Employee/Petitioner

v.

Case# 14-WC-16359
14-WC-16360
14-WC-28400

CAHOKIA DISTRICT 187
Employer/Respondent

16IWCC0272

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On January 7, 2014, March 25, 2015, and June 25, 2014, the Respondent, Cahokia District 187, was operating under and subject to the provisions of the Illinois Workers' Compensation Act, and on these dates the relationship of employee and employer existed between the Petitioner, Janice Downard, and said Respondent.

It is undisputed that on the January 7, 2014, Petitioner sustained accidental injuries which arose out of and in the course of the employment by Respondent; and timely notice was given to Respondent for this accident. Respondent disputed that an accident occurred on March 25, 2014, and June 25, 2014, but notice to Respondent for these two dates of accident are not in dispute. The parties stipulated to an average weekly wage of $802.39. The above cases have been consolidated.

Petitioner testified that she is employed by Cahokia School District 187, and has been a custodian there for 16 years. Her job duties include various cleaning activities, including taking out large bags of garbage and cleaning and moving large furniture items. The custodial job includes a lot of heavy lifting. Petitioner testified that on January 7, 2014, it had snowed a great deal, and part of a custodian's job is shoveling all of the snow off all the sidewalks and entry areas.

Petitioner testified that while shoveling this snow she injured her low back. She testified that by the end of the day she could barely stand up straight. Again, this accident is not disputed by Respondent. After work that day the Petitioner thought her pain would go away, but it did not, so she tried some home treatment to alleviate her pain. This did not work so Petitioner went to a chiropractor a few days later.

Petitioner had been to this chiropractor before for a prior injury, however, the Petitioner had not seen the chiropractor in some time as she had recovered completely from this prior injury. Prior to the accident of January 7, 2014, Petitioner had no low back pain, no limitations on what she could do, and no problems ever performing her job duties.

After the accident of January 7, 2014, since the chiropractic treatment did not help her pain, Petitioner presented to her family doctor, Dr. Simmering. He had x-rays taken at Anderson Hospital, he prescribed muscle relaxers, and took Petitioner off work. Petitioner testified that she tried to continue to work, but had to take days off

because of continued pain. As a result, Dr. Simmering ordered an MRI and physical therapy on January 24, 2014. Petitioner testified that the MRI and first physical therapy appointment were actually set, but they were later cancelled by Respondent's nurse case manager. Petitioner was then sent by her employer to Dr. Doll on February 10.

Dr. Doll recommended physical therapy, which Petitioner started at Apex, and he also put Petitioner on work restrictions. Petitioner did physical therapy, and returned to see Dr. Doll on March 10, 2014. Dr. Doll noted that Petitioner still had pain complaints as well as issues with prolonged standing and walking, yet he said she could return to work, although Petitioner was ordered to continue physical therapy at Apex. Dr. Doll also instructed Petitioner to continue her medications, and return to see Dr. Doll on April 1, 2014. (PX 3, 053-056) Petitioner testified that she was concerned about going back to work, and she expressed these concerns to Dr. Doll.

When Petitioner returned to work she had problems doing her job because of continued low back pain. She had problems sleeping, and had to take increasing amounts of medication. The physical therapist at Apex noted that Petitioner was having increased pain while working, and problems with lifting items. (PX 5, 085-089) On March 25, 2014, while emptying the garbage, Petitioner experienced increased pain and the inability to stand up straight, so she called her supervisor, Steve Crum, to get a replacement sent to finish the job. Afterwards, Petitioner called Respondent's nurse case manager, who instructed Petitioner to call Dr. Doll's office.

Dr. Doll simply ordered more pain medications, which did not help Petitioner. Petitioner's pain got increasingly worse later that day, so Petitioner was taken by her boyfriend to Memorial Hospital, where Petitioner was given injections of pain medication. The emergency room staff noted that Petitioner had pain stemming from the accident in January, and also noted Petitioner's history of heavy lifting earlier in the day. (PX 6, 170-181) She was placed on work restrictions and ordered to follow-up with Dr. Simmering.

Petitioner saw Dr. Simmering on March 28, 2014, and the doctor noted that Petitioner was still in physical therapy, and the doctor also noted Petitioner's problems at work on March 25, 2014. At this time Petitioner was having continued low back pain, as well as pain into her left buttock and thigh. Dr. Simmering again ordered the MRI, which was obtained on April 4, 2014. Dr. Simmering also recommended additional physical therapy and work hardening, which Petitioner did at Apex. The staff at Apex noted Petitioner's continued complaints of pain in her low back. (PX 5, 090-132)

On April 11, after reviewing the MRI results, Petitioner was referred by Dr. Simmering to pain management for injections due to her continued complaints of low back pain, and pain into her left leg. (PX 2, 019-023) Petitioner was also kept on work restrictions. Petitioner underwent three lumbar epidural injections by Dr. Yang at St. Elizabeth's Hospital, and Petitioner testified that the injections helped at first, but wore off after a period of time. (PX 8) Dr. Yang noted that Petitioner's issues all started in January with the incident shoveling snow, and were subsequently exacerbated in March when Petitioner was returned to work. (PX 8, 207)

After the first injection, Dr. Yang also ordered additional physical therapy, which Petitioner later started at Associated Physicians Group, and Dr. Yang also ordered Petitioner to return for her two additional injections. While Petitioner was undergoing this additional physical therapy at Associated Physicians, the therapist continued to note that Petitioner was having continued low back pain, especially on the left, with pain into her left buttock and thigh. (PX 9, 234) This was also noted by Dr. Yang.

Between the first and second injection by Dr. Yang, the Petitioner was sent by Respondent to Dr. DeGrange for an IME. Dr. DeGrange found that Petitioner suffered injuries on January 7, 2014, and March 25, 2014, and he also causally connected Petitioner's condition to those accidents. He stated that the treatment Petitioner had up to June 4, 2014, was both reasonable and necessary. Dr. DeGrange noted that Petitioner's MRI showed annular

tears and bulging at L4-5 and L5-S1, however, the doctor claimed Petitioner was at maximum medical improvement and could return to work without restrictions. (RX 4) When DeGrange made this recommendation, the Petitioner was already on work restrictions from Dr. Simmering due to continued pain in Petitioner's low back into her left buttock and thigh, and Dr. Yang had already scheduled two more epidural injections and physical therapy.

Nonetheless, Petitioner attempted to return to work, although she initially had to modify her activity so she could sit if she needed to. On June 25, 2014, Petitioner had to move furniture during summer cleaning, and she had increased pain in her low back, as well as neck pain, so she had to sit down. She was unable to stand without assistance, so she called her supervisor, Steve Crum, who sent another individual, Calvin Spencer, to check on Petitioner. Mr. Spencer had Petitioner call Company Nurse, who instructed Petitioner to go to Midwest Occupational Medicine. The Petitioner was unable to get into Midwest until the next day, so Petitioner went to Memorial Hospital where it was noted that Petitioner had increased back pain and neck pain while moving furniture at work. (PX 6, 140-152)

Memorial Hospital instructed the Petitioner to follow-up with her family doctor, which Petitioner did the following day. Dr. Simmering noted Petitioner's history of lifting furniture the day before, and Dr. Simmering put Petitioner back on work restrictions, and instructed her to do the last injection with Dr. Yang. (PX 2, 030-033) The Petitioner saw Dr. Byler at Midwest Occupational Medicine the same day, and Dr. Byler put the same restrictions on Petitioner that Dr. Simmering did. (PX 10) Dr. Byler noted the Petitioner's injury history, and recommended she see a specialist. (PX 10)

The Respondent again sent Petitioner to Dr. DeGrange for another IME on July 7, 2014. Dr. DeGrange ordered a cervical MRI, and opined that Petitioner suffered a cervical and lumbar strain on June 25, 2014, however, contrary to the opinions of Dr. Simmering, Dr. Byler, and Dr. Yang, Dr. DeGrange claimed Petitioner was at MMI and needed no further medical treatment. (RX 4) This was less than two weeks after the accident.

Pursuant to the recommendations of both Dr. Simmering and Dr. Yang, the Petitioner did not return to work following the accident of June 25, 2014. Dr. Yang performed the third lumbar injection, and on July 23, 2014, Dr. Simmering referred Petitioner to Dr. Matthew Gornet. Petitioner saw Dr. Gornet on August 14, 2014, with continued complaints of low back pain, as well as neck pain, and pain into her left leg. Dr. Gornet noted that Petitioner had a history of chiropractic treatment, which was consistent with Petitioner's testimony at trial. Dr. Gornet opined that Petitioner had a cervical disc herniation at C5-6, as well as an annular tear and disc protrusion and L4-5 and L5-S1. Dr. Gornet's opinion was that Petitioner's problems all started on January 7, 2014, and the Petitioner's condition was causally related to her work related injury. (PX 11, 253-255)

Dr. Gornet referred Petitioner for cervical injections with Dr. Boutwell, which were performed on August 27, 2014 and September 10, 2014, and Dr. Gornet has since recommended additional physical therapy, which Petitioner did at Associated Physicians. Dr. Gornet is now recommending a new higher-quality lumbar MRI, as well as lumbar discography. (PX 11)

The Petitioner testified at trial that her life has changed drastically since her work accident. She can no longer ride her bicycle, stand for long periods, sit for long periods, or sleep comfortably. Prior to her work accident, she could do whatever she wanted.

On cross-examination, the Petitioner confirmed all the medical doctors she had seen for her injuries, and also gave additional information regarding her job duties while working for Cahokia. Petitioner again testified to her history of seeing a chiropractor in 2011 for a prior injury, and this testimony was consistent with her prior testimony and history given to Dr. Gornet.

When being questioned about the accident of January 7, 2014, which was undisputed, Petitioner testified that she did not recall hearing a pop or feeling a pull in her back. Petitioner testified that the initial physical therapy ordered by Dr. Doll did help, but only for short periods after it was done for the day.

Regarding the accident of March 25, 2014, Petitioner testified that she was cleaning up the breakfast trash when she had pain in her back, which was a little sharper than the pain she had from the January injury. She estimated the bags of garbage she was lifting weighed between 30 and 40 pounds. She reported the injury to Steve Crum, her supervisor.

For the June 25, 2014, injury, Petitioner stated that she was moving furniture and desks that day, as the cleaning had already been done. There are approximately 30 desks in a classroom, and Petitioner stated they had cleaned two classrooms that morning. On further cross-examination, Petitioner stated she is still seeing Dr. Gornet, and she still takes muscle relaxers. She is also limited around the house in what she can do.

The Respondent called Steve Crum, Petitioner's supervisor, as a witness at trial. Mr. Crum's testimony regarding Petitioner's job duties was consistent with Petitioner's testimony. He stated he vaguely remembered Petitioner's accident in March of 2014 while lifting garbage bags. He also testified that Petitioner would have been doing summer cleaning in June of 2014, with Bev Blevins, who Petitioner testified she was working with on June 25, 2014. On cross-examination, Mr. Crum confirmed Petitioner's testimony that there is no evening shift during summer cleaning.

Respondent also called David Augustine as a witness at trial. He testified that he is also kind of Petitioner's supervisor, but if Petitioner got hurt she should report it to Mr. Crum.

CONCLUSIONS OF LAW

1. The Arbitrator finds that Petitioner suffered an accident arising out of and in the course of her employment on January 7, 2014, March 25, 2014, and June 25, 2014. The Arbitrator notes that the parties stipulated to the accident occurring on January 7, 2014, which involved the Petitioner injuring her low back while shoveling snow.

With regard to the accident of March 25, 2014, the Petitioner testified credibly that while at work on March 25, 2014, she experienced increasing low back pain while lifting large garbage bags full of trash. This is consistent with the history provided to the emergency room at Memorial Hospital the same day, and the history Petitioner gave to Dr. Simmering and Dr. Yang. Respondent's witness, Steve Crum, did recall Petitioner being injured this way, and there was no evidence presented at trial to contradict Petitioner's testimony regarding this accident.

Regarding the June 25, 2014, date of accident, Petitioner testified credibly that she was moving furniture when she experienced worsening low back pain and neck pain. The Arbitrator notes that Petitioner reported this incident immediately, and Respondent submitted the report of this accident at trial. See Respondent's Exhibit 6. The accident report indicates it was called in by Kelvin Spencer, who Petitioner testified was sent over to the school she was working at to report the injury. Petitioner's testimony regarding this accident was also consistent with the notes from Memorial Hospital, Dr. Simmering, and Midwest Occupational Medicine. Petitioner was sent to Midwest by her employer on the date of the accident. Dr. DeGrange even opined Petitioner suffered an injury on this date.

2. The Arbitrator finds Petitioner's current condition of ill-being to be causally connected to the accidents of January 7, 2014, March 25, 2014, and June 25, 2014. In doing so, the Arbitrator relies primarily on the opinions of Dr. Simmering, Dr. Yang, Dr. Byler, and Dr. Gornet. The medical evidence and testimony shows

that Petitioner's current low back condition was initially caused by the undisputed accident of January 7, 2014. While she was released to return to work in March of 2014, Petitioner clearly had not recovered from the initial injury as she was still undergoing active treatment with Apex and Dr. Doll, Respondent's chosen doctor.

The Petitioner's return to work in March and June of 2014, and the resulting accidents of March 25, 2014, and June 25, 2014, further deteriorated Petitioner's condition preventing Petitioner recovery, and leading to the necessity of additional treatment, currently at the hands of Dr. Gornet. While Dr. DeGrange stated in his initial IME report that Petitioner was at MMI, and could return to work without restrictions, he fails to mention that at that time, two other physicians were recommending additional treatment in the form of physical therapy and injections. He also fails to mention that at this point the Petitioner had already started having pain into her left buttock and thigh.

Further, after Petitioner's injury of June 25, 2014, Dr. DeGrange states that Petitioner suffered cervical and lumbar strains, however, he somehow states the Petitioner needs no treatment for these injuries only two weeks after. This is contrary to the opinions of three doctors, one of which, Dr. Byler, the Petitioner was sent to by her employer. Dr. Byler, and Dr. Simmering, gave Petitioner restrictions after the June 2014 injury, and Dr. Byler recommended Petitioner see a specialist, however, in his second IME report, Dr. DeGrange never mentions this, or the fact that Petitioner has continued to treat in the form of physical therapy and injections. The opinions of Dr. Simmering, Dr. Yang, and Dr. Gornet are simply more credible than those of Dr. DeGrange.

3. For the reasons enumerated above, the Arbitrator finds Respondent liable for the medical treatment and accompanying medical bills contained in Petitioner's Exhibit 13 totaling $47,449.27. Respondent shall pay these reasonable and necessary medical services 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.

4. Respondent shall pay Petitioner temporary total disability benefits of $534.93/week for 31 and 6/7 weeks commencing August 6, 2014 through March 17, 2015, as provided in Section 8(b) of the Act.

5. Also, for the reasons enumerated above, Respondent shall authorize and pay for, pursuant to the medical fee schedule, the treatment currently being recommended by Dr. Matthew Gornet, namely a lumbar MRI and CT discogram, as provided in Sections 8(a) and 8.2 of the Act.

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

DOWNARD, JANICE
Employee/Petitioner

Case# **14WC016360**

14WC016359
14WC028100

CAHOKIA DISTRICT 187
Employer/Respondent

16IWCC0272

On 5/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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STATE OF ILLINOIS)
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☐ 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)

Janice Downard
Employee/Petitioner

v.

Case # 14WC16360

Consolidated cases: 14 WC 16359
14WC28400

Cahokia District 187
Employer/Respondent

16IWCC0272

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 **3/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Accident (3/25/14, 6/25/14), Causal connection, medical, TTD, prospective medical.**

16IWCC0272

FINDINGS

On the date of accident, **1/7/14, 3/25/14, and 6/25/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to these accidents.

In the year preceding the injury, Petitioner earned $**41,724.17**; the average weekly wage was $**802.39**.

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

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

Respondent shall be given a credit of $**11,157.12** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**11,157.12**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $47,449.27, listed in Petitioner's Exhibit 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.

Respondent shall pay Petitioner temporary total disability benefits of $534.93/week for 31 and 6/7 weeks commencing August 6, 2014 through March 17, 2015, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $11,157.12 for temporary total disability benefits that have been paid.

Respondent shall authorize and pay for, pursuant to the medical fee schedule, the treatment currently being recommended by Dr. Matthew Gornetas 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.

Signature of Arbitrator

5/11/15
Date

State of Illinois)

MAY 27 2015

)SS
County of Madison)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JANICE DOWNARD
Employee/Petitioner

v.

16IWCC0272

Case# 14-WC-16359
14-WC-16360
14-WC-28400

CAHOKIA DISTRICT 187
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On January 7, 2014, March 25, 2015, and June 25, 2014, the Respondent, Cahokia District 187, was operating under and subject to the provisions of the Illinois Workers' Compensation Act, and on these dates the relationship of employee and employer existed between the Petitioner, Janice Downard, and said Respondent.

It is undisputed that on the January 7, 2014, Petitioner sustained accidental injuries which arose out of and in the course of the employment by Respondent; and timely notice was given to Respondent for this accident. Respondent disputed that an accident occurred on March 25, 2014, and June 25, 2014, but notice to Respondent for these two dates of accident are not in dispute. The parties stipulated to an average weekly wage of $802.39. The above cases have been consolidated.

Petitioner testified that she is employed by Cahokia School District 187, and has been a custodian there for 16 years. Her job duties include various cleaning activities, including taking out large bags of garbage and cleaning and moving large furniture items. The custodial job includes a lot of heavy lifting. Petitioner testified that on January 7, 2014, it had snowed a great deal, and part of a custodian's job is shoveling all of the snow off all the sidewalks and entry areas.

Petitioner testified that while shoveling this snow she injured her low back. She testified that by the end of the day she could barely stand up straight. Again, this accident is not disputed by Respondent. After work that day the Petitioner thought her pain would go away, but it did not, so she tried some home treatment to alleviate her pain. This did not work so Petitioner went to a chiropractor a few days later.

Petitioner had been to this chiropractor before for a prior injury, however, the Petitioner had not seen the chiropractor in some time as she had recovered completely from this prior injury. Prior to the accident of January 7, 2014, Petitioner had no low back pain, no limitations on what she could do, and no problems ever performing her job duties.

After the accident of January 7, 2014, since the chiropractic treatment did not help her pain, Petitioner presented to her family doctor, Dr. Simmering. He had x-rays taken at Anderson Hospital, he prescribed muscle relaxers, and took Petitioner off work. Petitioner testified that she tried to continue to work, but had to take days off

because of continued pain. As a result, Dr. Simmering ordered an MRI and physical therapy on January 24, 2014. Petitioner testified that the MRI and first physical therapy appointment were actually set, but they were later cancelled by Respondent's nurse case manager. Petitioner was then sent by her employer to Dr. Doll on February 10.

Dr. Doll recommended physical therapy, which Petitioner started at Apex, and he also put Petitioner on work restrictions. Petitioner did physical therapy, and returned to see Dr. Doll on March 10, 2014. Dr. Doll noted that Petitioner still had pain complaints as well as issues with prolonged standing and walking, yet he said she could return to work, although Petitioner was ordered to continue physical therapy at Apex. Dr. Doll also instructed Petitioner to continue her medications, and return to see Dr. Doll on April 1, 2014. (PX 3, 053-056) Petitioner testified that she was concerned about going back to work, and she expressed these concerns to Dr. Doll.

When Petitioner returned to work she had problems doing her job because of continued low back pain. She had problems sleeping, and had to take increasing amounts of medication. The physical therapist at Apex noted that Petitioner was having increased pain while working, and problems with lifting items. (PX 5, 085-089) On March 25, 2014, while emptying the garbage, Petitioner experienced increased pain and the inability to stand up straight, so she called her supervisor, Steve Crum, to get a replacement sent to finish the job. Afterwards, Petitioner called Respondent's nurse case manager, who instructed Petitioner to call Dr. Doll's office.

Dr. Doll simply ordered more pain medications, which did not help Petitioner. Petitioner's pain got increasingly worse later that day, so Petitioner was taken by her boyfriend to Memorial Hospital, where Petitioner was given injections of pain medication. The emergency room staff noted that Petitioner had pain stemming from the accident in January, and also noted Petitioner's history of heavy lifting earlier in the day. (PX 6, 170-181) She was placed on work restrictions and ordered to follow-up with Dr. Simmering.

Petitioner saw Dr. Simmering on March 28, 2014, and the doctor noted that Petitioner was still in physical therapy, and the doctor also noted Petitioner's problems at work on March 25, 2014. At this time Petitioner was having continued low back pain, as well as pain into her left buttock and thigh. Dr. Simmering again ordered the MRI, which was obtained on April 4, 2014. Dr. Simmering also recommended additional physical therapy and work hardening, which Petitioner did at Apex. The staff at Apex noted Petitioner's continued complaints of pain in her low back. (PX 5, 090-132)

On April 11, after reviewing the MRI results, Petitioner was referred by Dr. Simmering to pain management for injections due to her continued complaints of low back pain, and pain into her left leg. (PX 2, 019-023) Petitioner was also kept on work restrictions. Petitioner underwent three lumbar epidural injections by Dr. Yang at St. Elizabeth's Hospital, and Petitioner testified that the injections helped at first, but wore off after a period of time. (PX 8) Dr. Yang noted that Petitioner's issues all started in January with the incident shoveling snow, and were subsequently exacerbated in March when Petitioner was returned to work. (PX 8, 207)

After the first injection, Dr. Yang also ordered additional physical therapy, which Petitioner later started at Associated Physicians Group, and Dr. Yang also ordered Petitioner to return for her two additional injections. While Petitioner was undergoing this additional physical therapy at Associated Physicians, the therapist continued to note that Petitioner was having continued low back pain, especially on the left, with pain into her left buttock and thigh. (PX 9, 234) This was also noted by Dr. Yang.

Between the first and second injection by Dr. Yang, the Petitioner was sent by Respondent to Dr. DeGrange for an IME. Dr. DeGrange found that Petitioner suffered injuries on January 7, 2014, and March 25, 2014, and he also causally connected Petitioner's condition to those accidents. He stated that the treatment Petitioner had up to June 4, 2014, was both reasonable and necessary. Dr. DeGrange noted that Petitioner's MRI showed annular

tears and bulging at L4-5 and L5-S1, however, the doctor claimed Petitioner was at maximum medical improvement and could return to work without restrictions. (RX 4) When DeGrange made this recommendation, the Petitioner was already on work restrictions from Dr. Simmering due to continued pain in Petitioner's low back into her left buttock and thigh, and Dr. Yang had already scheduled two more epidural injections and physical therapy.

Nonetheless, Petitioner attempted to return to work, although she initially had to modify her activity so she could sit if she needed to. On June 25, 2014, Petitioner had to move furniture during summer cleaning, and she had increased pain in her low back, as well as neck pain, so she had to sit down. She was unable to stand without assistance, so she called her supervisor, Steve Crum, who sent another individual, Calvin Spencer, to check on Petitioner. Mr. Spencer had Petitioner call Company Nurse, who instructed Petitioner to go to Midwest Occupational Medicine. The Petitioner was unable to get into Midwest until the next day, so Petitioner went to Memorial Hospital where it was noted that Petitioner had increased back pain and neck pain while moving furniture at work. (PX 6, 140-152)

Memorial Hospital instructed the Petitioner to follow-up with her family doctor, which Petitioner did the following day. Dr. Simmering noted Petitioner's history of lifting furniture the day before, and Dr. Simmering put Petitioner back on work restrictions, and instructed her to do the last injection with Dr. Yang. (PX 2, 030-033) The Petitioner saw Dr. Byler at Midwest Occupational Medicine the same day, and Dr. Byler put the same restrictions on Petitioner that Dr. Simmering did. (PX 10) Dr. Byler noted the Petitioner's injury history, and recommended she see a specialist. (PX 10)

The Respondent again sent Petitioner to Dr. DeGrange for another IME on July 7, 2014. Dr. DeGrange ordered a cervical MRI, and opined that Petitioner suffered a cervical and lumbar strain on June 25, 2014, however, contrary to the opinions of Dr. Simmering, Dr. Byler, and Dr. Yang, Dr. DeGrange claimed Petitioner was at MMI and needed no further medical treatment. (RX 4) This was less than two weeks after the accident.

Pursuant to the recommendations of both Dr. Simmering and Dr. Yang, the Petitioner did not return to work following the accident of June 25, 2014. Dr. Yang performed the third lumbar injection, and on July 23, 2014, Dr. Simmering referred Petitioner to Dr. Matthew Gornet. Petitioner saw Dr. Gornet on August 14, 2014, with continued complaints of low back pain, as well as neck pain, and pain into her left leg. Dr. Gornet noted that Petitioner had a history of chiropractic treatment, which was consistent with Petitioner's testimony at trial. Dr. Gornet opined that Petitioner had a cervical disc herniation at C5-6, as well as an annular tear and disc protrusion and L4-5 and L5-S1. Dr. Gornet's opinion was that Petitioner's problems all started on January 7, 2014, and the Petitioner's condition was causally related to her work related injury. (PX 11, 253-255)

Dr. Gornet referred Petitioner for cervical injections with Dr. Boutwell, which were performed on August 27, 2014 and September 10, 2014, and Dr. Gornet has since recommended additional physical therapy, which Petitioner did at Associated Physicians. Dr. Gornet is now recommending a new higher-quality lumbar MRI, as well as lumbar discography. (PX 11)

The Petitioner testified at trial that her life has changed drastically since her work accident. She can no longer ride her bicycle, stand for long periods, sit for long periods, or sleep comfortably. Prior to her work accident, she could do whatever she wanted.

On cross-examination, the Petitioner confirmed all the medical doctors she had seen for her injuries, and also gave additional information regarding her job duties while working for Cahokia. Petitioner again testified to her history of seeing a chiropractor in 2011 for a prior injury, and this testimony was consistent with her prior testimony and history given to Dr. Gornet.

When being questioned about the accident of January 7, 2014, which was undisputed, Petitioner testified that she did not recall hearing a pop or feeling a pull in her back. Petitioner testified that the initial physical therapy ordered by Dr. Doll did help, but only for short periods after it was done for the day.

Regarding the accident of March 25, 2014, Petitioner testified that she was cleaning up the breakfast trash when she had pain in her back, which was a little sharper than the pain she had from the January injury. She estimated the bags of garbage she was lifting weighed between 30 and 40 pounds. She reported the injury to Steve Crum, her supervisor.

For the June 25, 2014, injury, Petitioner stated that she was moving furniture and desks that day, as the cleaning had already been done. There are approximately 30 desks in a classroom, and Petitioner stated they had cleaned two classrooms that morning. On further cross-examination, Petitioner stated she is still seeing Dr. Gornet, and she still takes muscle relaxers. She is also limited around the house in what she can do.

The Respondent called Steve Crum, Petitioner's supervisor, as a witness at trial. Mr. Crum's testimony regarding Petitioner's job duties was consistent with Petitioner's testimony. He stated he vaguely remembered Petitioner's accident in March of 2014 while lifting garbage bags. He also testified that Petitioner would have been doing summer cleaning in June of 2014, with Bev Blevins, who Petitioner testified she was working with on June 25, 2014. On cross-examination, Mr. Crum confirmed Petitioner's testimony that there is no evening shift during summer cleaning.

Respondent also called David Augustine as a witness at trial. He testified that he is also kind of Petitioner's supervisor, but if Petitioner got hurt she should report it to Mr. Crum.

CONCLUSIONS OF LAW

1. The Arbitrator finds that Petitioner suffered an accident arising out of and in the course of her employment on January 7, 2014, March 25, 2014, and June 25, 2014. The Arbitrator notes that the parties stipulated to the accident occurring on January 7, 2014, which involved the Petitioner injuring her low back while shoveling snow.

With regard to the accident of March 25, 2014, the Petitioner testified credibly that while at work on March 25, 2014, she experienced increasing low back pain while lifting large garbage bags full of trash. This is consistent with the history provided to the emergency room at Memorial Hospital the same day, and the history Petitioner gave to Dr. Simmering and Dr. Yang. Respondent's witness, Steve Crum, did recall Petitioner being injured this way, and there was no evidence presented at trial to contradict Petitioner's testimony regarding this accident.

Regarding the June 25, 2014, date of accident, Petitioner testified credibly that she was moving furniture when she experienced worsening low back pain and neck pain. The Arbitrator notes that Petitioner reported this incident immediately, and Respondent submitted the report of this accident at trial. See Respondent's Exhibit 6. The accident report indicates it was called in by Kelvin Spencer, who Petitioner testified was sent over to the school she was working at to report the injury. Petitioner's testimony regarding this accident was also consistent with the notes from Memorial Hospital, Dr. Simmering, and Midwest Occupational Medicine. Petitioner was sent to Midwest by her employer on the date of the accident. Dr. DeGrange even opined Petitioner suffered an injury on this date.

2. The Arbitrator finds Petitioner's current condition of ill-being to be causally connected to the accidents of January 7, 2014, March 25, 2014, and June 25, 2014. In doing so, the Arbitrator relies primarily on the opinions of Dr. Simmering, Dr. Yang, Dr. Byler, and Dr. Gornet. The medical evidence and testimony shows

that Petitioner's current low back condition was initially caused by the undisputed accident of January 7, 2014. While she was released to return to work in March of 2014, Petitioner clearly had not recovered from the initial injury as she was still undergoing active treatment with Apex and Dr. Doll, Respondent's chosen doctor.

The Petitioner's return to work in March and June of 2014, and the resulting accidents of March 25, 2014, and June 25, 2014, further deteriorated Petitioner's condition preventing Petitioner recovery, and leading to the necessity of additional treatment, currently at the hands of Dr. Gornet. While Dr. DeGrange stated in his initial IME report that Petitioner was at MMI, and could return to work without restrictions, he fails to mention that at that time, two other physicians were recommending additional treatment in the form of physical therapy and injections. He also fails to mention that at this point the Petitioner had already started having pain into her left buttock and thigh.

Further, after Petitioner's injury of June 25, 2014, Dr. DeGrange states that Petitioner suffered cervical and lumbar strains, however, he somehow states the Petitioner needs no treatment for these injuries only two weeks after. This is contrary to the opinions of three doctors, one of which, Dr. Byler, the Petitioner was sent to by her employer. Dr. Byler, and Dr. Simmering, gave Petitioner restrictions after the June 2014 injury, and Dr. Byler recommended Petitioner see a specialist, however, in his second IME report, Dr. DeGrange never mentions this, or the fact that Petitioner has continued to treat in the form of physical therapy and injections. The opinions of Dr. Simmering, Dr. Yang, and Dr. Gornet are simply more credible than those of Dr. DeGrange.

3. For the reasons enumerated above, the Arbitrator finds Respondent liable for the medical treatment and accompanying medical bills contained in Petitioner's Exhibit 13 totaling $47,449.27. Respondent shall pay these reasonable and necessary medical services 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.

4. Respondent shall pay Petitioner temporary total disability benefits of $534.93/week for 31 and 6/7 weeks commencing August 6, 2014 through March 17, 2015, as provided in Section 8(b) of the Act.

5. Also, for the reasons enumerated above, Respondent shall authorize and pay for, pursuant to the medical fee schedule, the treatment currently being recommended by Dr. Matthew Gornet, namely a lumbar MRI and CT discogram, as provided in Sections 8(a) and 8.2 of the Act.

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

DOWNARD, JANICE
Employee/Petitioner

Case# **14WC028400**

14WC016360
14WC016359

CAHOKIA DISTRICT 187
Employer/Respondent

16IWCC0272

On 5/27/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1239 KOLKER LAW OFFICES
DANIEL G BROOMBAUGH
9423 W MAIN ST
BELLEVILLE, IL 62223

5196 CLAYBORNE SABO & WAGNER
JENNIFER BARBIERI
525 W MAIN ST SUITE 105
BELLEVILLE, IL 62220

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)

Janice Downard
Employee/Petitioner

v.

Cahokia District 187
Employer/Respondent

Case # 14WC28400

Consolidated cases: 14WC16360, 14 WC 16359

16IWCC0272

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 **3/17/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Accident (3/25/14, 6/25/14), Causal connection, medical, TTD, prospective medical.**

FINDINGS

On the date of accident, **1/7/14, 3/25/14, and 6/25/14**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to these accidents.

In the year preceding the injury, Petitioner earned **$41,724.17**; the average weekly wage was **$802.39**.

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

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

Respondent shall be given a credit of **$11,157.12** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$11,157.12**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $47,449.27, listed in Petitioner's Exhibit 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.

Respondent shall pay Petitioner temporary total disability benefits of $534.93/week for 31 and 6/7 weeks commencing August 6, 2014 through March 17, 2015, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $11,157.12 for temporary total disability benefits that have been paid.

Respondent shall authorize and pay for, pursuant to the medical fee schedule, the treatment currently being recommended by Dr. Matthew Gornetas 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.

Signature of Arbitrator

5/11/15
Date

State of Illinois)

MAY 27 2015

)SS
County of Madison)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JANICE DOWNARD
Employee/Petitioner

v.

Case# 14-WC-16359
14-WC-16360
14-WC-28400

16IWCC0272

CAHOKIA DISTRICT 187
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On January 7, 2014, March 25, 2015, and June 25, 2014, the Respondent, Cahokia District 187, was operating under and subject to the provisions of the Illinois Workers' Compensation Act, and on these dates the relationship of employee and employer existed between the Petitioner, Janice Downard, and said Respondent.

It is undisputed that on the January 7, 2014, Petitioner sustained accidental injuries which arose out of and in the course of the employment by Respondent; and timely notice was given to Respondent for this accident. Respondent disputed that an accident occurred on March 25, 2014, and June 25, 2014, but notice to Respondent for these two dates of accident are not in dispute. The parties stipulated to an average weekly wage of $802.39. The above cases have been consolidated.

Petitioner testified that she is employed by Cahokia School District 187, and has been a custodian there for 16 years. Her job duties include various cleaning activities, including taking out large bags of garbage and cleaning and moving large furniture items. The custodial job includes a lot of heavy lifting. Petitioner testified that on January 7, 2014, it had snowed a great deal, and part of a custodian's job is shoveling all of the snow off all the sidewalks and entry areas.

Petitioner testified that while shoveling this snow she injured her low back. She testified that by the end of the day she could barely stand up straight. Again, this accident is not disputed by Respondent. After work that day the Petitioner thought her pain would go away, but it did not, so she tried some home treatment to alleviate her pain. This did not work so Petitioner went to a chiropractor a few days later.

Petitioner had been to this chiropractor before for a prior injury, however, the Petitioner had not seen the chiropractor in some time as she had recovered completely from this prior injury. Prior to the accident of January 7, 2014, Petitioner had no low back pain, no limitations on what she could do, and no problems ever performing her job duties.

After the accident of January 7, 2014, since the chiropractic treatment did not help her pain, Petitioner presented to her family doctor, Dr. Simmering. He had x-rays taken at Anderson Hospital, he prescribed muscle relaxers, and took Petitioner off work. Petitioner testified that she tried to continue to work, but had to take days off

because of continued pain. As a result, Dr. Simmering ordered an MRI and physical therapy on January 24, 2014. Petitioner testified that the MRI and first physical therapy appointment were actually set, but they were later cancelled by Respondent's nurse case manager. Petitioner was then sent by her employer to Dr. Doll on February 10.

Dr. Doll recommended physical therapy, which Petitioner started at Apex, and he also put Petitioner on work restrictions. Petitioner did physical therapy, and returned to see Dr. Doll on March 10, 2014. Dr. Doll noted that Petitioner still had pain complaints as well as issues with prolonged standing and walking, yet he said she could return to work, although Petitioner was ordered to continue physical therapy at Apex. Dr. Doll also instructed Petitioner to continue her medications, and return to see Dr. Doll on April 1, 2014. (PX 3, 053-056) Petitioner testified that she was concerned about going back to work, and she expressed these concerns to Dr. Doll.

When Petitioner returned to work she had problems doing her job because of continued low back pain. She had problems sleeping, and had to take increasing amounts of medication. The physical therapist at Apex noted that Petitioner was having increased pain while working, and problems with lifting items. (PX 5, 085-089) On March 25, 2014, while emptying the garbage, Petitioner experienced increased pain and the inability to stand up straight, so she called her supervisor, Steve Crum, to get a replacement sent to finish the job. Afterwards, Petitioner called Respondent's nurse case manager, who instructed Petitioner to call Dr. Doll's office.

Dr. Doll simply ordered more pain medications, which did not help Petitioner. Petitioner's pain got increasingly worse later that day, so Petitioner was taken by her boyfriend to Memorial Hospital, where Petitioner was given injections of pain medication. The emergency room staff noted that Petitioner had pain stemming from the accident in January, and also noted Petitioner's history of heavy lifting earlier in the day. (PX 6, 170-181) She was placed on work restrictions and ordered to follow-up with Dr. Simmering.

Petitioner saw Dr. Simmering on March 28, 2014, and the doctor noted that Petitioner was still in physical therapy, and the doctor also noted Petitioner's problems at work on March 25, 2014. At this time Petitioner was having continued low back pain, as well as pain into her left buttock and thigh. Dr. Simmering again ordered the MRI, which was obtained on April 4, 2014. Dr. Simmering also recommended additional physical therapy and work hardening, which Petitioner did at Apex. The staff at Apex noted Petitioner's continued complaints of pain in her low back. (PX 5, 090-132)

On April 11, after reviewing the MRI results, Petitioner was referred by Dr. Simmering to pain management for injections due to her continued complaints of low back pain, and pain into her left leg. (PX 2, 019-023) Petitioner was also kept on work restrictions. Petitioner underwent three lumbar epidural injections by Dr. Yang at St. Elizabeth's Hospital, and Petitioner testified that the injections helped at first, but wore off after a period of time. (PX 8) Dr. Yang noted that Petitioner's issues all started in January with the incident shoveling snow, and were subsequently exacerbated in March when Petitioner was returned to work. (PX 8, 207)

After the first injection, Dr. Yang also ordered additional physical therapy, which Petitioner later started at Associated Physicians Group, and Dr. Yang also ordered Petitioner to return for her two additional injections. While Petitioner was undergoing this additional physical therapy at Associated Physicians, the therapist continued to note that Petitioner was having continued low back pain, especially on the left, with pain into her left buttock and thigh. (PX 9, 234) This was also noted by Dr. Yang.

Between the first and second injection by Dr. Yang, the Petitioner was sent by Respondent to Dr. DeGrange for an IME. Dr. DeGrange found that Petitioner suffered injuries on January 7, 2014, and March 25, 2014, and he also causally connected Petitioner's condition to those accidents. He stated that the treatment Petitioner had up to June 4, 2014, was both reasonable and necessary. Dr. DeGrange noted that Petitioner's MRI showed annular

tears and bulging at L4-5 and L5-S1, however, the doctor claimed Petitioner was at maximum medical improvement and could return to work without restrictions. (RX 4) When DeGrange made this recommendation, the Petitioner was already on work restrictions from Dr. Simmering due to continued pain in Petitioner's low back into her left buttock and thigh, and Dr. Yang had already scheduled two more epidural injections and physical therapy.

Nonetheless, Petitioner attempted to return to work, although she initially had to modify her activity so she could sit if she needed to. On June 25, 2014, Petitioner had to move furniture during summer cleaning, and she had increased pain in her low back, as well as neck pain, so she had to sit down. She was unable to stand without assistance, so she called her supervisor, Steve Crum, who sent another individual, Calvin Spencer, to check on Petitioner. Mr. Spencer had Petitioner call Company Nurse, who instructed Petitioner to go to Midwest Occupational Medicine. The Petitioner was unable to get into Midwest until the next day, so Petitioner went to Memorial Hospital where it was noted that Petitioner had increased back pain and neck pain while moving furniture at work. (PX 6, 140-152)

Memorial Hospital instructed the Petitioner to follow-up with her family doctor, which Petitioner did the following day. Dr. Simmering noted Petitioner's history of lifting furniture the day before, and Dr. Simmering put Petitioner back on work restrictions, and instructed her to do the last injection with Dr. Yang. (PX 2, 030-033) The Petitioner saw Dr. Byler at Midwest Occupational Medicine the same day, and Dr. Byler put the same restrictions on Petitioner that Dr. Simmering did. (PX 10) Dr. Byler noted the Petitioner's injury history, and recommended she see a specialist. (PX 10)

The Respondent again sent Petitioner to Dr. DeGrange for another IME on July 7, 2014. Dr. DeGrange ordered a cervical MRI, and opined that Petitioner suffered a cervical and lumbar strain on June 25, 2014, however, contrary to the opinions of Dr. Simmering, Dr. Byler, and Dr. Yang, Dr. DeGrange claimed Petitioner was at MMI and needed no further medical treatment. (RX 4) This was less than two weeks after the accident.

Pursuant to the recommendations of both Dr. Simmering and Dr. Yang, the Petitioner did not return to work following the accident of June 25, 2014. Dr. Yang performed the third lumbar injection, and on July 23, 2014, Dr. Simmering referred Petitioner to Dr. Matthew Gornet. Petitioner saw Dr. Gornet on August 14, 2014, with continued complaints of low back pain, as well as neck pain, and pain into her left leg. Dr. Gornet noted that Petitioner had a history of chiropractic treatment, which was consistent with Petitioner's testimony at trial. Dr. Gornet opined that Petitioner had a cervical disc herniation at C5-6, as well as an annular tear and disc protrusion and L4-5 and L5-S1. Dr. Gornet's opinion was that Petitioner's problems all started on January 7, 2014, and the Petitioner's condition was causally related to her work related injury. (PX 11, 253-255)

Dr. Gornet referred Petitioner for cervical injections with Dr. Boutwell, which were performed on August 27, 2014 and September 10, 2014, and Dr. Gornet has since recommended additional physical therapy, which Petitioner did at Associated Physicians. Dr. Gornet is now recommending a new higher-quality lumbar MRI, as well as lumbar discography. (PX 11)

The Petitioner testified at trial that her life has changed drastically since her work accident. She can no longer ride her bicycle, stand for long periods, sit for long periods, or sleep comfortably. Prior to her work accident, she could do whatever she wanted.

On cross-examination, the Petitioner confirmed all the medical doctors she had seen for her injuries, and also gave additional information regarding her job duties while working for Cahokia. Petitioner again testified to her history of seeing a chiropractor in 2011 for a prior injury, and this testimony was consistent with her prior testimony and history given to Dr. Gornet.

When being questioned about the accident of January 7, 2014, which was undisputed, Petitioner testified that she did not recall hearing a pop or feeling a pull in her back. Petitioner testified that the initial physical therapy ordered by Dr. Doll did help, but only for short periods after it was done for the day.

Regarding the accident of March 25, 2014, Petitioner testified that she was cleaning up the breakfast trash when she had pain in her back, which was a little sharper than the pain she had from the January injury. She estimated the bags of garbage she was lifting weighed between 30 and 40 pounds. She reported the injury to Steve Crum, her supervisor.

For the June 25, 2014, injury, Petitioner stated that she was moving furniture and desks that day, as the cleaning had already been done. There are approximately 30 desks in a classroom, and Petitioner stated they had cleaned two classrooms that morning. On further cross-examination, Petitioner stated she is still seeing Dr. Gornet, and she still takes muscle relaxers. She is also limited around the house in what she can do.

The Respondent called Steve Crum, Petitioner's supervisor, as a witness at trial. Mr. Crum's testimony regarding Petitioner's job duties was consistent with Petitioner's testimony. He stated he vaguely remembered Petitioner's accident in March of 2014 while lifting garbage bags. He also testified that Petitioner would have been doing summer cleaning in June of 2014, with Bev Blevins, who Petitioner testified she was working with on June 25, 2014. On cross-examination, Mr. Crum confirmed Petitioner's testimony that there is no evening shift during summer cleaning.

Respondent also called David Augustine as a witness at trial. He testified that he is also kind of Petitioner's supervisor, but if Petitioner got hurt she should report it to Mr. Crum.

CONCLUSIONS OF LAW

1. The Arbitrator finds that Petitioner suffered an accident arising out of and in the course of her employment on January 7, 2014, March 25, 2014, and June 25, 2014. The Arbitrator notes that the parties stipulated to the accident occurring on January 7, 2014, which involved the Petitioner injuring her low back while shoveling snow.

With regard to the accident of March 25, 2014, the Petitioner testified credibly that while at work on March 25, 2014, she experienced increasing low back pain while lifting large garbage bags full of trash. This is consistent with the history provided to the emergency room at Memorial Hospital the same day, and the history Petitioner gave to Dr. Simmering and Dr. Yang. Respondent's witness, Steve Crum, did recall Petitioner being injured this way, and there was no evidence presented at trial to contradict Petitioner's testimony regarding this accident.

Regarding the June 25, 2014, date of accident, Petitioner testified credibly that she was moving furniture when she experienced worsening low back pain and neck pain. The Arbitrator notes that Petitioner reported this incident immediately, and Respondent submitted the report of this accident at trial. See Respondent's Exhibit 6. The accident report indicates it was called in by Kelvin Spencer, who Petitioner testified was sent over to the school she was working at to report the injury. Petitioner's testimony regarding this accident was also consistent with the notes from Memorial Hospital, Dr. Simmering, and Midwest Occupational Medicine. Petitioner was sent to Midwest by her employer on the date of the accident. Dr. DeGrange even opined Petitioner suffered an injury on this date.

2. The Arbitrator finds Petitioner's current condition of ill-being to be causally connected to the accidents of January 7, 2014, March 25, 2014, and June 25, 2014. In doing so, the Arbitrator relies primarily on the opinions of Dr. Simmering, Dr. Yang, Dr. Byler, and Dr. Gornet. The medical evidence and testimony shows

that Petitioner's current low back condition was initially caused by the undisputed accident of January 7, 2014. While she was released to return to work in March of 2014, Petitioner clearly had not recovered from the initial injury as she was still undergoing active treatment with Apex and Dr. Doll, Respondent's chosen doctor.

The Petitioner's return to work in March and June of 2014, and the resulting accidents of March 25, 2014, and June 25, 2014, further deteriorated Petitioner's condition preventing Petitioner recovery, and leading to the necessity of additional treatment, currently at the hands of Dr. Gornet. While Dr. DeGrange stated in his initial IME report that Petitioner was at MMI, and could return to work without restrictions, he fails to mention that at that time, two other physicians were recommending additional treatment in the form of physical therapy and injections. He also fails to mention that at this point the Petitioner had already started having pain into her left buttock and thigh.

Further, after Petitioner's injury of June 25, 2014, Dr. DeGrange states that Petitioner suffered cervical and lumbar strains, however, he somehow states the Petitioner needs no treatment for these injuries only two weeks after. This is contrary to the opinions of three doctors, one of which, Dr. Byler, the Petitioner was sent to by her employer. Dr. Byler, and Dr. Simmering, gave Petitioner restrictions after the June 2014 injury, and Dr. Byler recommended Petitioner see a specialist, however, in his second IME report, Dr. DeGrange never mentions this, or the fact that Petitioner has continued to treat in the form of physical therapy and injections. The opinions of Dr. Simmering, Dr. Yang, and Dr. Gornet are simply more credible than those of Dr. DeGrange.

3. For the reasons enumerated above, the Arbitrator finds Respondent liable for the medical treatment and accompanying medical bills contained in Petitioner's Exhibit 13 totaling $47,449.27. Respondent shall pay these reasonable and necessary medical services 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.

4. Respondent shall pay Petitioner temporary total disability benefits of $534.93/week for 31 and 6/7 weeks commencing August 6, 2014 through March 17, 2015, as provided in Section 8(b) of the Act.

5. Also, for the reasons enumerated above, Respondent shall authorize and pay for, pursuant to the medical fee schedule, the treatment currently being recommended by Dr. Matthew Gornet, namely a lumbar MRI and CT discogram, as provided in Sections 8(a) and 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Nevin,

Petitioner,

vs.

NO: 11 WC 32807

16IWCC0273

Atlas Door Repair,

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 and partial 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 finds that Petitioner failed to prove that he sustained any permanency as a result of his alleged head injury and the award of 1% person as a whole under §8(d) 2 is hereby denied. The Commission also finds that the Petitioner sustained a loss of use of 6% of his right leg for the injury sustained on July 12, 2011.

Outside of his emergency room visit on July 12, 2011, the Petitioner received no other treatment to his alleged head injury. The Petitioner further testified that his head was fine. (Transcript Pgs. 26-27) A later MRI taken by the Respondent's medical examiner was negative. (Petitioner Exhibit 4)

The Petitioner also sustained redness and draining from an abrasion on the right leg that he sustained July 12, 2011. X-rays and ultra sound of the leg were negative. Although the ulcers were nearly completely healed and the erythema and swelling were gone, Petitioner still had complaints of persistent numbness and intermittent pain over the right shin. (Petitioner Exhibit 2, Respondent Exhibit 4)The Commission finds that Petitioner sustained a 6% loss of use to the right leg.

All else is affirmed.

16IWCC0273

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $826.56 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. Respondent is entitled to a credit of $4,899.36 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $695.78 per week for a period of 12.9 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the permanent loss of use to the right leg to the extent of 6%.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,100.00. 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 25 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 2/24/16
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NEVIN, JAMES
Employee/Petitioner

Case# **11WC032807**

16IWCC0273

ATLAS DOOR REPAIR
Employer/Respondent

On 1/29/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

1334 STEPHEN G PINTO LTD
CELSO FUENTES JR
111 W WASHINGTON ST SUITE 1521
CHICAGO, IL 60602

0000 THADDEUS J GUSTAFASON
WILLIAM A DELANY
2 N LASALLE ST SUITE 2510
CHICAGO, IL 60602

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

James Nevin,
Employee/Petitioner

v.

Atlas Door Repair,
Employer/Respondent

Case # **11** WC **32807**

Consolidated cases: **none**

16IWCC0273

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **New Lenox**, on **11/17/14**. 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 _____

16IWCC0273

FINDINGS

On **7/12/11**, 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 $**64,471.68**; the average weekly wage was $**1,239.84**.

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 $**4,899.36** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**4,899.36**.

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 $826.56 per week for 4-5/7 weeks, commencing 7/18/11 through 8/19/11, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7/13/11 through 11/17/14, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $4,899.36 for temporary total disability benefits that have been paid. To the extent the amount paid in TTD exceeds the amount awarded, Respondent is entitled to a credit in said amount to be applied to the permanency portion of this award.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 21.5 weeks, because the injuries sustained caused the 10% loss of the right leg, as provided in Section 8(e)12 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $695.78 per week for 5 weeks, because the injuries sustained caused the 1% 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

1/26/15
Date

JAN 29 2015

16IWCC0273

STATEMENT OF FACTS:

Petitioner testified that he was hired by Respondent in October 2008 as a commercial door technician. On Tuesday July 12, 2011, Petitioner was at a job site in Bolingbrook to repair a door. At the time of the incident, Petitioner was in a 4-foot by 4-foot cage positioned on the forks of a lift truck. When the cage was between six to eight feet off the ground, Petitioner leaned over the railing of the cage and fell head first to the ground. The cage then landed on his body. Following the fall he noted that he was dazed, and that he had pain in his right shin, right wrist and stomach area. He also had a bleeding laceration at the hair line and a big lump on his forehead.

Petitioner was helped up from the ground and driven to the emergency room at Edward Hospital. There, the Petitioner complained of pain in his head, right wrist and right leg. After being examined, the petitioner was discharged; no prescriptions were issued. The next day the petitioner returned to work, He did not recall if he worked on Thursday July 14, 2011 or Friday July 15, 2011.

On July 18, 2011, Petitioner visited Dr. Daniel DeSimone, who had been the petitioner's primary care physician for many years. The Petitioner complained of head, wrist and right shin pain. On cross-examination, the Petitioner first testified that he recalled Dr. DeSimone stating that an area of his right shin was infected and then testified that all he recalled was his leg retaining water. Petitioner was taken off work by Dr. DeSimone.

On July 20, 2011, the Petitioner returned to the emergency room because his right leg had swollen to twice its normal size. An ultrasound and x-ray of the right leg were completed. Petitioner was discharged from the emergency room. Thereafter, the Petitioner saw Dr. DeSimone on July 22, 2011 and August 12, 2011. The Petitioner testified he was in a compression cast for an unspecified period of time.

On August 19, 2011 the Petitioner returned to Dr. DeSimone. At approximately 10:30 a.m., Dr. DeSimone released Petitioner to return to work full duty. That afternoon, the Petitioner presented Dr. DeSimone's return to work form to the president of Atlas Door Repair and requested to return to full duty work. The Petitioner testified he was told a meeting was required before he could return to work. The meeting took place on Saturday August 20, 2011. On Monday August 22, 2011, the Petitioner returned to Atlas Door Repair at which time was told there was no work available.

In December 2011, the Petitioner was seen by Dr. Ross for an independent medical examination at Respondent's request. Dr. Ross prescribed a MRI of the brain that was completed; the Petitioner did not recall the result. The Petitioner testified that he had not had any treatment for his head injury since the first emergency room visit on July 12, 2011.

Petitioner testified he was ready, physically able and willing to work full-duty, seven days a week from August 19, 2011 through the date of the hearing. At the time of the hearing the Petitioner was working seven days a week as a door technician performing his full pre-accident work duties including climbing ladders and carrying heavy equipment.

The medical records reveal the following: The emergency room record from July 12, 2011 states that the Petitioner was ambulatory with a steady gait, he was alert and oriented x3, and had a head injury with no loss of consciousness. The complaints recorded were mild pain over the right forehead, right upper arm and right lower leg. On physical examination, there was noted to be mild to moderate swelling over the right forehead with

minimal tenderness; a small ecchymosis in the right medial aspect of the upper arm; and a mild area of abrasion and ecchymosis over the right anterior shin. The impression was a mild closed head injury; and multiple contusions and abrasions. There is no mention in these records of any bleeding to the forehead. There is no indication that any diagnostic studies were ordered or completed. (P.Ex.1)

On July 18, 2011, the Petitioner was seen by Dr. DeSimone who recorded that the Petitioner had an accident at work where he hit his head and scraped his right leg. The Petitioner's major complaint was a sore right leg at the site of the injury. Dr. DeSimone's assessment was an infected right shin abrasion; Bactrim was prescribed. There is no mention of a laceration to the hairline or swelling to the forehead. (R.Ex.2)

The emergency room record of July 20, 2011 notes a chief complaint of right leg swelling. The physical examination showed a healing scab on the right shin with no redness and minor tenderness noted around the site. Swelling was noted in the posterior calf extending into the right foot without any tenderness. There was full range of motion of the right hip, knee and ankle without pain. X-rays of the right tibia and fibula showed unremarkable soft tissues, and no fracture or dislocation. Ultrasound studies of the right leg were negative for deep vein thrombosis. The assessment was a residual hematoma to the right leg. The prescribed treatment was to use warm compresses on the leg; elevate the leg; and finish the antibiotics. The Petitioner was discharged and instructed to follow up with his Primary Care Physician. (P.Ex.1)

On July 22, 2011, July 29, 2011 and August 12, 2011, Dr. DeSimone noted gradual improvement of the infected right shin abrasion. The July 22, 2011 note mentioned right wrist pain. Otherwise, none of these office notes mentioned any other residual problems. On August 19, 2011, Dr. DeSimone noted that the right leg boot was removed, the swelling was down and the Petitioner was complaining of subjective paresthesia directly over the area of the ulcer on the right anterior shin. Dr. DeSimone released the Petitioner back to work and told him to follow up as needed. (R.Ex.2)

On August 24, 2011, the Petitioner returned to Dr. DeSimone with multiple complaints including an episode of numbness of the R side of his neck and head. Dr. DeSimone ordered a MRI of the cervical spine. On September 12, 2011, the Petitioner was noted to have numbness in the anterior right thigh intermittently for the last two weeks. (R.Ex.2) On October 31, 2011, MRI of the cervical spine was completed. The radiologist's impression was mild straightening of the cervical lordotic curve with no evidence of disc bulge/protrusion, thecal sac or nerve root compression. (P.Ex.3)

On December 1, 2011, the Respondent had the Petitioner examined by Dr. Matthew Ross, a neurosurgeon, with regard to the complaints of right facial numbness and right leg numbness. Dr. Ross noted that the Petitioner had some pain and weakness in his right wrist, but that was now better. Dr. Ross's physical examination was essentially normal. According to Dr. Ross, the cervical spine MRI taken on October 31, 2011 showed minimal degenerative change at C5-6 with no disc herniation or nerve impingement. Dr. Ross stated that it appeared the Petitioner had damaged the sensory nerves of the anterior shin and probably the lateral femoral cutaneous nerve of the right thigh. Dr. Ross opined that it was likely the Petitioner would make a good recovery although he may be left with some permanent sensory alteration in his right leg. Dr. Ross stated the recurring facial numbness was puzzling. He recommended MRI of the brain. Dr. Ross stated the Petitioner was capable of working at a full duty capacity. (P.Ex.5)

On September 6, 2012, MRI of the brain was completed. (P.Ex.4) Dr. Ross authored an Addendum report dated November 13, 2013. Dr. Ross stated he reviewed the brain MRI films. He stated that the facial numbness could

only occur with pathology at the brain or brain stem level or along the trigeminal nerve. Dr. Ross stated that the MRI of the brain did not show any evidence of a traumatic injury and no evidence of a prior hemorrhage. The only abnormality on the films possibly represented a small arachnoid cyst which is unrelated to the Petitioner's trauma and not responsible for his symptoms of occasional facial numbness. Dr. Ross concluded that no further treatment was necessary and again stated that the Petitioner could return to work full duty without restrictions. (P.Ex.5)

Petitioner testified his right wrist was "messed up" for months after the accident. In addition, he noted that he still has numbness in his right leg on and off. However, he indicated that currently his head is "fine" and his stomach is "okay".

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

Petitioner testified that on July 12, 2011 he was at a job in Bolingbrook, repairing a large overhead door, when he leaned out of the cage of a lift to reach some cables and fell 6 to 8 feet to the ground. He noted that he fell head first and landed upside down, and that the cage fell on top of him. He estimated that the cage weighed about 200 pounds. Petitioner stated that he noticed he was dazed and not really there after the incident, and that his right shin, right wrist and stomach area hurt. He also noted that he had a big lump on his head.

Following the incident, Petitioner was taken to Edward Hospital. He testified he had complaints of right wrist, right shin and head pain at that time. Edward Hospital records on that date noted that Petitioner was "... complaining of head injury. Patient was about 5 or 6 feet in the air. He was in a cage supported by a forklift when he leaned over the cage fell off struck his head. When he injured his right shin. In right upper arm. There is no loss of consciousness. Complained of pain over the right for [sic] head right upper arm and right lower leg. This is mild. There is no loss of consciousness neck pain vomiting." (PX1). Petitioner was diagnosed with a mild closed head injury and multiple contusions and abrasions. (PX1). He was given head injury instructions, instructed to Tylenol or Advil and to see a doctor if he had any problems. (PX1). After being examined, he was discharged. The next day, July 13, 2011, Petitioner returned to work. However, Petitioner could not recall if he worked on Thursday July 14, 2011 or Friday July 15, 2011.

On July 18, 2011, Petitioner visited his primary care physician, Dr. Daniel DeSimone. At that time, Dr. DeSimone recorded that Petitioner presented for evaluation following a head injury at work, noting that Mr. Nevin had "... hit head (no LOC) & scraped up R leg = has some neck stiffness –HA better – major c/o is sore R loer [sic] leg at injury site." (RX2). Dr. DeSimone diagnosed an infected leg abrasion and prescribed Bactrim. (RX2).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner sustained accidental injuries arising out of and in the course of his employment on July 12, 2011.

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

Petitioner testified that the work accident caused injuries to his head, stomach, right wrist and right leg. With regard to his head, Petitioner testified that the accident caused a big lump on his head and a laceration to the

right forehead at the hairline. There is no mention of such a laceration in the emergency room records from the date of the accident or any later medical records. There is mention of mild to moderate swelling in an area of the right forehead in the emergency room record from the date of the accident. Petitioner did not testify to any other injury to his head or face. Petitioner had no other treatment relative to his head injury following his ER visit, and testified at the time of arbitration that his head was "fine."

With regard to the stomach there is a reference in Dr. Ross's report of December 1, 2011 that Petitioner stated his right abdomen turned black and blue a few days after the accident. (PX5). Other than that, there is no indication that Petitioner received any treatment for his stomach and/or abdomen. At arbitration, he testified that his stomach was "fine."

With respect to his claimed right wrist injury, Dr. Ross noted in his December 1, 2011 report that Petitioner noted "some pain in his right lateral wrist" and that "the right hand was weak but it is now better." (PX5). There is no indication that Petitioner received any treatment for his right wrist.

With regard to the right leg, Petitioner testified that he continues to have numbness on occasion in the entire right leg. Dr. Ross stated that Petitioner damaged the sensory nerves of the front of the right shin at the site of the infected abrasion. Petitioner also testified that he experiences numbness in an area of his right thigh. Dr. Ross stated that Petitioner probably had some nerve damage to the lateral femoral cutaneous nerve of the right thigh.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered injuries to his head, right leg, right wrist and stomach and that said conditions were causally related to the accident on July 12, 2011.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

The record shows that Petitioner was taken off work by Dr. DeSimone on July 18, 2011 and subsequently released to full duty work by the same physician on August 19, 2011. (RX2).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner was temporarily totally disabled from July 18, 2011 through August 19, 2011, for a period of 4-5/7 weeks.

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

Petitioner's testimony and the medical evidence show that Petitioner suffered an injury to his head when he fell out of the cage of the lift. He complained of occasional facial numbness, but a subsequent MRI of the brain did not show any evidence of traumatic injury. Petitioner also complained at various times of pain in his right wrist and right abdomen or stomach, noting that his right wrist was "messed up" for months following the injury. However, Petitioner received little if any treatment for any of these conditions, and in fact testified at arbitration that his head was "fine" and his stomach was "okay."

Petitioner's main complaint seems to have been his right leg, including pain and numbness as well as swelling and an episode of cellulitis. Dr. Ross noted that the swilling has since resolved and that Petitioner is left with

residual numbness and induration over the right anterior shin. (PX5). Petitioner testified that since the accident he has experienced numbness on and off in his right leg, and that he still experiencing same as of the date of his testimony at arbitration.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the right leg pursuant to §8(e)12 of the Act and 1% person-as-a-whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

As noted above, the Arbitrator determined that Petitioner was temporarily totally disabled from July 18, 2011 through August 19, 2011, for a period of 4-5/7 weeks. (See issue "K", supra). Thus, based on a TTD rate of $826.56, the amount of TTD payable would be $3,896.64.

The parties also stipulated that Respondent paid TTD in the amount of $4,899.00. (Arb.Ex.#1). Respondent is entitled to a credit in this amount, and to the extent that the amount paid exceeds the amount of TTD awarded, said excess shall be credited against the amount of permanency awarded 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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TRACY REBOLETTI,

Petitioner,

vs.

NO: 14 WC 15182

16IWCC0274

STERIGENICS,

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, temporary total disability, medical expenses, prospective medical and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner began working for Respondent in June or July of 2012. She was hired as a Temp as Executive Assistant to the CEO. She managed calendars, catering, travel arrangements and other projects. Eventually Petitioner was hired full time as HR Administrator/Front Desk Receptionist. She answered phones, kept inventory of supplies, mail, packages and handled guests and visitors.

2. On February 20, 2014 Petitioner arrived at work, took a few steps towards the building, and then fell and slid down a steep incline in the lot. There was snow and ice on the

ground. Respondent is one of many tenants in the building. Petitioner parked in the back lot, as the majority of spots in the front lot are reserved for visitors.

3. When Petitioner was first hired, the temp agency told her that she could park anywhere except the handicapped or the visitor spots. She also could not park in garages because they had gates. She noted that senior level Respondent employees were allowed to access underground parking.

4. When Petitioner was hired full time, she was told by Human Resources that she could park anywhere except for visitor parking and underground parking.

5. She usually parked in the back lot or on the side of the garage. The side of the garage is covered parking.

6. Petitioner was Respondent's liaison to the property management. She was aware that Arden Realty owned the parking lot in 2015. If staff wanted to park their car in the lot overnight before going out of town they would have to get clearance from Arden Realty. Petitioner was also made aware when vehicle information needed to be disseminated to employees regarding their parking. Respondent was required to submit employee badge numbers, a fitness center document and vehicle information to the building.

7. Respondents' employee handbook did not require Petitioner to park in any specific area. Petitioner parked where it was most convenient, although she had the option to park in the semi covered area.

8. Outside of designated spots, all employees of the building are able to park where they pleased. The general public was able to use these spots as well.

9. A diagram of the front and back parking lots surrounding Respondent's workplace was submitted into evidence. The restricted visitor parking area was a very small portion of the parking spaces made available to Petitioner.

The Commission reverses the Arbitrator's finding of accident. Although Respondent placed some restrictions on where Petitioner could park, these restrictions were minor, as the diagram showed that there was a wide array of parking spots still available to Petitioner. Therefore, the Commission finds that Respondent did not maintain the requisite amount of control over where Petitioner parked. Additionally, visitors were also allowed to park in the same area, thus Petitioner did not face a risk greater than that of the general public. Accordingly, the Commission finds that Petitioner has failed to prove a work-related accident by a preponderance of evidence.

16IWCC0274

IT IS THEREFORE ORDERED BY THE COMMISSION that, since Petitioner has failed to prove accident by a preponderance of evidence, Respondent shall not be held liable for Petitioner's injuries and subsequent medical care.

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 Petitioner 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:
O: 2/25/16
DLG/wde
45

APR 2 5 2016

Mario Basurto

Stephen Mathis

Dissent

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

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Philip Vena,

Petitioner,

vs.

NO: 08 WC 27766

16IWCC0275

Benq USA Corp.,

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 temporary total disability, causal connection, 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 August 6, 2015, is hereby affirmed and adopted.

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

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

16IWCC0275

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,900.00. 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 28 2016
o041416
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VENA, PHILIP
Employee/Petitioner

Case# 08WC027766

16IWCC0275

BENQ USA CORP
Employer/Respondent

On 8/6/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.16% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0000 PHILIP VENA
4551 CORNELL AVE
DOWNERS GROVE, IL 60515

0532 HOLECEK & ASSOCIATES
CARTER ESTERLING
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

16IWCC0275

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Philip Vena
Employee/Petitioner

v.

Beng USA Corp.
Employer/Respondent

Case # 08 WC 27766

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Wheaton**, on **May 22, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 13, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned $**51,333.36**; the average weekly wage was $**987.18**.

On the date of accident, Petitioner was **57** 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 $**154,000.08** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**154,000.08**.

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

ORDER

Respondent shall pay $0 in disputed medical bills as provided in Section 8(a) of the Act, because Petitioner failed to establish by a preponderance of the evidence that the alleged unpaid bills of Pain Specialists of Greater Chicago ($1,419.00), Injured Workers' Pharmacy ($95.23), and out-of-pocket expenses ($123.69) were incurred for treatment causally related to the work injury of May 13, 2008.

Respondent shall be given a credit of $154,000.08 for temporary total disability benefits that have been paid to date, and shall owe no additional temporary disability benefits as Petitioner failed to establish by a preponderance of the evidence that he remains restricted from working as a result of the work injury of May 13, 2008.

Respondent shall pay Petitioner permanent partial disability benefits of $592.31/week for 30 weeks, because the injuries sustained caused disability equaling 6% 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

8/4/15
Date

AUG 6 - 2015